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SUMMARY CONDEMNATION OF NUISANCES.

I.

Of the general extent of this power, aside from special and positive legislative enactment, there is no better statement than is contained in the language used by a distinguished Justice, in directing an injunction against a threatened destructive abatement of a wharf which had been declared a nuisance by a special ordinance passed under an act of the State Legislature, authorizing the City of Milwaukee to establish wharf and dock lines and prevent encroachments or obstructions in the two rivers passing through that municipality :—

> But the mere declaration of the City Council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such a declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the City or of the State, within which a given structure can be shown to be a nuisance can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the City itself. This would place every house, every business, and all the property of the City, at the uncontrolled will of the temporary local authorities: MILLER, J., *Yates* v. *City of Milwaukee* (1871), 10 Wall. (77 U. S.) 497, 505.

These principles have been frequently recognized: thus, in *Arkansas*, by SMITH, J., *Ward* v. *City of Little Rock* (1883), 41 Ark. 526, 530, refusing an injunction against working convicts in the streets of Little Rock; in *Colorado*, by STONE, J., *City of Denver* v. *Mullen* (1884), 7. Col. 347,

353–4, where he declared that only certain kinds of nuisances, such as those affecting health, or the safety of person or property, or tangible street obstructions presenting an emergency, could be summarily abated by the public; in *Illinois*, by SHELDON, J., *King et al.* v. *Davenport, Exr.* (1881), 98 Ill. 305, 316, where he distinguished the destruction of a wooden roof by the fire marshal, in obedience to the city ordinance, because the ordinance had been passed long before, and the roof itself had the character of a nuisance; and previously, in *Chicago, R. I. & Pacific R. R. Co.* v. *City of Joliet* (1875), 79 Ill. 25, 44, where the operation of a railroad according to its franchise was solemnly declared a nuisance by the city fathers and a bill filed for abatement; in *Iowa*, where shade trees were condemned: *Everett* v. *The City of Council Bluffs* (1877), 46 Iowa 66, 67; in *Mississippi*, in the case of a planing mill: *Lake* v. *City of Aberdeen* (1879), 57 Miss. 270; *Green* v. *Lake* (1882), 60 Id. 451.

It is not intended in this article to develop the law of nuisances further than reasonably necessary to illustrate the limits of the particular municipal power of summarily condemning a nuisance; assuming knowledge of the principles of this branch of law or access to the text books wherein it has been stated, this article will the more closely adhere to that narrow but important part of the law of nuisance indicated in its title, without restating the general underlying principles.

One caution is to be observed: over and above the nuisances recognized at common law, there can be no doubt of the sufficiency of the State's police power to authorize the legislature to declare acts or things to be nuisances which otherwise would not be so in law: *Mugler* v. *Kansas* (1887), 123 U. S. 623, 660 (distillery); *Comm.* v. *Alger* (1851), 7 Cush. (Mass.) 53, 84, 95, per SHAW, C. J. (wharf beyond the established lines); *Vanderbuilt* v. *Adams* (1827), 7 Cowan (N. Y.) 349 (anchoring vessels); *Lawton et al.* v. *Steele* (1890), 119 N. Y. 226, 233, per ANDREWS, J. (*infra*); *Carleton* v. *Rugg* (1889), 149 Mass. 550 (liquor saloon); *Weller* v. *Snover*

(1880), 42 N. J. Law 341 (fish trap); *Shivers* v. *Newton* (1883), 45 Id. 469, 473–4, per REED, J. (adulteration of milk). Consequently a legislative declaration that anything shall be considered a nuisance, excludes evidence that the thing is not a nuisance in fact: DEVENS, J., *Train* v. *Boston Disinfecting Co.* (1887), 144 Mass. 523, 531 (imported rags). With such declarations, this article has nothing to do, as it would involve a discussion of the fundamentals of the State's police power. This is a completely severable and much more elementary subject than is here discussed.

II.

There seems to be no reasonable doubt of the power to summarily destroy or remove nuisances, without judicial trial or process. It "was an established principle of common law long before the adoption of" any American Constitution, and "it has never been supposed that this common law principle was abrogated by the" constitutional provisions "for the protection of life, liberty and property, * * * although the exercise of the right might result in the destruction of property": ANDREWS, J., speaking especially of the Constitution of New York, in *Lawton et al.* v. *Steele* (1890), 119 N. Y. 226, 235. To the same effect is the language of MAGIE, J., quoted, *infra*, page 176, and the opinions of Vice-Chancellor DODD, in *Manhattan Mfg. & Fert. Co.* v. *Van Keuren* (1872), 23 N. J. Eq. 251, and of SUTHERLAND, J., in *Coe* v. *Shultz* (1866), 47 Barb. 64 (both the latter cases arising from offensive manufactures).

Consequent upon the existence of the power of summary abatement, is that of delegating its exercise to executive officers, to proceed without the delay of judicial proceedings, "in cases analogous to those where the remedy by summary abatement existed at common law": ANDREWS, J., *Lawton et al.* v. *Steele* (1890), 119 N. Y. 226, 238, and *infra*, page 167.

III.

