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ILLEGALITY OF PLAINTIFF'S OWN USE, AS BAR TO RECOVERY FROM UPPER RIPARIAN OWNER FOR DIVERSION.

The case of *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co. et al.*[1] involves two rather novel phases of the "plaintiff-wrongdoer" doctrine, as applied to riparian proprietors, and which in this particular situation caused a strong dissent by Judges Garrison, Trenchard, Black, White and Terhune, from the majority decision. The plaintiff had sued the defendants in a lower court for diversion of water such as to interfere with plaintiff's use of its dye works, and had recovered substantial damages. On appeal the decision was reversed and new trial awarded, on the ground that, since plaintiff's own use of the water in its dye works so polluted the stream as to constitute a

[1] 96 Atl. (N. J.) 60.

public nuisance, and was thus not a reasonable use, plaintiff was entitled to no more than nominal damages, if any.

The right of a riparian owner to a reasonable use of passing water is appurtenant to the soil[2] and its mere invasion implies damage.[3] The existence of the right does not depend upon the actual use. A plaintiff is not bound to show that at the time he is making any use.[4] He may even, in the past, have committed the same misuse for which he is now suing the defendant.[5] Consequently when the majority opinion in the principal case intimates that the plaintiff's misuse might bar recovery altogether that intimation can be justified only if the act in question falls within one or more of certain recognized classes that so operate. These are: (a) unlawful acts contributing as a cause (not merely a condition) of the harm; (b) acts violating a criminal law designed to prevent the entire transaction in which the plaintiff is engaged; (c) acts violating a civil or criminal law whose main purpose is to protect an interest of the defendant's which the plaintiff is now attempting to injure.[6] Obviously the nuisance committed here by the plaintiff in the course of its business does not fall within the first two groups. As to the third it is not enough to say the defendant is a member of the state, and its interest as member is being attacked. This reasoning would prevent suit by any law breaker. As an individual, defendant has the right that the stream flowing past it shall not be polluted, but this right is not being invaded for the very good reason that plaintiff's dye works is situated lower down the stream. If then, plaintiff's illegal action is not such as to defeat altogether its right of recovery, should the illegality operate to reduce the damages to a merely nominal amount?

"Damages are given as a compensation, recompense or satisfaction to the plaintiff for injury actually received by him from

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[2] *Kraver v. Smith*, 177 S. W. (Ky.) 286.

[3] *Bolivar Mfg. Co. v. Neponset Mfg. Co.*, 33 Mass. (16 Pick.) 241; *McEvoy v. Gallagher*, 107 Wis. 331; *Parker v. Griswold*, 17 Conn. 288; *Newhall v. Ireson*, 62 Mass. (8 Cush.) 595; *Stotwell v. Lincoln*, 77 Mass. (11 Gray) 434; *Webb v. Portland Mfg. Co.*, Fed. Cas. 17, 323 (3 Sumn. 189); *Whipple v. Cumberland Mfg. Co.*, Fed. Cas. 17, 516 (2 Story 661).

[4] *Southern Marble Co. v. Darnell*, 94 Ga. 231; *Hogg v. Connellsville Water Co.*, 168 Pa. 456; *Ellis v. Tone*, 58 Cal. 289.

[5] *Watson v. Town of New Milford*, 72 Conn. 561.

[6] Wigmore, Torts, Vol. II, p. 885.

the defendant."[7] The measure of damages here is, roughly, the pecuniary loss resultant from loss of use of the water including permanent diminution in market value of the land and improvements.[8] The majority opinion in the principal case denies that plaintiff can measure its damages by its loss in being "deprived of the means of an illegal act."[9] This denial, it will noted, assumes two things; that value is value only in so far as the act creating it is legal, and secondly that the whole value lost to plaintiff by defendant's diversion had been created solely by its illegal act in polluting the stream. The second assumption is undoubtedly far fetched—as an incident to the profitable running of its dye works it may happen that the water discharged into the stream is impregnated with refuse, but surely this incident is not a complete cause or even essential condition. It might be argued that deducting the expense saved—and thus value created—by the illegal act of discharging the water used without removing the impurities, there still remains a very considerable legally created value, for whose destruction the plaintiff has a right to compensation. The fact that the evidence can not establish this amount of damages with perfect certainty need not bar recovery.[10]

But why is it necessary to go to that extreme? In point of fact the plaintiff has suffered financial loss. The minority view more logically holds that inasmuch as the illegality of the plaintiff's act is not so much of the essence as to deprive it altogether of a right of action, such illegality should not speak against the actual damage the plaintiff has sustained. "The responsibility of the plaintiff to lower riparian owners and its liability to the state of New Jersey or some of its public agents are distinct questions that could not be tried out in this action."[11]

C. B.

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[7] Greenleaf, Evidence (14th Ed.) § 253.

