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COUNTY JAIL AS A NUISANCE. REMEDY OF ADJACENT PROPERTY OWNERS.

The right of adjacent property owners to obtain relief either by an action at law, for damages, or in equity, by restraint through an injunction, as for a nuisance, for injuries to their property caused by the erection and maintenance of a county jail, is expressly denied as against the county. The point was recently passed upon by the Appellate Court of Indiana, in the case of *Pritchett v. Board of Commissioners of Knox County et al,* 85 N. E. 32. In this case, complainant had owned the south half of a certain residence lot in the town of Vincennes, for a number of years prior to 1901. In that year the county commissioners began negotiations looking to the purchase of the north half of that lot for jail purposes, whereupon complainant promptly gave notice that its use for such a purpose would be a nuisance as to her property, and would render it unfit for use as a residence, but the commissioners disregarded the protest and proceeded with the erection of a jail. The complainant charged that the jail has since been maintained in such a manner as seriously annoys and affects the use of her residence; that from the second floor of the said jail the prisoners, sometimes insane persons, may be

seen from the windows of her home, that these prisoners often call to herself and members of her family, expose themselves in nude and indecent conditions at these windows, and in general, render her home uninhabitable. The county commissioners, the sheriff and jailor, are named as co-defendants, they being charged jointly, but not severally, with the damage which results to complainant's property and her use of it.

In holding that there can be no recovery against the county, or the commissioners as officers of the county, the court seems to follow the general rule prevailing in the United States, that when an act is done by a subdivision of the state in the exercise of its governmental functions, such as the building of a jail—the duty of erecting and maintaining a suitable jail being laid by law upon each county—neither the inconvenience caused by the erection, or by the maintenance, gives a cause of action against the county, the jail being erected with reasonable care and maintained so as not to cause *unnecessary* inconvenience.

There can be no question that the location of a jail in any portion of a thickly settled county will cause inconvenience to adjoining property owners, and in most cases will also cause the property to materially deteriorate in value. Although a jail is not a desirable institution in the immediate neighborhood of one's home or property, still it must be built somewhere, and the discretion of the commissioners in selecting the site is not a matter open to review by the courts. *High on Injunctions,* Sect. 1270. The special damage in such a case is incident to what the general interest of the community requires and becomes *damnum absque injuria. Burwell v. Commissioners,* 93 N. C. 73. If these commissioners have abused this discretion or acted arbitrarily or capriciously, the people have their remedy by electing other commissioners at the next election, but the individual has no relief.

Nor will an action lie against the county for the inconvenience or annoyance that arises from the conduct of the jail. The point has been expressly adjudicated. "A county is not liable for the nuisance arising from the conduct of a jail." *Wehn v. Gage County Com'rs.* 5 Neb. 494; 25 *American Reporter,* 1497.

The conduct of the county in maintaining a jail which becomes a nuisance to others is not subject to the restraint of a court of equity. The county should provide proper buildings and officials and do its best to minimize the injuries that flow from the conduct of the jail, and when it has done this, there is no remedy. If the

act is required to be done by law, it is a defense to a bill in equity to enjoin the doing of it. *Wood on Nuisances,* Sect. 753; *Transportation Company v. Chicago et al,* 99 U. S. 635. The complainant therefore can have no relief against the county, either at law or in equity, unless some remedy is expressly given him by statute. It has often been held that when an act authorized by the legislature, acting within its constitutional powers, is done by a corporation with due care and in good faith, the corporation is not liable to persons injured by the act in an action for trespass, nuisance, etc., but the remedy, if there is any, is that provided by statute. If the thing done is within the statute it is clear that no compensation can be afforded for any damages sustained thereby, except so far as the statute itself has provided it. and this is clear, on the legal presumption, that the act creating the damage must be a lawful act. See *Marshall on Corporations,* Sect. 109.

Although a county has been held liable for a nuisance arising from the conduct of a market, that is more properly an act done by the county on its private side, while the erection and maintenance of a jail is clearly an act done by the county on its public side.

The county is one of the instrumentalities of government and exercises governmental functions. It is organized to give effect to the great principle of local self-government which forms such an important element of English and American liberty, and which is, indeed, the vitalizing and preserving element of constitutional freedom. "The care of county prisons is committed to the county officers in order to enable the county to discharge its duties as a governmental subdivision. The governmental power under which the care and control of prisons fall is the great one commonly called 'police power.' In caring for prisons, a county exercises part of this great power by virtue of delegation by the legislature to it, and it is no more liable for the wrongful or negligent acts of the officers in immediate charge of the prison than is the state for the tortious conduct of officers placed in charge of the prisons controlled by it." *White v. Board,* 129 Ind. 396; 28 N. E. 846.