The fundamental error in almost every instance of a contested declaration of nuisance by a municipality, arises from

a curious assumption that the declaration is final and indisputable in any action subsequently brought. The authorities for condemning the error are chiefly considered herein, under the division of nuisances prejudicial to the public health, though some appear also under those obstructing public highways and those dangerous to life and property. They all deny to a municipality the power to declare that to be a nuisance which is not such in law. Some of these authorities are: *Hutton* v. *City of Camden* (1876), 39 N. J. Law 122 (*infra*); *Newark &c. Rwy. Co.* v. *Hunt* (1888), 50 Id. 308 (glandered horses); *Baldwin* v. *Heitzman* (1885), 47 Id. 280 (division line); *Wreford* v. *The People* (1865), 14 Mich. 41, 47, per CAMPBELL, J. (maintaining a slaughter house); *The Village of St. John* v. *McFarlan* (1875), 33 Mich. 72, 74, per MARSTON, J. (wooden building); *The City of Hannibal* v. *Richards* (1884), 82 Mo. 330 (grading a lot); *Darst et al.* v. *The People* (1869), 51 Ill. 286, per LAWRENCE, J. (indictment for riot in forcibly seizing liquors); *Barling* v. *West et al.* (1871), 29 Wis. 307, which was caused by a lemonade stand; the market stall case, where this language was used:

> It may well be doubted whether the legislature can delegate to any body of men the power to declare what is or what is not a nuisance. Such power would be equal to a power to declare what should be a criminal act; because it is a crime to maintain a public nuisance, and if the legislature can delegate to individuals the power to define a nuisance, they can delegate to them the power to make acts criminal which are not so by law. Such a power cannot be delegated to others by the legislature. They may authorize boards of health to pass ordinances necessary for the objects of their creation, but they cannot delegate to them the power to define what shall be a nuisance, or make acts criminal which the law holds to be innocent: INGRAHAM, J., *Mayor, &c., of New York* v. *The Board of Health* (1866), 31 How. Prac. (N. Y.) 385, 396.

A curious illustration of the erroneous principle under discussion, is found in the case of *Green* v. *The Mayor & Aldermen of Savannah* (1849), 6 Ga. 1. The municipality, under their power to remove all nuisances, had prohibited the cultivation of rice on an island within the City limits. Green cultivated rice in defiance of the ordinance, and when

summoned before the City Council, endeavored to prove that the cultivation of his rice did not endanger the public health. Failing to prevent the condemnation, Green then removed the case by *certiorari* into the Superior Court, where he failed again. In affirming the judgment, the Supreme Court, speaking by WARNER, J., considered that the discretionary power over nuisances made the municipal authorities the sole and exclusive judges of the existence of the facts upon which the exercise of the power depended, so that their determination of the existence of a nuisance, arising from the cultivation of the rice, was conclusive.

To these citations may be added some remarks which will lead up to a consideration of the origin of the assumed finality of municipal declarations of nuisance, without further examination of such power of a municipality. It must be remembered that this article deals with the effect of a summary condemnation of a nuisance, and not with the municipal power in general over nuisances.

We do not at all question the general proposition, which has been argued with so much elaboration by appellant's counsel [W. C. Goudy], that under a general grant of power over nuisances, like the one in question, town authorities have no power to pass an ordinance declaring a thing a nuisance which in fact is clearly not one. The adoption of such an ordinance would not be a legitimate exercise of the power granted, but on the contrary, would be an abuse of it. But in doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power like the one we are considering, their action under such circumstances, would be conclusive of the question. * * * * And so we regard the use of steam in the manner specified in the ordinance, for the purpose of propelling street cars along a public street in a thickly populated town in the absence of any legislative grant authorizing it to be done. Such a use of steam, under the circumstances stated, is *per se*, a nuisance: MULKEY, J., *N. Chicago City Ry. Co.* v. *Lake View* (1883), 105 Ill. 207, 212, 213.

This case originated in the Criminal Court of Cook County, where the Railway Company was convicted of violating the town ordinance by propelling its cars by steam power. The conviction was affirmed.

The principles contained in these remarks of Judge MULKEY were applied to the emission of dense smoke from the chimney of a tug boat, contrary to the city ordinance, in *Harmon* v. *City of Chicago* (1884), 110 Ill. 400, and were approved by ELLIOTT, J., in *Baumgartner* v. *Hasty* (1884), 100 Ind. 575, 577–8, where the Court declared lawful the summary destruction of a wooden shed maintained in violation of the city ordinance. And again, in the case of a steam grist mill, the Court saying:

> The charter of Aberdeen confers on it, power to "prevent and remove all nuisances." We agree with counsel in the assertion that this grant of power does not authorize the town to declare that to be a nuisance which is not, and destroy property or interfere with individual rights improperly under the pretence of preventing or removing nuisances; but the town has power to prevent and remove what comes within the legal notice of a nuisance, and, according to the petition in this case, the establishment complained of, was a nuisance, because of its condition and surroundings: CAMPBELL, C. J., *Green* v. *Lake* (1882), 60 Miss. 451, 456.

Hence the cause of the error, that a summary municipal declaration of a nuisance is final, seems to be in the necessity for the exercise of a wide discretion by municipal authorities in the use of prompt and decisive measures: WELLS, J., *City of Salem* v. *Eastern RR. Co.* (1868), 98 Mass. 431, 446. In this cited case, the extent of destructive powers, the compensation of the owner of the property, and the persons liable to the owner, were not decided, as the case went off on a denial of the finality of the municipal declaration of a nuisance. In other words, this citation belongs with the class of cases arising out of lawful trades which become a nuisance by the manner of their conduct: DEVENS, J., *Train* v. *Boston Disinfecting Co.* (1887), 144 Mass. 523, 530.

