Volume 40 | Issue 1 Article 6

December 1933

Nuisances--Injunctions--Pollution of Stream by City--Balance of Convenience

Charles W. Caldwell
West Virginia University College of Law

NUISANCES — INJUNCTIONS — POLLUTION OF STREAM BY CITY — BALANCE OF CONVENIENCE

Plaintiff, owner of a stock farm of 300 acres, sought damages and an injunction permanently to enjoin the City of Harrisonville from discharging effluent from its sewage disposal plant into a small, meandering stream, which flowed through a detached portion of said farm, on the ground that such pollution was a nuisance. The sewage disposal plant, which removed 60 per cent of the putrescible organic matter, was erected in 1923 at a cost of $60,000; a secondary plant which would remove 30 per cent more of such matter would cost $20,000; and the city with a population of 2000 had no surplus revenues, and its borrowing capacity was almost exhausted. The court, while acknowledging that the nuisance was indisputable, denied the equitable relief sought because of the gross disproportionate hardships that would result, but did so on the condition that the city pay the plaintiff the depreciation on account of the wrong. *City of Harrisonville v. Dickey Clay Mfg. Co.*[1]

Even in the situations wherein the controversy is between private parties and a legal wrong is admitted to exist, equity has exercised a discretion to deny an injunction where the elements of inconvenience or hardships upon the defendant, and often upon the public, far outweigh the advantages to the party injured. The factors in balancing the hardships have been grouped as follows:[2] the conduct of the parties with reference to the transaction; the portions and values of the properties involved; the use made of the properties, *e. g.*, dwelling, farming, or manufacturing; whether the use of the property would be destroyed or merely impaired; and the possible injury to the community or public.

Courts feel less free to exercise the discretion as against a public corporation in favor of a private defendant.[3] On the other

[1] 53 S. Ct. 602 (1933). In the district court (Western Dist. of Mo.) plaintiff was given $3,500 for clearing the creek bed and banks, $500 as annual damages for the five year period, and the nuisance was abated. On appeal the circuit court modified the decree by striking out the award for $3,500. 61 F. (2d) 210 (1932).

[2] McClintock, *Injunction Against Trespass and Nuisance, Discretion to Deny* (1928) 12 MINN. L. REV. 565.

[3] In Georgia v. Tennessee Copper Co., 206 U. S. 230, 238, 27 S. Ct. 618, (1906), where the state of Georgia sought an injunction against the defendant, a corporation in Tennessee, to abate a nuisance, Mr. Justice Holmes, writing the opinion of the court said: "This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two

hand, where the defendant was a public corporation, an injunction has seldom been denied on the balancing of convenience theory.[4] Factors to be considered in determining the equities include: the inactivity of a party in sleeping on his rights and permitting a public project to do harm;[5] the unusual situation of an increase in the actual value of the plaintiff's property;[6] the comparative extent of the injuries;[7] the nature of the injury, *i. e.*, merely financial[8] or one that affects the mode of enjoyment;[9] the effect

---

subjects of a single political power." See Town of Bristol v. Pulmer, 83 Vt. 54, 74 Atl. 332 (1909).

[4] City of Rochester, 110 N. Y. 273, 18 N. E. 88, 1 L. R. A. 296 (1888); Minto v. Salem Water, L. & P. Co., 120 Ore. 202, 250 Pac. 722 (1926); Fletcher v. Town of Lisbon, 222 Ill. App. 525 (1921); Mason v. City of Matton, 95 Ill. App. 525 (1900); 2 JOYCE, DAMAGES (1909) § 1094.

One of the few cases which squarely refuses to abate a nuisance of stream pollution is City of Valparaiso v. Hagen, 153 Ind. 337, 54 N. E. 1062 (1899), 48 L. R. A. 707 (1900). There the court said: "The facts present a case wherein the principle of the greatest good to the greatest number must be permitted to operate and private interest yield to public good."

[5] Herr v. Central Lunatic Asylum, 110 Ky. 282, 61 S. W. 283 (1901). (A dam reducing the natural flow and a sewer system affecting the quality of the water in a stream which flowed through plaintiff's farm was not enjoined.) Smiley v. City of Graham, 37 S. W. (2d) 289 (Tex. 1930). (The placing of a small drainage ditch in an alley at the rear of plaintiff's property). New York City v. Pine, 185 U. S. 93, 22 S. Ct. 562 (1902). (An injunction was sought to restrain the City of New York from diverting water from a stream.)

[6] In Gray v. Railroad Company, 128 N. Y. 419, 28 N. E. 498 (1891), where an elevated railroad was constructed in a street the abutting property owners were denied equitable relief.

[7] Boyd v. City of San Angelo, 290 S. W. 833 (Tex. 1927). Injunction denied because impossible for city to move its sewage disposal plant to another location (*dicta*). Daniels v. Keokuk Water Works, 61 Iowa 549, 16 N. W. 705 (1883). The "rule of convenience" applies where there is an inconvenience or annoyance and not where there is an injury to health and an absolute destruction of property. To the same effect, Herr v. Central Ky. Lunatic Asylum, *supra* n. 5.