The only remaining ground to be considered is whether the rendering of adjoining property unfit for use by the establishment of the jail is not such a "taking" as to be within constitutional provisions protecting private property against public taking without due compensation. While this has been held true in some states in the case of quasi-public corporations, it is not true in the case

of a county. "Acts done in the proper exercise of governmental powers and not directly encroaching upon private property, although the consequence may impair its use, are not such a taking within the meaning of the constitutional provision forbidding the taking of private property for public purposes without due compensation." *Cooley's Constitutional Limitations,* p. 542 and note.

Are complainants in such a case entirely remediless? It would seem not. The statute making it the duty of the board of county commissioners to erect a jail does not carry with it authority to so manage it as to create a nuisance, in the sense of injuries that do not necessarily flow from its proper use as a public function. But in such a case, the excessive acts are chargeable to the officers individually, and not to the corporation, called the county. In a proper case, if the sheriff or jailor did not use all the powers at their command in a reasonable effort to keep down the consequential injuries as much as possible, they might become personally liable in damages to the persons specially affected. If they show that they have used in good faith all the facilities at their command, they would have a good defense, otherwise not. The commissioners, in a proper case, after due notice, might also become liable if they persisted in retaining in office men notoriously unfit to discharge their duties. See *Board, etc. v. Allman,* 142 Ind. 573. Nor would it be necessary that there be any actual invasion of the complainant's property, a cutting off of light, or noxious odors. The shouting and cursing of the prisoners, their exposing themselves in view of the complainant's windows, no doubt affected her right of "privacy," a right which, while not recognized by Sir William Blackstone, springs from natural law, and which commentators of civil law claim has always existed. For a full discussion of this right, see *Pavesch v. New England Life Ins. Co.,* 122 Ga. 194, 69 L. R. A. 101; also *3rd Mich. Law Review,* 559.

INTERPRETATION OF "PURE FOOD" STATUTES—INTENT AS AN ELEMENT OF OFFENSE.

In view of the efforts being made by state legislatures to protect their respective communities from deception in the purchase of food, it is gratifying to note that the trend of judicial decision in interpreting these acts is such that the real legislative intent is placed in operation. In *Groffe v. State,* 85 N. E. (Ind.) 769, decided in October, 1908, the defendant was convicted of the sale of oleomargarine for dairy butter. The conviction was under a

statute making it unlawful for any person to offer for sale or sell any adulterated or misbranded article of food, and on appeal the Supreme court held that the absence of guilty knowledge or intent upon the part of the defendant was immaterial, and although the sale was made by a clerk contrary to defendant's express instructions, the conviction should be sustained. Chief Justice Gilbert dissented.

For many years legislatures have passed these so-called pure food laws, and the general policy of the courts has been towards declaring that intent is not an ingredient in the crime. At one time in Indiana, however, it was thought that the prosecution had to show defendant's knowledge of the fact that the article of food was not as represented. *Schmidt v. The State,* 78 Ind. 41. The court relied upon the decision in *Commonwealth v. Boynton,* 12 Cush. 499, but the statute upon which the prosecution was based in that case expressly made knowledge a part of the crime, so the court was placed under the necessity of requiring proof of intent in order to satisfy the statute. *Schmidt v. The State* was decided by a divided court and has never been followed. In *State v. Engle,* 156 Ind. 339, it was held that if the act is made *malum prohibitum,* the voluntary doing of the act, regardless of the intent, constitutes the offense.

At common law only acts committed with an unlawful intent were criminal, but the complex social conditions which have arisen in the last fifty years, have made it necessary to change this rule to a certain extent. A man may commit an act which so far as the act itself is concerned may be above reproach, and yet the consequences may be extremely disastrous to the public-at-large. It is needless to attempt any justification of legislative enactments which tend to prevent such acts, for no one is bound to act unless he can do so lawfully, and it is perfectly reasonable for the legislature to say that if he acts in certain instances, he does so at his peril. *State v. Ryan,* 70 N. H. 196.

In *People v. Fulle,* 1 N. Y. Cr. R. 172, the court protested very strongly against the doctrine that it was not necessary to show intent in such cases, declaring that the only criminal case in which this quality may be absent is in a matter involving gross negligence. But, as the learned reporter observes in a note to this case, while sound principle would seem to support the view of the court, yet there are numerous cases to the contrary. The efficacy of such statutes would entirely be taken away were it incum-

bent on the prosecution to prove the dealer's intention to deceive, and the legislature's intention in almost every case would be frustrated. *People v. Kibler,* 106 N. Y. 321; *People v. Hillman,* 58 A. D. 571. As long ago as 1864, we find the courts of Massachusetts holding that where the statute does not require proof of unlawful intention, it need not be shown, for it is impracticable to prove that the seller of an article of food had knowledge of its defects, and that it is reasonable for him to take the risk of knowing its qualities. *Commonwealth v. Farren,* 9 Allen (Mass.) 489; *Commonwealth v. Nicholas,* 10 Allen (Mass.) 199.