The exercise of discretion in determining whether a particular thing falls within a category of condemned acts or conditions, is said to belong to a *quasi* judicial rather than ministerial power in the municipality: BIGELOW, C. J., *Belcher et al.* v. *Farrar* (1864), 8 Allen (Mass.) 325, 327, (*infra*); per VAN SYCKEL, J., in *State, Marshal, Pros.* v. *Street Commissioner of Trenton* (1873), 36 N. J. Law 283,

285 (tannery); EARL, C. J., *Underwood* v. *Green* (1870), 42 N. Y. 140, 142 (*infra*). In the former of these cases, the learned Judge administered the corrective to this classification, taken in the abstract, by grounding the immediate application of such power, without that preliminary hearing which justice requires, upon a subsequent occasion for the orderly presentation of the truth to a court of justice. In part, he said:

> The unrestrained enjoyment of property by its owner is an abstract right but it is to be exercised in subordination to another rule equally clear, embodied in the maxim, *Expedit reipublicæ ne sua re quis male utatur*. So the right of the subject to the liberty of his person is indisputably clear; but it cannot be enjoyed if the good of society requires his restraint, or if the rights of others will be endangered or lost if he is permitted to go free. It is therefore no violation of principle to suspend the appropriation of private property to a particular use alleged to be hurtful and injurious to others, until it can be ascertained judicially whether such allegation is well founded; nor can it be said to be an unlawful infringement of the liberty of the citizen to arrest him on a charge of crime, or on an allegation of injury to the person or property of third persons, until it can be determined whether his release will be consistent with the peace and good order of society, or a due regard to the security and preservation of the rights of others. It is upon this ground that courts of equity are empowered to issue injunctions to restrain the use of property, and courts of law are authorized to issue writs and warrants for the arrest of the person. Such processes are only preliminary. They do not conclude the rights of parties, but are merely the initiatory steps in the administration of justice, which, when followed up in due course of law, will lead to judgments by which those rights can be finally adjudicated and settled. Of this nature are the proceedings in controversy in the present case: BIGELOW, C. J., *Belcher et al.* v. *Farrar* (1864), 8 Allen (Mass.) 325, 329.

This case was a bill in equity by the municipal authorities for an injunction against an oil refinery, and the particular point for decision was the power of the board of health to forbid the use of the refinery, without first notifying its owner. An affirmative response was given by the Supreme Judicial Court of the State, for the reasons already mentioned. The same result was reached in deciding an action of trespass against the owner of a barn and sheds, which had been pulled down at the direction of the board of health, in *Van Wormer* v. *Mayor &c. of Albany* (1836), 15 Wend. (N. Y.) 262.

The classification of this municipal power as *quasi* judicial, should not be pressed too far upon the authority of the case cited, as it was made with reference to the local statute, and "in the sense that it is not to be contested or revised, except in the manner provided in the statute": GRAY, C. J., *Taunton* v. *Taylor* (1874), 116 Mass. 254, 261 (bone boiling); *Sawyer* v. *State Board of Health* (1878), 125 Id. 182 (slaughter house); *Comm.* v. *Young* (1883), 135 Id. 526 (keeping swine). The principle upon which the classification is made, however, is of general application, as will be seen from some consideration of the cases arising out of the great fire in New York City, in 1835 (*infra*, page 189).

IV.

Recognizing the fundamental principles, that the declaration of a nuisance is a proceeding of a judicial nature, and that no such proceeding can validly affect person or property, without hearing, the curious claim is sometimes made by municipalities, that the owner will be deprived of his remedies at law or in equity, unless he appear and contest before the municipal officers charged with the determination of the question of nuisance. It should be enough to recall that proceedings in court are not by way of appeal from the decision of the municipality: WELLS, J., *City of Salem* v. *Eastern RR. Co.* (1868), 98 Mass. 431, 447, and therefore pleading before the municipal officers has no legal result. An avoidance of litigation may, of course, follow, from convincing the officers of the error of their proposed action. This general statement is made subject to the provisions of special statutes giving an appeal from the municipal action, as in *City of Taunton* v. *Taylor* (1874), 116 Mass. 254, where GRAY, C. J. (page 261,) distinguished the case of *City of Salem* v. *Eastern RR. Co.* on this particular ground. In this respect, but requiring compliance with the statutory directions by the municipal officers, a similar case is that of *Comm.* v. *Young* (1883), 135 Mass. 526, 529.

V.

If the municipal authorities are dealing with a nuisance at common law or by statute, they must be prepared to establish such facts as will prove the nuisance; they cannot justify under any municipal declaration, because no such power is conferred by a general authority to "abate any nuisance": *Hennessy* v. *City of St. Paul* (1889), U. S. C. Ct. D. Minn., 37 Fed. Repr. 565. Here, a partially burned house was pulled down, under a resolution of the common council, and no facts being established to prove the existence of a nuisance, save the resolution, the City was properly mulcted in damages. Similarly, *Cole* v. *Kegler* (1884), 64 Iowa 59 (destruction of a dwelling), and *Joyce* v. *Woods* (1880), 78 Ky. 386 (draining a lot). In a Georgia City, the Mayor and other City officials were about destroying a mill pond as a nuisance, when a flood relieved them of the necessity: the injunction subsequently granted to the owner against the City officers was dismissed, because the wrong person had been enjoined, "for the Almighty had already abated the nuisance." But the Court took occasion to say also that:

> Whenever the City authorities proceed in the summary manner authorized by their charter, they do so at their peril. The owner of the pond in this case would not have been remediless at law. He would have had a right, in a suit at law, to establish, if he could, that the pond was not a nuisance; and if he could show that to the satisfaction of the jury, he would be entitled to such damages as he had sustained by the summary action of the City authorities. It would be a great wrong upon the people living in crowded cities, to hold that, in every case of nuisance, affecting perhaps the lives of hundreds or thousands of the inhabitants, the city authorities would have to go through a long and tedious trial before a court and jury, before they could abate or abolish the nuisance. But, as said before, when they do act, they must be certain that they are right, and that the thing abated is a nuisance, or they will subject the municipality to damages: SIMMONS, J., *City of Americus* v. *Mitchell* (1888), S. Ct. Ga., 5 S. E. Repr. 201, 202.