[8] "On the other hand the injury to the plaintiff is wholly financial," *supra* n. 1, at page 604. But see Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557 (1897), where the damage resulting from the pollution of a stream was very small, yet the court said, "Her right as a riparian owner was not only to have the water of the stream flow over her land in its usual volume, but to have it flow in its natural purity; . . . . and the fact that the defendant is a municipal corporation does not enhance its rights or palliate its wrongs in this respect."

[9] City of Marlin v. Criswell, 293 S. W. 910 (Tex. 1927). There the plaintiff complained of obnoxious odors and offensive vapors which affected the enjoyment of his home, and the city defended on the ground that $38,000 was already appropriated to improve the plant and that it was impossible to move it to another location. The injunction was granted. In Town of Rentz v. Roach, 154 Ga. 419, 115 S. E. 94 (1922), the bill alleged that the pollution of the stream was injurious to health. The relief asked was given, even though the defendant city had only a population of 300.

upon the public;[10] and the fact that the defendant possesses the power of eminent domain.[11]

The court in the principal case says that the power of eminent domain is immaterial, but, if of any effect at all, is only a stronger reason for denying the relief.[12] It seems that a proper disposition of this factor depends upon the laws of a given state. West Virginia,[13] Missouri,[14] and other states[15] have constitutional provisions forbidding the taking or damaging of private property for public use unless security be given or money paid. In Missouri,[16] the *situs* of the principal case, as in West Virginia,[17] the constitution is deemed to require payment or security in advance only in the case of a physical taking and not that of consequential injury. By dicta in West Virginia the effect of the constitutional provision is to leave a legal action for permanent damages the

---

[10] (Equity will not raise its restraining arm if, by so doing, great and irreparable injury might result to the public). York Haven Water & Power Co. v. York Haven Paper Co., 201 F. 270 (1912). (Where the use of the defendant's property directly affects the public it will be taken into consideration when an injunction is sought against the nuisance created by such use). Daniels v. Keokuk Water Works, *supra* n. 7.

In the situation where no nuisance exists but where there are grounds for injunctive relief, the chancellor will not grant an injunction if public mischief or inconvenience will result. Board of Health v. Purdon, 99 N. Y. 237, 1 N. E. 687 (1885); Belmont Quadrangle Drilling Corp. v. Galek, 137 Misc. 487, 244 N. Y. Supp. 231 (1930); Bronson v. Board of Public Instruction, 45 So. 833, 836 (Fla. 1933).

[11] In Sammons v. City of Gloversville, 33 Misc. 549, 70 N. Y. Supp. 284 (1901) the court said: "I see no relief for the defendant, except some appropriate legislation giving it the right to condemn the property affected." See also Moody v. Village of Saratoga Springs, 45 N. Y. Supp. 365 (affirmed 163 N. Y. 581, 57 N. E. 1118 (1900).

But see Weidmann Silk Dyeing Co. v. East Jersey Water Co., 88 N. J. Eq. 397, 102 Atl. 585 (1918), where it was held that the diversion of water from a stream should not be enjoined if the power of eminent domain existed.

[12] Osborne v. Missouri Pacific Ry., 147 U. S. 284, 259, 13 S. Ct. 299 (1892); Winslow v. B. & O. R. R. Co., 188 U. S. 646, 660, 23 S. Ct. 443, 47 L. Ed. 635 (1902); Kamper v. City of Chicago, 215 F. 706, 708 (C. C. A. 7th 1914).

[13] Art. III, § 9.

[14] Art. II, § 21.

[15] SEDGWICK, DAMAGES (9th ed. 1913) § 1118 *et seq.*

[16] In Smith v. City of Sedalia, 244 Mo. 107, 149 S. W. 597 (1912), where the bill alleged that the water was made unfit for man and beast, the court said: "The city has not disturbed the property of plaintiff . . . . . It has not invaded his land, but has erected a structure no nearer thereto than 600 feet. The damages are consequential."

[17] While West Virginia recognizes the principle, there seems to be an apparent conflict as to what constitutes consequential damages. In Spencer v. Pt. Pleasant *etc.* R. R. Co., 23 W. Va. 409 (1884), the court held that the laying of a railroad track in a city street could not be enjoined by abutting property owners, who owned the fee of the street. But in a later case, Jackson v. Railroad Co., 63 W. Va. 18, 59 S. E. 749 (1907), it was held that if the grant of an easement called only for the transportation of certain minerals, and the coal company subsequently converted the railroad into a common car-

sole redress for consequential injury.[18] But a taking will be enjoined in any case to protect the right of prior payment.[19] While in most instances the pollution of a stream would involve only consequential damage, there might be situations where its effect would be a taking.[20] Missouri has a statute which expressly gives to cities the power to condemn a water course for sewage disposal purposes.[21] Thus, it seems that the Supreme Court should have looked to the law of Missouri.