There is no doubt but that this principle would not be applied in cases *malum in se,* or involving acts of a serious nature. But the evils against which it is sought to protect society, by these statutes, could not be avoided by the application of a more liberal rule. *State v. Rogers,* 95 Me. 94. Dealers in these products have many opportunities for informing themselves as to the real nature of the articles they are selling, and the cases are rare indeed, in which, by a reasonable amount of diligence, they could not be able to guard against selling spurious articles.

If the legislature is desirous of making proof of unlawful intention a condition precedent to conviction, there is no reason why it should not so express itself. But in the absence of any such expression on the part of the legislative body, the courts seem to be of the opinion that a condition of this kind may not be implied. *Waterbury v. Newton,* 50 N. J. L. 534; *Vandegrift v. Meihle,* 66 N. J. L. 92. Nor does it seem reasonable when the courts are called upon to construe these statutes, that they should cast unnecessary burdens upon the prosecution, for, as has already been indicated, it is practically impossible to show the intention of the seller of the article. After a large number of people have been injured by the consumption of an adulterated food, there is but little consolation in learning that the dealer unwittingly sold something he would not have sold had he been more cautious. *State v. Kelly,* 54 Ohio St. 166.

In *People v. Snowberger,* 113 Mich. 86, the court intimates that while legislation of this character may work a hardship, yet the remedy is with the legislature and not the courts. It is difficult, however, to see wherein the hardship lies, for the exercise of sufficient care on the part of the seller will always operate as a complete safeguard. It would work an extreme hardship on the consumer, however, if he were obliged to make extensive in-

quiries with every purchase to ascertain whether or not the food he buys is fit to be eaten. In a matter in which the public is so vitally interested, it should not be possible for scheming and fraudulent dealers to shelter themselves behind the plea of ignorance. The law imposes upon them the duty of knowing what they are selling and they should not be exculpated merely because they violate this duty.

The courts of Texas, contrary to the great weight of authority, still cling to the view that it is necessary to prove intent even where the statute does not require it. *Teaque v. State,* 25 Tex. App. 577. The question has been directly presented but once, however, and it seems probable that the next time it arises the Texas courts will adopt the prevailing view.

WAIVER OF CONDITION PRECEDENT.

The Court of Appeals of New York on November 10, 1908, rendered a most interesting decision in the case of *Clark v. West.* This was an action to recover on a written agreement entered into between two parties, by which the plaintiff was to write law books for the defendant, receiving two dollars per page during the progress of the work, and, if he abstained from the use of intoxicating liquors during the existence of the contract, he should, every six months after the publication of a book, receive a percentage of the net receipt of the sales, amounting, with what he had already received, to six dollars per page. The plaintiff completed the work to the satisfaction of the defendant after having complied with all the terms of the contract, with the exception of that of total abstinence, which the defendant knew had been violated, but nevertheless continued to exact full performance of all the other conditions, and repeatedly avowed, and represented to the plaintiff, that he was entitled to and would receive the royalty payment. The court held the stipulation with respect to the plaintiff's total abstinence was not of the consideration, or the subject matter of the contract, but an incident to the method of its performance, and might, therefore, be waived without any formal agreement to that effect based on a new consideration.

This case, rather unusual in its nature, seems undoubtedly to be properly decided, for as the court says: "The subject matter of the contract was the writing of the books," and the stipulation, in regard to the plaintiff receiving a greater sum in the event of

his total abstinence during the continuation of the contract, was inserted not to make it "a contract to write books in order that the plaintiff should keep sober," but on the contrary, so as to insure his keeping sober so he could write more satisfactory books. Thus, it is evident that the stipulation was not the consideration of the contract, but merely one of the conditions which should be included with the many others so as to insure a work, which would be a normal production of the plaintiff. It was a condition precedent upon which the defendant could have insisted, or, for the breach of which a loss or forfeiture could have been enforced upon the plaintiff.

The courts, both in this country and in England, have generally held, that in the case of conditions precedent, if the promisor attaches any such conditions to his promise, he cannot be bound unless those conditions have been absolutely and literally fulfilled, Thus, in the case of *Bruce v. Snow,* 20 N. H. 484, in which the plaintiff gave a note to insure the presence of an accused person at the office of the defendant from nine to ten on a certain day, on the condition that if the accused should appear the note would be void. On the designated day, the accused did not appear till nine-forty and the court held, that as the accused was forty minutes late, the condition was not fulfilled and the note was still in force. In an English case, *Beatson v. Schank,* 3 East 233, the court held that a party who bound himself to keep a certain number of men on his vessel, was compelled to provide against the exigency of any of them dying, by taking an extra number on board. Similar decisions have been rendered in the cases of *Oakley v. Morton,* 11 N. Y. 25, and *Dorsley v. Wood,* 6 T. R. 710.