The same recognition of the right of the owners and other aggrieved persons to appeal to a court of justice against arbitrary or wanton exercise of municipal authority, appears in *Harvey* v. *Dewoody et al.* (1856), 18 Ark. 252, 261 (unoccu-

pied house); *State* v. *Mott* (1883), 61 Md. 297, 308 (lime kiln); *Manhattan Mfg. & Fert. Co.* v. *Van Keuren* (1872), 23 N. J. Eq. 251, 256 (manufactory of fertilizers); *Compton* v. *Waco Bridge Co.* (1883), 62 Texas, 715, 719 (fences).

Another and perhaps more familiar aspect of the right to judicial investigation, has been expressed in the decision of a suit for the penalty fixed by the City of Baltimore upon all persons erecting or carrying on a distillery of spirits, turpentine or varnish, or factories for earthen or stone ware, soap and candles, or slaughter houses; the ordinance had been adopted under a power conferred by the legislature, to prevent fires and nuisances.

The validity of many ordinances is at once perceived, because they appear upon the face of them to be in the execution of a delegated power. Of this character, for example, would be such ordinances as relate to the laying out of new streets, the establishment of night watches, the erection of lamps, the providing for the general survey of the city, laws for cleaning and deepening the basin, and many other powers of the like description, which it is unnecessary to enumerate.

But the power to prevent fires and the power to remove nuisances, are grants of a totally different description, and there may be just, necessary and proper exercises of these powers, which the court cannot judicially see. Thus, whether the various manufactories spoken of [*supra*] in the Seventeenth section of the ordinance, are calculated to endanger the habitations, or the health of the inhabitants, may be a matter of science, upon which possibly a diversity of views might be entertained, and thus the legitimate exercise of the power might become a mixt question of law and of fact. The city authorities might pronounce that to be a nuisance, which evidence might show was not a nuisance. They might prohibit a particular occupation upon the ground that it increased the danger of fire, when the reverse could be shown by the concurring testimony of all men. The power, therefore, or the want of power, to suppress a particular occupation as a nuisance, or as a means of preventing fire, should be shown in proof.

It is true the corporation have power to pass all laws, which are necessary or proper to carry into effect any given power, and the degree of its necessity or propriety would not be minutely, or critically scrutinized; but the court ought to see that it may be the means of accomplishing the object of the grant. The degree of necessity would, indeed, be properly, perhaps, the subject for the judgment of the corporation, but that it contributes in any degree, would be for the determination of the court.

Now that the prevention of such occupations as are, under certain circumstances, prohibited by the ordinances under consideration, would, in any degree, be a means of preventing fires, or of removing nuisances, must be disclosed by evidence. None is produced, and we therefore think,

upon this ground, the court were wrong in their direction to the jury, that if they found the facts proven in the bill of exceptions to be true, they must find for the plaintiff: ARCHER, J., *Glenn* v. *The Mayor* (1833), 5 Gill & J. (Md.) 424, 428–9.

VI.

The necessity for vindicating the peremptory orders of municipalities, has led to judicial interference by injunction to restrain the abatement of what the land owner or occupant denied to be a nuisance. This jurisdiction is defended not only from precedent, but still more from a sound reason that thereby an officer required to proceed summarily, and of course under the liability of a future action, may secure a judicial decree upon the legality of his proposed action: BECK, C. J., *Bolton* v. *McShane* (1885), 67 Iowa 207, 209 (fence). Hence, the jurisdiction over road supervisors in that State has been exercised for a long time: Id. And in cases where the question is whether an obstruction in a street is a nuisance, the land owner, or other aggrieved person, may also have an injunction to prevent the contemplated action, until hearing in court: *Bills* v. *Belknap* (1873), 36 Iowa 583, 585 (growing trees); *Everett* v. *The City of Council Bluffs* (1877), 46 Id. 66, and *Quinton* v. *Burton* (1883), 61 Id. 471, 476 (shade trees); *Everett* v. *The City of Marquette* (1884), 53 Mich. 450, where COOLEY, C. J., sustained an injunction against the removal of basement steps upon the municipal declaration that they were illegal without proof of interference with the public, adding that *People* v. *Carpenter* (*infra*, page 184,) had "never been doubted in this State."

A good illustration of this exercise of equitable jurisdiction by injunction appears in a Mississippi case:

Appellant states that an ordinance was passed by the corporate authorities of the town of Shieldsboro, ordering him to remove his lumber from his lot, as described in the bill, on the bank of the Bay of St. Louis; that he was a dealer in lumber, as well as a merchant of the place; that they "caused the marshal of said City to give him notice to remove or destroy said lumber within five days, or they would have it removed or destroyed by force." The bill further alleges, that *no cause* or reasons have been given for the issuance of the order for the removing or for the destroying of his lumber.

These allegations, we think, show good grounds for relief. It cannot be seriously contended that the corporate authorities of a town can, by an arbitrary ordinance, destroy private property by force, or compel the owner of it to have it removed, unless it was a nuisance, and so declared in the ordinance, and shown to be such by its location, or by the sanitary condition of the city or town: SHACKELFORD, C. J., *Pieri* v. *Mayor etc.* (1869), 42 Miss. 493, 495.

