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Nuisance--What Constitutes--Right of Infant Trespasser (Carlow v. Manning Paper Co., 221 A.D. 415 (3rd Dep't. 1927))

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ing and renumbering Fourth Avenue between Thirty-second and Thirty-fourth Streets declared invalid and the proceedings thereunder enjoined. After a decision for the defendant in the trial court and pending this appeal, the borough president assigned to the property of the defendant the number "One Park Avenue" and renumbered the houses on the east side of Park Avenue between Thirty-fourth and Thirty-fifth streets, assigning to the plaintiff's property the number five. On appeal the judgment was reversed. Martha W. Bacon, *et al., v.* Hon. Julius Miller, as President of the Borough of Manhattan, and One Park Avenue Corporation, N. Y. L. J., Nov. 11, 1927, at 693 (App. Div. 1st Dep't.).

It cannot be denied that the board of aldermen and the borough president acted under adequate statutory authority in the renaming and renumbering of the street.[1] But the authority to act for the public in such matters, conferred by the people upon public officials, who are the servants of the people, carries with it the duty of acting in good faith.[2] While a municipality under the police power has broad and comprehensive rights with reference to many matters, those rights are based on the theory that the act is a benefit to the public or is a public necessity. In the instant case no attempt was made to show either necessity or benefit to the community. The courts have been careful not to allow the authority of municipal corporations to be used to oppress the inhabitants within their jurisdictions, and for injurious abuses of power and invasions of the legal rights of persons subject to municipal control there is a remedy in equity.[3] This intervention of equity is demanded in the case of an arbitrary attempt to take away one man's property and give it to another where the community does not benefit from and does not need such action, and courts of equity will give relief in such a situation.[4]

NUISANCE—WHAT CONSTITUTES—RIGHTS OF INFANT TRESPASSER. —Defendant had been dumping its waste hemp and refuse on the property of a third party without permission. Its practise had been to set this waste afire but the refuse was of such nature that the fire smouldered underneath without the surface indicating it. The dump was about three hundred feet from the nearest street and not upon or so near a street that a pedestrian would be injured by coming in contact with it. A path which skirted the hole about five feet from its edge had been used by the public for many years. Plaintiff, an infant of four years, while walking over the dump, and not using the path, was burned by the hidden fire. He instituted an action against defendant on the theory that the dump was a nuisance. *Held,* plaintiff was a trespasser on the property and the dump being

[1] Greater New York Charter, § 50 (chapter 466 of the Laws of 1901), as amended by chapter 592 of the Laws of 1916; Greater New York Charter, § 40; Code of Ordinances of the City of New York, Ch. 23, art. X, § 111.

[2] Anderson *v.* The Lord Mayor and Corporation of Dublin, L. R., Ireland, vol. 15, 1885-1886, p. 410.

[3] Dillon, Municipal Corporations, 5th ed., vol. 4, § 1573, p. 2751.

[4] N. Y. L. J., Nov. 16, 1927, at p. 776.

on private land and a considerable distance from any public highway or street was therefore not a nuisance. Carlow *v.* Manning Paper Co., 221 App. Div. 415, 223 N. Y. Supp. 358 (3rd Dep't. 1927).

The decision is consistent with the law of this jurisdiction. Negligence was not involved hence the plaintiff was required to stand or fall by his proof of nuisance. The court does not touch on the fact that defendant was also a trespasser who had no more legal right to be on the premises than plaintiff. In principle there should be no difference in the law because of it. Either a given thing is a nuisance or it is not a nuisance, whether brought into being by the owner of property on which it is located or by a trespasser. The advantage of alleging nuisance is that all persons creating and continuing it are liable irrespective of their negligence, in the absence of contributory negligence on the part of the injured person.[1]

From the earliest times it has been recognized as a nuisance for one to obstruct or interfere with the right of the public to free and safe use of a highway for purposes of travel,[2] but in the instant case there was affirmative evidence that the alleged nuisance was a considerable distance from the nearest public highway, hence the question of illegal obstruction did not enter. It is doubtful whether a different rule would have obtained had the action been in negligence. The rule is that the owner or occupier of land owes no duty to keep his premises safe in behalf of trespassers[3] or others who come thereon without right or invitation.[4] As to them the obligation is to refrain from wilful acts or from acts meant to injure them[5] and this rule applies to children as well as to adults.[6] Some courts have held,

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[1] Irvine *v.* Wood, 51 N. Y. 224 (1872); Congreve *v.* Smith, 18 N. Y. 79 (1858); Congreve *v.* Morgan, id. 84 (1858); Creed *v.* Hartman, 29 N. Y. 591 (1864).

[2] Cushing-Wetmore Co. *v.* Gray, 152 Cal. 118, 92 Pac. 70 (1907); Linsley *v.* Bushnell, 15 Conn. 225 (1842); Oehler *v.* Levy, 234 Ill. 595, 85 N. E. 271 (1908); Haynes *v.* Brewer, 194 Mass. 435, 80 N. E. 503 (1907); City of New York *v.* Rice, 198 N. Y. 124, 91 N. E. 283 (1910); Green *v.* Thresher, 235 Pa. St. 169, 83 Atl. 711 (1912); Liermann *v.* Milwaukee, 132 Wis. 628, 113 N. W. 65 (1907); Lyons *v.* Gulliver, 1 Ch. 631 (England, 1914).