But, general as this proposition is, there exists in some states a peculiar doctrine, by which, if the plaintiff has attempted to perform his contract with the defendant in good faith, and has substantially performed it, he may recover the contract price from the defendant less the amount necessary to compensate the defendant for damages caused by his, the plaintiff's, failure to perform the contract exactly. Probably one of the most interesting cases in this connection is the case of *Nolan v. Whitney,* 88 N. Y. 648, in which the plaintiff's testator had entered into a contract with the defendant company to do the mason work in the erection of two buildings. The work was to be done under the direction and to the satisfaction of the architect, who was to give the contractor his certificate testifying to his satisfaction before any payment

could be made. The payments were to be made in installments and as the last one had not been paid the plaintiff brought this action to recover it. The defendant claimed the work had been improperly done and that the contractor had not obtained the architect's certificate. The court held, however, that, as the evidence showed the contractor had substantially performed his agreement, and had acted in good faith, the architect was bound to give him his certificate, and thus he could recover the contract price less due compensation, for the loss incurred by not having performed the work according to details. This principle is also exemplified in the cases of *Shepherd v. Mills,* 173 Ill. 223, and *Keeler v. Herr,* 157 Ill. 57.

Although this doctrine, recognizing substantial compliance as being sufficient, is generally limited to building contract cases, where the owner of land has no opportunity of rejecting a building which does not conform to specifications, nevertheless, it is difficult to see how it can be supported on the contractual or quasi-contractual theory. In viewing it from the contractual side, it seems evident the plaintiff would have no right to demand the contract price, because he has not performed the contract; while if the defendant's obligation is quasi-contractual, it must be measured by the actual value of the work which the plaintiff has performed and not by the contract price less the damage caused by non-performance. The better rule seems to be that if any obligation exists, it is quasi-contractual and limited to the value of the benefits received. *Harriman on Contracts,* 2nd. Ed., Sect. 339.

Conditions precedent may, however, be waived, without any consideration, by the act of the party for whom they are imposed, as in this case of *Clark v. West.* Waiver has been defined to be "the intentional relinquishment of a known right. It is voluntary and implies an election to dispense with something of value, or forego some advantage upon which the party waiving it might at his option have demanded or insisted." *Herman on Estoppel and Res Adjudicata,* Vol. II, p. 954. It usually arises when the substantial part of a contract has been performed, and the other party has voluntarily accepted and received the benefit of the past performance, knowing that the contract has not been fully carried out. This acceptance will amount to a waiver of the party's right to compel full performance as a condition of his liability. The case of *Wiley v. The Inhabitants of Athol,* 150 Mass. 426, serves

as a good illustration of this principle. In that case, the plaintiff company entered into a contract guaranteeing to furnish the defendant town a specified supply of water for fire service, at a certain rental per hydrant, for a term of years. At no time did the plaintiff furnish the guaranteed amount, but the defendant, having knowledge of this, nevertheless continued to use it for a number of years and then refused to pay their rent, alleging the supply was not in conformity with the contract. In an action for arrears by the plaintiff, the court held that as the defendant had voluntarily accepted and received the benefit of part performance, knowing the contract was not being fully performed, they were precluded from relying on the performance of the residue as a condition precedent to their liability. *Sykes v. City of St. Cloud,* 60 Minn. 442; *Phillips and Colby Const. Co. v. Seymour,* 91 U. S. 646, and *Barnes v. McLeod,* 114 Mich. 73, exemplify this doctrine.

The decision in this case of *Clark v. West* in no way conflicts with the rules governing the cases of *Hamer v. Sidway,* 124 N. Y. 538; or the two cases similar to it of *Lindell v. Rokes,* 60 Mo. 249, and *Talbott v. Stemmons,* 89 Ky. 222. For in *Hamer v. Sidway, supra,* an uncle had promised his nephew the sum of five thousand dollars if he should refrain from drinking liquor, using tobacco, swearing, and playing cards and billiards for money, until he should become twenty-one years of age. Upon the fulfillment of all conditions by the nephew, a suit was brought against his uncle's estate to recover the sum, and the court held recovery could be had as the abandonment of the legal right to use tobacco and occasionally drink liquor on faith of the promise of the uncle was sufficient consideration to support the contract, without inquiring as to whether there was a benefit to the promisor or a detriment to the promisee. In that case, the forbearance by the nephew of using tobacco and liquor for several years, was the consideration and the very substance of the contract, for it was upon the surrender of his legal rights that the entire contract was based; while in the case recently decided, the insertion of the clause requiring the plaintiff to abstain from liquor, was a mere incidental condition as to the method of the performance of the contract for writing books, which the defendant could waive at will.