The jurisdiction was also exercised in *Northwestern Fertilizing Co.* v. *Hyde Park* (1878), 7 Otto (97 U. S.) 659, though the question chiefly agitated there was the extent of the State's police power, and not its summary application. This was also the case in *Kennedy* v. *Peters* (1855), 10 La. Ann. 227, where a hide-curing establishment had been condemned.

As will again appear, with regard especially to street obstructions (*infra*, page 180), and nuisances prejudicial to the public health (page 175), a court of equity will not restrain a mere trespass, or grant an injunction, unless the complainant's right is free from doubt, or the injury would be irreparable, and not susceptible of legal compensation in damages. Such was the emphatic ruling of the Court in the leading case of *Hart* v. *Mayor &c. of Albany* (1832), 9 Wend. (N. Y.) 571, where an injunction was refused against the threatened destructive abatement of a float in the canal basin at that City. It is not possible to enter into an examination of this branch of equitable jurisdiction; nor is it necessary, as there is nothing peculiar in its application to the restraints of summary abatements by municipal authority of suppressed nuisances. It is enough to emphasize that the foundation of this jurisdiction is the proof to be offered to the chancellor against the municipal declarations.

VII.

In declaring anything a nuisance, care must be taken to proceed against the actual nuisance, and not against something subsidiary or merely contributory. Such an error will afford good ground for the recovery of damages. The general principle involved may be otherwise stated, that property is not to be destroyed beyond what is needful to

abate a nuisance: GRAVES, J., *Shepard* v. *People* (1879), 40 Mich. 487, 492 (mill dam), and *Messersmidt* v. *People* (1881), 46 Id. 437, 438 (refuse from glue factory); *Brightman* v. *Bristol* (1876), 65 Me. 426 (porgy oil factory); *Gray* v. *Ayres et al.* (1838), 7 Dana (Ky.) 375 (tarring and feathering a receiver of stolen goods). Thus, in *Verder* v. *Ellsworth* (1887), 59 Vt. 354, a fence was condemned as a nuisance and torn down by the village trustees, though the fence was proved not to have been a nuisance, but merely a screen behind which trespassers committed the nuisance. The owner recovered damages for the trespass, though the removal of the fence so exposed the trespassers that they ceased to commit the nuisance. In other words, the removal of the fence could only be justified after a condemnation of the nuisance, and not of the fence, and then only as the proper means of abatement of the nuisance. There might have been other methods of preventing the recurrence of the nuisance, such as the services of a watch dog or the cultivation of prickly bushes.

Similarly, in *Miller* v. *Burch* (1869), 32 Texas 208, the destruction of an unoccupied and dilapidated stable was considered to be ground for damages, because "the nuisance was not caused by the" stable, "but by the persons who resorted there," as in the Vermont case, at the call of nature, and that was the nuisance which could have been suppressed without the demolition of the building. The reasoning of this opinion does proceed upon the ground that the buildings in which people misbehave themselves, are not nuisances, as well as those in which noxious trades are carried on, because it is the abuse of the building which makes the nuisance. But the fact remains that the demolition was not necessary, and therefore the principles of *Mugler* v. *Kansas* (1883), 123 U. S. 623 need be no more than generally referred to as matter of caution in using this authority.

Similarly, a "ball alley" could not be removed as a nuisance because its proprietor permitted disorderly persons

to play at ten pins: *Bloomhuff* v. *The State* (1846), 8 Blackford (Ind.) 205.

The destruction of a house of ill fame by a city marshal, under a resolution of the City Council of Detroit, again raised the question of abating the nuisance by destroying the house where the thing was practiced. The Court was disposed to deny the power of the legislature to authorize the municipalities to destroy, perchance, the most costly edifice in the city, if the abode of the vicious and profligate; but beyond indicating the bias of the judicial mind, this subject may be passed over for the consideration of the method of abating the nuisance. Holding the municipality to the same strict but reasonable power of abatement already mentioned, the Court said:

> The law undoubtedly authorizes the Corporation of Detroit, or any person residing within the limits, to abate any nuisance that may exist. This right is one of the few exceptions to the general rule that no man shall take the law into his own hands; the exception finds its vindication in the law of necessity. It is a right, however, to be exercised with caution. Care must be taken that nothing is done but what is absolutely necessary to abate the nuisance.
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> Let us apply the rule contended for by the defendants to the present case. It is said that the house is a nuisance. This may be very true; but it was a nuisance in consequence of its being the resort of persons of ill fame. That which constitutes or causes the nuisance, may be removed; thus, if a house is used for the purpose of a trade or business, by which the health of the public is endangered, the nuisance may be abated, by removing whatsoever may be necessary to prevent the exercise of such trade or business; so a house in which gaming is carried on, to the injury of the public morals; the individual by whom it is occupied may be punished by indictment, and the implements of gaming removed; and a house in which indecent and obscene pictures are exhibited, is a nuisance which may be abated by the removal of the pictures. Thousands of young men are lured to our public theatres, in consequence of their being the resort, nightly, of the profligate and abandoned; this is a nuisance. Yet in this, and in the other cases stated, it will not be contended that a person would be justified in demolishing the house, for the obvious reason that to suppress the nuisance such an act was unnecessary.
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> But surely the destruction of the house did not abate the nuisance; the cause still remained; its inmates would resort to other receptacles of vice; and in no respect would the public morals be promoted. In this, and the like cases, the only remedy for the mischief is to apply the stringent provisions of our criminal law [and indict the persons offending]: WHIPPLE, J., *Welch* v. *Stowell* (1846), 2 Doug. (Mich.) 332, 341–2.