[8] *Rider v. York Haven Water & Power Co.*, 95 Atl. (Pa.) 803; *Jones v. Sewer Improvement Dist. No. 3 of City of Rogers*, 177 S. W. (Ark.) 888; *Wasioto & B. M. R. Co. v. Hensley*, 148 Ky. 366; *King v. Board of Council of City of Danville*, 32 Ky. Law Rep. 1188; *Commrs. of Aberdeen v. Bradford*, 94 Md. 670; *Sparks Mfg. Co. v. Town of Newton*, 45 Atl. (N. J.) 596; *Gallagher v. Kingston Water Co.*, 164 N. Y. 602.

[9] *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.*, supra.

[10] *Bigbee Fertilizer Co. v. Scott*, 56 So. (Ala.) 834; *Wall v. Hardwood Mfg. Co.*, 127 La. 959.

[11] *Auger & Simon Silk Dyeing Co. v. East Jersey Water Co.*, supra.

IS THE DOCTRINE OF THE "POLLOCK CASE" STILL THE LAW?

In upholding the Federal Income Tax Law of 1913, under the Sixteenth Amendment, the Supreme Court of the United States,[1] in disposing of one of the adverse contentions, elaborated the following proposition,—that the Sixteenth Amendment, authorizing the imposition of taxes upon incomes "from whatever source derived," without apportionment, repudiates the classification of the "Pollock case,"[2] insofar as the latter held a tax upon incomes from property to be a direct tax; and that all income taxes are, therefore, henceforth subject to the rule of uniformity. So far-reaching a proposition, even though not indispensable to the decision of the case, invites a critical examination.

The amendment itself[3] contains not even a remote suggestion of a purpose to alter the constitutional classification as theretofore judicially established. To raise by implication a purpose not suggested by the language used, is at best hazardous, and not encouraged by the authorities.[4]

The language of the amendment is, however, positively adverse to the contention of the principal case. The words "without apportionment among the several states and without regard to any census or enumeration," clearly correlate the amendment to Art. I, § 2, cl. 3, of the original Constitution,[5] as providing for a special case to which the general rule laid down in the latter clause shall not apply. A provision for an exception to a general rule is strong evidence that but for such provision the general rule would apply.[6] It follows that the provision that income taxes shall not be subject to apportionment, raises the presumption that these taxes fall within the class which, but for such provision, would be subject to apportionment.

Such would clearly be the construction of the language, had the words constituted a part of the original Constitution. But

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[1] *Brushaber v. Union Pacific Ry. Co.*, 36 Sup. Ct. Rep. (U. S.) 236.

[2] *Pollock v. Farmers' Loan & T. Co.*, 157 U. S. 429 and 158 U. S. 601.

[3] Art. XVI. "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration."

[4] *State v. McGough*, 118 Ala. 159, 169; *State v. Dillon*, 90 Mo. 229.

[5] Art. I, § 2, cl. 3. "Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, etc."

[6] *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1, 191.

an amendment must be presumed to be intended to be read as if incorporated into the original instrument.[7]

Historical antecedents, if invoked, confirm the view here maintained. The amendment was adopted as a result of dissatisfaction with the conclusions of the Pollock case.[8] The decision in that case was reached after the most exhaustive consideration, and its classification of the income tax as direct was perfectly well known. Had the amending power desired to alter this classification it could easily have employed language for the purpose. That it did not do so, is conclusive that its sole object was to authorize the imposition of income taxes without apportionment, regardless of classification.

If it be said that this literal interpretation of the amendment results in a disturbance of the previous "all-embracing" classification of the Constitution into direct and indirect taxes, the former to be apportioned, the latter to be uniform,[9] two answers may be made. First, it has by no means been the unanimous opinion of the profession that this classification was originally all-embracing.[10] Second, the disturbance, if any, must be presumed to have been intentional unless (a) the omitted restrictive or enlarging words may be considered as taken for granted by the framers,[11] or (b) the disturbance was produced by a failure to provide for an unforeseen exceptional consequence of the literal language, such as, if foreseen, would clearly have been obviated by specific provision.[12] Neither of these hypotheses is here admissible. The previous classification of the income tax as direct had been the subject of full discussion, and its importance clearly required any intended alteration to be expressly provided.