[3] Riedel *v.* West Jersey &c. R. Co., 177 Fed. 374 (1910); City of Pekin *v.* McMahon, 154 Ill. 141, 39 N. E. 484 (1895); O'Brien *v.* Union Freight R. Co., 209 Mass. 449, 95 N. E. 861 (1911); Weitzmann *v.* A. L. Barber Asphault Co., 190 N. Y. 452, 83 N. E. 477 (1908); Cauley *v.* Pittsburgh &c. R. Co., 95 Pa. St. 398 (1880).

[4] Pekin *v.* McMahon, *supra,* note 3; Driscoll *v.* Scanlon, 165 Mass. 348, 43 N. E. 100 (1896); Kinney *v.* Onsted, 113 Mich. 96, 71 N. W. 482 (1897); Daneck *v.* Pennsylvania R. Co., 59 N. J. L. 415, 37 Atl. 59 (1897); Steiger *v.* Van Sicklen, 132 N. Y. 499, 30 N. E. 987 (1892).

[5] Lake Shore &c. R. Co., *v.* Bodemer, 139 Ill. 596, 29 N. E. 692 (1892); O'Brien *v.* Union Freight R. Co., *supra,* note 3; Magar *v.* Hammond, 183 N. Y. 387, 76 N. E. 474 (1906); Cleveland &c. R. Co. *v.* Workman, 66 Ohio St. 509, 64 N. E. 582 (1902); Rodgers *v.* Lees, 140 Pa. St. 475, 21 Atl. 399 (1891).

[6] West *v.* Poor, 196 Mass. 183, 81 N. E. 960 (1907); McAlpin *v.* Powell, 70 N. Y. 126 (1877); Rodgers *v.* Lees, *supra,* note 5; Walsh *v.*

however, that where a nuisance exists the owner of property must inform trespassers if he knows of their presence and of its existence.[7] And it is established that one who merely suffers or acquiesces in the use of his premises, or permits others to enter thereon for their own purposes, does not owe to such persons the duty to those who enter by invitation.[8] It appears, therefore, that the plaintiff had no cause of action against the defendant unless it could be shown that the latter acted wilfully and with intent to injure him.

PLEADING AND PRACTICE; MUNICIPAL COURT; JURISDICTION WHERE AMOUNT EXCEEDS ONE THOUSAND DOLLARS.—Five parties, named as plaintiffs in one summons, brought an action in the municipal court of the city of New York demanding separate and distinct judgments. The amount involved exceeded one thousand dollars and defendant denied the jurisdiction of the court over the subject matter of the action. *Held,* there was but one action and but one summons, and the amount demanded in that summons exceeded one thousand dollars. Hence the municipal court was without jurisdiction to entertain the action. Dilworth *v.* Yellow Taxi Corp., 220 App. Div. (N. Y.) 772 (2nd Dep't. 1927), reversing 127 Misc. 543.

The Civil Practice Act[1] provides than all persons may be joined in one action as plaintiffs where the right to relief arises out of the same transaction. A section of the Municipal Court Code incorporates this section into the code.[2] However the jurisdiction of the municipal court is limited to actions where the amount demanded in the summons does not exceed one thousand dollars.[3] So that, desirable as it may be that all actions arising out of one transaction be set out in one summons and complaint by the various plaintiffs this cannot be done in the municipal court where the amounts sued for by the respective plaintiffs total in the aggregate more than one thousand dollars. The Court of Appeals has stated that the purpose of the Civil Practice Act provision[4] is "to lessen the delay and expense of litigation by permitting the claims of different plaintiffs to be decided in one action instead of many when, although legally separate and distinct, they nevertheless so involve common questions and spring out of identical or related transactions that their common

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Pittsburgh Rwys. Co., 221 Pa. St. 463, 70 Atl. 826 (1908). But see Peuso *v.* McCormick, 125 Ind. 116, 25 N. E. 156 (1890).

[7] Peters *v.* Bowman, 115 Cal. 345, 47 Pac. 113 (1897); Hobbs *v.* George W. Blanchard &c. Co., 74 N. H. 116, 65 Atl. 382 (1906).

[8] Gibson *v.* Leonard, 143 Ill. 182, 32 N. E. 182 (1892); Redigan *v.* Boston &c. R. Co., 155 Mass. 44, 28 N. E. 1133 (1891); Cusick *v.* Adams, 115 N. Y. 55, 21 N. E. 673 (1889); Fox *v.* Warner-Quinlan Asphault Co., 204 N. Y. 240, 97 N. E. 497 (1912); Weaver *v.* Carnegie Steel Co., 223 Pa. St. 238, 72 Atl. 552 (1909).

[1] N. Y. Civ. Prac. Act § 209.
[2] N. Y. Mun. Ct. Code § 15.
[3] *Ibid.,* § 6.
[4] *Supra,* note 1.