A New York case will further illustrate the principle here under consideration. The City of Buffalo threatened to fill up a canal which was a valuable appurtenant to Babcock's lot. He was allowed to prove that the nuisance of stagnant water and filth could be removed without filling the waterway, and was in fact caused by the negligence of the City, under its charter powers, in not preserving the canal in a navigable condition. The lot owner was therefore entitled to an injunction: *Babcock* v. *City of Buffalo et al.* (1874), 56 N. Y. 268. This case was recognized as good law by ANDREWS, J., in *Lawton et al.* v. *Steele*, to be mentioned presently.

The Michigan decision just mentioned, was made with especial regard to *Meeker* v. *Van Rensaeller* (1836), 15 Wend. (N. Y.) 397, where a disused tan house had become tenanted by foreigners and extremely filthy, during the prevalence of cholera. The building was pulled down, under the direction of the Board of Health, as a nuisance, and the proof established that the destruction of the building was the only way to correct the evil. The proof being the other way in the Michigan case, the judgment was accordingly for damages. The same principle governed *Ferguson* v. *City of Selma* (1869), 43 Ala. 398, where the houses were admitted to be of no intrinsic value, though yielding a fair rental. The proof showed that the City authorities had condemned these shanties because of their filthy condition, their age and dilapidation, their owner's refusal to repair, though he was of sufficient financial ability, their situation in an improving and flourishing part of the city, and their occupancy by tenants afflicted with small pox. The Supreme Court affirmed the Chancellor's refusal to enjoin the City from removing these tenements, on the express grounds that the owner's rights were not illegally assailed, and, of course, not threatened with irreparable damage.

So far as the right to abate was concerned, *Meeker* v. *Van Rensaeller* has recently been recognized in *Lawton et al.* v. *Steele* (1890), 119 N. Y. 226, 236–7, by ANDREWS, J., where the learned Judge continued the discussion beyond

the power of the municipality upwards into the constitutional restraint upon the legislative power. Of course, the delegation to a municipality is limited by the bounds of legitimate legislative action.

Where a public nuisance consists in the location or use of tangible personal property, so as to interfere with or obstruct a public right or regulation, as in the case of the float in the Albany basin (*Hart et al.* v. *The Mayor &c.* of Albany, [1832] 9 Wend. [N. Y.] 571), or the [fish] nets in the present case, the legislature may, we think, authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property, necessarily incident to the exercise of the summary jurisdiction, interferes with no legal right of the owner. But the legislature cannot go further. It cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment of the wrong, nor even, as we think, to prevent a future illegal use of the property, it not being a nuisance *per se*, and appoint officers to execute its mandate. The plain reason is that due process of law requires a hearing and trial before punishment, or before forfeiture of property can be adjudged for the owner's misconduct. Such legislation would be a plain usurpation by the legislature of judicial powers, and under guise of exercising the power of summary abatement of nuisance, the legislature cannot take into its own hands the enforcement of the Criminal or *quasi* Criminal law. (See opinion of SHAW, C. J., in *Fisher* v. *McGirr* [1854], 1 Gray [Mass.] 1 [S. C. 2 AMERICAN LAW REGISTER, O. S. 460], and in *Brown* v. *Perkins* [1858], 12 Id. 89. [These were cases of violent entry and seizure of liquor in the former, and vinegar in the latter.]

The inquiry in the present case comes to this: Whether the destruction of the nets set in violation of the law, authorized and required by the act of 1883, is simply a proper, reasonable and necessary regulation for the abatement of the nuisance, or transcends that purpose, and is to be regarded as the imposition and infliction of a forfeiture of the owner's right of property in the nets, in the nature of a punishment. We regard the case as very near the border line, but we think the legislation may be fairly sustained on the ground that the destruction of nets so placed is a reasonable incident of the power to abate the nuisance. The owner of the nets is deprived of his property, but not as a direct object of the law, but as an incident to the abatement of the nuisance. * * * It is conceivable that nets illegally set, could, with the use of care, be removed without destroying them. But in view of their position, the difficulty attending their removal, the liability to injury in the process, their comparatively small value, we think the legislature could adjudge their destruction as a reasonable means of abating the nuisance: ANDREWS, J., *Lawton et al.* v. *Steele* (1890), 119 N. Y. 226, 239–40.

As this article deals with municipal, and not State power, to summarily condemn, the subject may be dropped here, the following cases being mentioned as in the same line of

thought: *Shivers* v. *Newton* (1883), 45 N. J. Law 469, 474 (adulteration of milk); *Holyoke Company* v. *Lyman* (1873), 15 Wall. (82 U. S.) 500 (mill dam).

Where notice is given, the duty of the municipality is in fact much simpler than the proceeding against a house, or fence, or some other thing: it is merely to inform the owner or other responsible person of the nature and locality of the supposed nuisance, so that he may, according to his own choice, abate the complaint and so secure himself from intrusion under the police power of the municipality: WELLS, J., *City of Salem* v. *Eastern RR. Co.* (1868), 98 Mass. 431, 444, where the real nuisance was the filth collected in a pond, and not the railroad embankment which stopped the escape of this filth.

VIII.

The limits upon summary abatement of nuisances prejudicial to the public health are well illustrated by a provision of the New Jersey Act establishing State and Local Boards of Health, in section

> 15. * * * * * No suit shall be maintained in any of the courts of this State to recover damages against any such board, its officers or agents, on proceedings had and maintained by them to abate and remove such nuisance and cause of disease, unless it can be shown in such suit, that the alleged nuisance and cause of disease did not exist, and that the same was not hazardous and prejudicial to the public health, and unless it be shown that the said board acted without reasonable and probable cause to believe that such nuisance did exist, and that such foul or noxious odors, gases, vapors or other cause was in fact prejudicial and hazardous to the public health: Laws of 1887, pages 88–9.