Both the reasoning and the authority of the Pollock case are precisely what they were prior to the adoption of the amendment. If the former was valid then, it is valid now. If the latter was binding prior to the adoption, it is binding now. If that decision is to be overruled on the ground obliquely suggested in the earlier case of *Hans v. Louisiana*,[13] of an implied repudiation by the

[7] *Ex parte Turner*, 24 S. C. 211, 214.

[8] Prin. case, pp. 240, 241.

[9] Ib., p. 242.

[10] *Hylton v. U. S.*, 3 Dall. (U. S.) 171, 173. *Pollock v. Co.*, 157 U. S., *supra*, 537 (argument).

[11] See e. g., *State v. Wilson*, 12 Lea (Tenn.) 246.

[12] *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 644. Cf. *People v. Potter*, 47 N. Y. 375.

[13] 134 U. S. 1, 11-12 (reviewing *Chisholm v. Ga.*, 2 Dall. (U. S.) 419).

amending power of an unpopular judicial decision, this is certainly a function of the amending power nowhere recognized in the Constitution. To overrule a thoroughly argued and well considered decision, particularly through a fanciful interpretation of an amendment, is to create a precedent which will more than offset any protective advantage afforded by the rule of uniformity as now narrowly construed[14] by the courts.[15]

C. R. W.

A WITHDRAWN PLEA OF GUILTY ADMISSIBLE AS AN EXTRAJUDICIAL CONFESSION

The Supreme Court of Errors of Connecticut recently decided[1] that where the accused entered a plea of guilty and thereafter withdrew it, on trial for the offense the plea was admissible as an extrajudicial confession, inconsistent with the claim of innocence urged on the subsequent trial, not conclusive, but requiring further proof to establish the *corpus delicti* in order to justify a conviction. The numerous decisions in the courts of England and the United States upon the admissibility of confessions are in a hopeless and irreconcilable conflict, but in examining the historical development of this subject and the reasons for admitting or excluding this kind of evidence, the ruling of the principal case seems correct in principle, and in harmony with the modern and probable future development of the doctrine of confessions.

A plea of guilty before a grand jury or at a preliminary hearing before a magistrate or county judge is admissible in evidence where the defendant pleads not guilty when subsequently put on trial.[2] So, where the defendant had pleaded guilty in a police court for violation of a municipal ordinance the fact that that plea had been entered was admissible when he later pleaded not guilty to an indictment for the same offense under a state statute similar to the ordinance.[3] Where a plea of guilty is offered by the

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[14] *Knowlton v. Moore*, 178 U. S. 41.

[15] For an extrajudicial opinion contrary to the principal case, see Graves, The Income Tax Amendment, XIX Yale Law Journal, 506.

[1] *State v. Carta*, 96 Atl. (Conn.) 411. (Wheeler and Roraback, JJ., *dissenting*.)

[2] *Browning v. State*, 142 S. W. (Tex.) 1; *People v. Gould*, 70 Mich. 240; *Green v. State*, 40 Fla. 474.

[3] *Bibb v. State*, 83 Ala. 84; *Ehrlick v. Commonwealth*, 31 Ky. Law Rep. 401, 102 S. W. 289.

defendant, but refused by the court, it can not be given in evidence against him on trial.[4] This seems correct, because the same facts which made the plea untrustworthy as a judicial (conclusive) confession of guilt would make it untrustworthy as evidence of guilt to be left to the jury. When a pleading in a civil suit is amended or withdrawn, the superseded portion disappears from the record as a judicial admission, but by the weight of authority it can be used as evidence against the party who withdrew it.[5] In *Boots v. Canine,* it is said, "We should feel that we were doing an idle thing if we should undertake to cite authority upon the proposition that a party can not be deprived of his right to give in evidence an admission because the latter [the party making it] had withdrawn it. Even in criminal cases, an admission made by the accused before the examining magistrate is not rendered incompetent by a subsequent withdrawal. The withdrawal of an admission may, in proper cases, go in explanation, but it can not change the rule as to its competency. We have never until the argument in this case known it to be asserted that the withdrawal of a confession or admission destroyed its competency as evidence against the person making it. If it did, then criminals might destroy evidence by retractions, and parties escape admissions by a like course. The law tolerates no such illogical procedure. It is proper to show the withdrawal and all attendant circumstances for the purpose of determining the weight to be attached to the admission, but not for the purpose of destroying its competency."