In New York permanent damages cannot be had at law, and thus in the elevated railroad cases equity granted an injunction to be dissolved upon payment of permanent damages.[22] In Michigan,[23] Minnesota,[24] and Nebraska[25] it is held that a nuisance, in all respects permanent in nature, caused by a railroad is continuous and damages can only be recovered up to the date of the writ. It would seem in these states, that equity should have jurisdiction of such controversies; otherwise, the plaintiff, having to bring a multiplicity of suits, would really be without adequate relief.

Even where the law affords permanent damages the legal remedy is not adequate. The idea that real property is unique clearly applies in the case of a taking,[26] and may well extend to

---

rier, such added burden was a taking within the meaning of the constitution. See also Ohio River R. Co., v. Gibbens, 35 W. Va. 57, 12 S. E. 1093 (1891); and Arbenz v. Wheeling & H. R. Co., 33 W. Va. 1, 10 S. E. 14 (1889). For a general discussion of consequential damages see SEDGWICK, *op. cit. supra* n. 15, § 1113, *et seq.*

[18] Spencer v. R. R. Co., *supra* n. 17. Plaintiff directed to sue at law for permanent damages which should include prospective damages for the nuisance of passing trains and smoke from the same. Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 452, 115 S. E. 451 (1922). The acts of a corporation, having power of eminent domain, cannot be abated as a nuisance, even though the damage or injury to private property is only a consequential damage (*dictum*). See also McCormick, *Damages for Anticipated Injury to Land* (1924) 37 HARV. L. REV. 574.

[19] Spencer v. R. R. Co., Jackson v. Railroad, both *supra* n. 17.

[20] In Sammons v. City of Gloversville, *supra* n. 11, the pollution of a stream and the killing of the grass along the banks of the stream was said to be a taking of property within the meaning of the constitution.

[21] Mo. REV. STAT. (1919), § 8358.

[22] Pappenheim v. Metropolitan El. R. R. Co., 128 N. Y. 436, 28 N.E. 518 (1891); Pond v. Metropolitan El. R. R. Co. Co., 112 N. Y. 186, 19 N. E. 487 (1899); Mitchell v. Metropolitan El. R. R. Co., 134 N. Y. 13, 31 N. E. 260 (1892).

[23] Addison F. M. Co. v. Lake Shore & M. S. Ry. Co., 16 Mich. 330, 125 N. W. 347 (1910).

[24] Lamm v. Chicago, St. P. M. & O. Ry. Co., 45 Minn. 71, 47 N. W. 455 (1890).

[25] Omaha & R. V. R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183 (1887).

[26] (An action sounding in damages such as assumpsit or an action on the case for the taking of private property for public use is not adequate remedy). Watson v. Fairmont & R. R. Co., 49 W. Va. 528, 39 S. E. 193 (1901); Jackson v. Railroad Co., *supra* n. 16.

irreparable consequential injury. If there is merely interruption of user, equity has as sound reason for interposing as in a case for specific performance of a contract to make a lease,[27] apart from the fact that the measure of damages is speculative.

What objections are there then, when the parties are properly in equity, to the granting of a conditional injunction to be later dissolved upon the payment of permanent damages to a plaintiff? There is none except where, as in West Virginia, the constitution is deemed to make the legal remedy for permanent damages exclusive. Since the same result would be ultimately achieved in an action at law, the decision in the principal case is objectionable only if the legal cause of action was barred by statute of limitations.[28] There is a very practical advantage to this wholesome procedure in that the uncertainty in having a judgment satisfied is omitted from the picture. If the defendant is a public service company the probability of insolvency is ever present, and if the defendant is a public corporation a writ of mandamus might be necessary to compel it to levy a tax to provide means of payment.

If in a given case it appears that the defendant public corporation or utility does not have the power of eminent domain then it is time to consider whether an injunction should be denied or a balance of convenience favoring the defendant. For such cases the principal case has much meaning because it makes the element of judicial discretion a matter of first importance.

—CHARLES W. CALDWELL.

---

[27] 4 POMEROY'S EQUITY JURISPRUDENCE, (4th ed. 1919) § 1400 *et seq.*

[28] If the injury is permanent only an action for permanent damages can ever be brought. Norfolk Co. Water Co. v. Etheridge, 120 Va. 379, 91 S. E. 133 (1917). If the nuisance is not permanent in nature, the statute of limitations does not bar successive actions. Norfolk *etc.*, Ry. Co. v. Allen, 118 Va. 428, 433, 87 S. E. 558 (1915). See Note (1909) 9 CAL. L. REV. 538.

There is no general rule as to what constitutes a permanent nuisance. In Keene v. City of Huntington, 79 W. Va. 713, 92 S. E. 119 (1917) the court held that if the nuisance arose from negligent operation it was temporary in character, but if it arose from the construction and proper operation it was permanent.

In Smith v. Sedalia, *supra* n. 16, where the nuisance was from sewer pollution and was held to be permanent the court said: "It is urged that this sewer system is not permanent, because it is within the power of the city to discontinue its use . . . . The same possibility exists in exery taking of property for public use. A railroad right of way . . . . may be abandoned." From this holding it seems that the city's contention, in the principal case, that the nuisance was permanent and barred by the statute should have been considered by the Supreme Court.