While protection is thus afforded to the officer, it must be observed that the Statute is interpreted so as to prevent these boards of health from summarily interfering with nuisances which merely render home uncomfortable, or depreciate the value of property, or amount to annoyance to individuals or the community; so that, in every instance, the board of health and the court are to determine whether the actual nuisance, in any reasonable event, would tend to inviting, generating, fostering, or promoting disease: BIRD, V. C., *State ex rel.* v. *Neidt*, Ct. Chan. N. J., Jan. 7, 1890.

Perhaps the reasonableness of this Statute arose from a previous judgment of the Court of Errors and Appeals, upon the principle that the legislature could not authorize any tribunal to render a judgment against the person or property of the citizen, without a notice and an opportunity to be heard: *Hutton* v. *City of Camden* (1876), 39 N. J. Law 122, 127. There, it had been assumed by the Board of Health, which ordered the filling up of a lot, and also by the trial court, that the resolution of the Board of Health was a final determination of the question of nuisance. In denying such a monstrous proposition, and sustaining the action of trespass, Chief Justice BEASLEY found himself supported by the *City of Salem* v. *Eastern RR. Co.* (1868), 98 Mass. 431, where the City dug a channel for the escape of water confined by the railroad embankment, and sought to recover the expense, chiefly on the ground that the proceedings of the City Board of Health were conclusive evidence of the existence of the nuisance: such weight was denied, as there seemed no reason, after the abatement of the supposed nuisance, either in the public exigency or in the justice of the case, which required "the holding of such *ex parte* adjudications final and conclusive to establish the facts"; otherwise the Court would have held that "no adjudication could be made in the premises, and no order issued, until the parties had been notified and heard in their defence": Id. 450.

This Massachusetts case was also followed in Iowa, where the municipality condemned, and after notice, removed an old house standing upon private property. The owner's action of trespass was allowed by the trial court to be met, by this defence of the conclusiveness of the municipal declaration that the house was a nuisance. But this was reversed on appeal, because:

> The power to abate implies that there is or may be in existence, something to be abated. A nuisance must exist before it can be abated. The power conferred, therefore, authorizes cities and towns to abate an existing thing. No express power is given to declare that a nuisance exists, nor do we think that it can or should necessarily be implied. The council may abate all nuisances, but this does not imply that it can determine what constitutes a nuisance as an existing thing, for the reason that the

nuisance must in fact exist. If it does, then it may be abated: SEEVERS, J., *Cole* v. *Kegler* (1884), 64 Iowa 59, 61.

Consequently, in *Underwood* v. *Green* (1870), 46 N. Y. 140, the health officer was condemned to pay the value of forty-two hogs which had been suffocated in the cars. On arrival at destination, the dead hogs were not offensive or dangerous to the public health, and the owner was ready and willing to remove them himself, but was prevented by the defendant, the city inspector, who seized and carried away the hogs. Upon the same principle, an injunction was allowed against a threatened destruction of a dam erected under the authority of an Act of the legislature, upon the express ground that the municipality could not declare a nuisance for the purpose of abatement: *Clark* v. *Mayor &c. of Syracuse* (1852), 13 Barb. (N. Y.) 32, 34.

Chief Justice BEASLEY did not halt upon such narrow ground, but went still further, and cut off another travesty on justice which seems to pervade the minds of municipal officers:

> There is an infirmity in all proceedings of this nature, which lies deeper than the one just noticed. Assuming the power in this board, derived from the legislature, to adjudge the fact of the existence of a nuisance, and also assuming such jurisdiction to have been regularly exercised, and upon notice to the parties interested, still, I think, it is obvious, that in a case such as that before the Court, the finding of the sanitary board cannot operate, in any respect as a judgment at law would, upon the rights involved. * *
>
> The authority to decide when a nuisance exists, is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made. This is a judicial function, and it is a function applicable to a numerous class of important interests. The use of land and buildings, the enjoyment of water rights, the practice of many trades and occupations, and the business of manufacturing in particular localities, all fall, on some occasions, in important respects, within its sphere. To say to a man that he shall not use his property as he pleases, under certain conditions, is to deprive him, *pro tanto*, of the enjoyment of such property. To find conclusively against him, that a state of facts exists with respect to the use of his property, or the pursuit of his business, which subjects him to the condemnation of the law, is to affect his rights in a vital point. The next thing to depriving a man of his property, is to circumscribe him in its use, and the right to use property is as much under the protection of law as the property itself, in any other respect, is, and the one interest

can no more be taken out of the hands of the ordinary tribunals than the other can. If a man's property cannot be taken away from him except upon trial by jury, or by the exercise of the right of *eminent domain* upon compensation made, neither can he, in any other mode, be limited in the use of it.

The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the land of the individual, is a Common law right and is derived, in every instance of its exercise, from the same source—that of necessity. It is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. But the necessity must be present to justify the exercise of the right, and whether present or not, must be submitted to a jury under the guidance of a court.

The finding of a sanitary committee, or of a municipal council, or of any other body of a similar kind, can have no effect whatever, for any purpose, upon the ultimate disposition of a matter of this kind. It cannot be used in evidence in any legal proceeding, for the end of establishing, finally, the fact of nuisance, and if it can be made testimony for any purpose, it would seem that it can be such only to show that the persons acting in pursuance of it were devoid of that malicious spirit which sometimes aggravates a trespass, and swells the damages: BEASLEY, C. J., *Hutton* v. *City of Camden* (1876), 39 N. J. Law 129–131.