In *People v. Ryan,*[6] it was held that after a plea of guilty had been withdrawn and a plea of not guilty substituted, the former plea of guilty was inadmissible as evidence against the accused, but in that case it appears from the report that there was no other evidence of guilt and the court excluded the evidence as a judicial confession. In *People v. Jacobs*[7] and *Commonwealth v. Ervine*[8] the defendant had been permitted to withdraw a plea of guilty and to plead not guilty, and the plea of guilty was held admissible

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[4] *State v. Meyers,* 99 Mo. 107.

[5] *Boots v. Canine,* 94 Ind. 408, 416; *Alabama Midland Co. v. Guilford,* 114 Ga. 627; *Caldwell v. Drummond,* (1903) 96 N. W. (Iowa) 1122; *Crews v. Yowell,* (1903) 76 S. W. (Ky.) 126. Contra: *Taft v. Fiske,* 140 Mass. 250.

[6] 82 Cal. 617.

[7] 151 N. Y. S. 522.

[8] 5 Dana (Ky.) 30.

against him as a confession. In the latter case the court said, "And if, as is certainly the case, parole evidence of such a confession made out of doors, would, in absence of proof tending to show that it had been improperly obtained, be admissible evidence to establish guilt, we think it unquestionable that the record of a confession in court, unimpeached as to the manner of its procurement, should be admitted. But the effect of the confession as proof of guilt, like that of other evidence, is subject to be repelled, and is from the nature of the proceeding, submitted to the judgment of the jury."

In the principal case the trial judge had an opportunity to pass on the facts which led the defendant to enter his plea of guilty both when the plea was entered and when it was later offered as evidence, and under the Connecticut rulings[9] his finding that the confession was not wrongly procured will not be overturned except in a case of clear and manifest error. Applying the orthodox test[10] of admissibility, it does not clearly appear that there was such an inducement in this case as to create a fair risk of a false confession.[11] The withdrawn plea of guilty was therefore rightly admitted as an extrajudicial confession inconsistent with his claim of innocence under the subsequent plea of not guilty.

S. H. S.

INJUNCTION—MANDATORY OR PROHIBITORY?

In a recent California case,[1] a temporary injunction was granted restraining the City and County of San Francisco from running an excess number of cars over terminal loops owned exclusively by the plaintiff street railroad, and over tracks which defendant owned in common with plaintiff. The defendant appealed and continued to run its cars, claiming the injunction to be mandatory in character as it required the defendant to do a positive act by relinquishing an incorporeal hereditament which

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[9] *State v. Cross*, 72 Conn. 722, 727; *State v. Willis*, 71 Conn. 293. See also *State v. Grover*, 96 Me. 363.

[10] I Wigmore on Evidence, §§ 824, 831.

[11] See *R. v. Baldry*, 2 Den. Cr. C. 430, 444; *Beckman v. State*, 100 Ala. 15; *State v. Jones*, 145 N. C. 466, 471. Chamberlayne, The Modern Law of Evidence, § 1485.

[1] *United Railroads of San Francisco v. Superior Court*, 155 P. (Cal.) 463.

it had acquired by the continued use of the cars in the manner objected to. The court held, however, that the injunction was essentially prohibitory in its character, as it merely restrained acts of repeated trespass, and therefore its operation was not stayed by appeal, as would have been the case had the injunction been mandatory. Though the decision of the court is in accordance with the weight of authority, the novelty of the defendant's claim would seem to warrant a brief inquiry as to the principles applicable to the case.

An injunction issues from a court of chancery to compel the specific performance of a duty. This form of remedy may be either preventative and protective, or it may be restorative. If it be the former, it is usually called a prohibitory injunction. If the latter, it is usually called a mandatory injunction, since it compels the defendant to take affirmative action to restore the plaintiff to his original situation.[2]

The wrong complained of in the principal case falls within that class of torts embracing nuisance, repeated trespass, and continuous trespass, which equity will prevent because the legal remedy is inadequate. Since it consists of a series of acts, namely, the unlawful daily running of the defendant's cars over the plaintiff's loops and tracks, it may be defined as a repeated trespass. It differs from a continuous trespass in that the latter, generally consisting of an erection or obstruction placed on the plaintiff's property, is analogous to a nuisance. The inquiry then is: What form of an injunction is necessary in each of the two trespasses to enforce the specific performance of a duty on the defendant's part?

Every case of a continuous trespass necessitates a mandatory injunction for the complete enforcement of the plaintiff's right on the one hand, and the specific performance of the defendant's duty on the other. The court in restraining the defendant from permitting his previous wrong to operate, compels him, in effect, to restore the plaintiff to his former condition by removing the obstruction or erection. It thus compels him to do an affirmative act of destruction. Mandatory injunctions have been issued to compel the removal of dirt,[3] of logs,[4] of a wall,[5] of a sewer,[6]

[2] Pomeroy's Equity, Vol. III, Sec. 1359.
[3] *Eno v. Christ*, 54 N. Y. S. 400.
[4] *White v. Codd*, 39 Wash. 14.
[5] *Haitsch v. Duffy*, 92 Atl. (Del. Ch.) 249.
[6] *Walther v. City of Cape Girardeau*, 166 Mo. App. 467.

of railroad tracks,[7] of a stairway,[8] when these objects were unlawfully placed on plaintiff's property.

What form of an injunction will suffice in the case of a repeated trespass? Since the wrong consists of a series of trespasses, not involving the erection of any obstruction on the plaintiff's land, an order of the court prohibiting the further commission of these acts will be sufficient to enforce the specific performance of the defendant's duty to keep off the plaintiff's land. Prohibitory injunctions have been issued to restrain the soliciting of passengers at a railroad station,[9] the riding of a bicycle on railroad tracks,[10] the cutting of timber on plaintiff's land,[11] the shooting of wild game on plaintiff's hunting ground,[12] and the tearing down of the plaintiff's fences,[13] when these acts were being repeatedly done.

In the principal case it was contended that as the acts complained of were done under a claim of right, and as the running of the excess cars had not been actually prevented by the plaintiff, the city was in possession of the interest claimed, and this injunction while requiring the defendant merely to cease the operation of its cars, really had the effect of compelling the defendant to relinquish that interest, and therefore it was mandatory in its character. The fact that the title or easement is in dispute, and that in the final hearing it may turn out that the defendant did have the title or easement in question and was deprived of its use by the temporary injunction, is not determinative of the question. If there be a dispute as to the title or the extent of the easement, the court will consider the balance of convenience[14] and use its discretion in granting the injunction. But if the court does grant an interlocutory decree, the question whether the injunction is prohibitory or mandatory will depend on whether the defendant, in order to perform specifically what the court says is his temporary duty, will have to do *affirmative acts* either of destruction or construction in order to restore the plaintiff to his original position, or whether he will merely have

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[7] *Northern Cent. Ry. Co. v. Canton Co.*, 65 Atl. (Md.) 337.
[8] *Stallard v. Cushing*, 76 Cal. 472.
[9] *N. Y., N. H. & H. R. R. Co. v. Scovil*, 71 Conn. 136.
[10] *A., T., & Santa Fe. R. Co. v. Spaulding*, 69 Ka. 431.
[11] *Griffith v. Hilliard*, 64 Vt. 643.
[12] *Kellog v. King*, 114 Cal. 378.
[13] *Ladd v. Osborne*, 79 Iowa 93.
[14] *Bacon v. Jones*, 4 Mylne & Craig 433.

to abstain from continuing certain physical acts. Ives v. Edison,[15] where the defendant was compelled to restore a stairway, is on one side of the line as a plain case of a mandatory injunction, while Griffith v. Hilliard,[16] enjoining the defendant from cutting plaintiff's timber, is on the other side as a plain case of a prohibitory injunction. The court, in the principal case, enjoined the defendant from operating an excess number of cars over the plaintiff's loops and tracks. The order, in its character, clearly operated to restrain the commission of a series of acts on the part of the defendant and its agents. Since the defendant was compelled to do no affirmative acts, but was merely restrained from further commission of the acts complained of, the injunction would seem to be clearly preventative in its scope, and therefore prohibitory. On principle, the court's decision seems to be correct.

F. R.

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[15] 124 Mich. 402.
[16] 64 Vt. 643.