This language was considered in *The Newark &c. Rwy. Co.* v. *Hunt* (1888), 50 N. J. Law 308, and the improper use of its principles repudiated. The case was trespass for killing glandered horses, under the orders of the State Board of Health, and the Company contended that the law authorizing the action of the Board of Health, was unconstitutional, because making the determination of the Board of Health final, without a hearing. But the Court found no such intention in the law, and proceeded to deny that it interfered with any rights of the owners, because it authorized the abatement of nuisances before a judicial adjudication. It did not deny this adjudication, and that at some time afterwards it might be had, was all the Fourteenth Amendment to the Constitution of the United States secured.

The Amendment was, in my judgment, likewise ineffectual to prevent the State from providing, under its police powers, for the immediate abatement of public nuisances actually existing, though not yet judicially adjudged nuisances. In such case, the officer entrusted with the power of abatement could not be protected if he destroyed property without the existence of these conditions which make it a common nuisance and justify its destruction. But if the property owner is not deprived of a right to

contest the existence of such conditions, and to obtain redress as for a trespass, if they are not shown to have existed, such legislative acts would not infringe any constitutional provision: MAGIE, J., *Newark &c. Rwy. Co.* v. *Hunt* (1888) 50 N. J. Law 308, 316.

Before closing this division of the subject, caution should be given that cases falling under general quarantine or other health regulations, such as disinfecting imported rags: *Train* v. *Boston Disinfecting Co.* (1887), 144 Mass. 523, 531, are beyond the scope of this article, which deals only with casual declarations of nuisance.

IX.

Very much the same principles apply to the declarations of nuisances prejudicial to life or property: See *Cole* v. *Kegler*, *supra*, page 174. Municipal governments must decide not what is a nuisance in itself, but what from its character, location, and surroundings, may become dangerous. The courts would usurp municipal functions to do more than examine when the police power is unlawfully exerted: ELLIOTT, J., *Baumgartner* v. *Hasty* (1884), 100 Ind. 575, 577.

The condemnation of wooden buildings and sheds in crowded locations may require summary execution, as occurred in the neighborhood of the Centennial Exhibition of 1876. No doubt was expressed that an action of trespass would lie against the Mayor of the City of Philadelphia as an individual, for having caused the destruction of these wooden buildings; even the defense of erection in violation of the municipal ordinances was held to be insufficient proof of a public nuisance: SHARSWOOD, C. J., *Fields* v. *Stokley* (1882), 99 Pa. 306, 309, and such was the judgment in *Kneedler* v. *Norristown* (1882), 100 Id. 368 (a frame stable), and the principle involved in *Harvey* v. *Dewoody et al.* (1856), 18 Ark. 252 (unoccupied house), and *McKibbin* v. *Fort Smith* (1880), 35 Id. 352 (frame building), though this was criticised as a narrow view of the subject, by ELLIOTT, J., in *Baumgartner* v. *Hasty* (1884), 100 Ind. 575, 581.

In fact, *Fields* v. *Stokley* was decided upon the almost admitted nuisance from proximity to the Exhibition buildings,

which had been threatened by a fire in the eastern portion of this Shantytown; from the flimsy character of these wooden buildings, and from the disorderly characters frequenting the bar-rooms there maintained. Moreover, the grand jury had presented this neighborhood as a nuisance, and the judge presiding in the criminal court had directed the Mayor to abate it on forty-eight hours' notice. All these facts appeared to the jury, and their verdict was well rendered for the Mayor, but the Supreme Court added, with great significance:

> It is true, that a private person, assumiug to abate a public nuisance, takes upon himself the responsibility of proving to the satisfaction of a jury; the fact of nuisance. The official position of the defendant, as Mayor of Philadelphia, did not relieve him from his personal responsibility in this respect. But he has been sustained by the verdict of the jury, which is a justification of his alleged trespass: SHARSWOOD, C. J., *Fields* v. *Stokley* (1882), 99 Pa., 306, 310.

The Pennsylvania Court is not alone in denying that proof of the existence of a wooden house in violation of a municipal ordinance, is evidence that the house is a nuisance. In Cleveland, Lenze owned a house standing on leased ground from a time anterior to the fire ordinance. The City gave permission to remove the house, through a public street, to another lot, and when the house had been started on its way, the permission to remove was revoked and the house was torn down by the City officials as an obstruction to the street wherein it stood when the permission to remove was revoked. Lenze was allowed to recover damages because of the wrongful and forcible deprivation of the use of his property; that is, he had the right to move the house from one lot to another within the fire limits: *City of Cleveland* v. *Lenze* (1875), 27 Ohio St. 383, 391, The contrary had been decided in *Wadleigh* v. *Gilman et al.* (1835), 12 Me. 403, by WESTON, C. J., "to prevent the mischief, and effect the salutary purposes contemplated by the [fire] Ordinance," by regarding "as within its operation, wooden erections placed where none existed before, whether nearly built, or removed there from some other quarter." This decision has been

recognized as founded upon the general principle that municipal ordinances must be reasonable, by PETERS, J., in *Jones* v. *Sanford* (1877), 66 Me. 585, 589 (leasing of the town hall); and *Portland* v. *Water Co.* (1877), 67 Id. 135, 138 (exemption from taxation.) By a strict construction, the same result is reached as in the Lenze case: *Brown* v. *Hunn* (1858), 27 Conn. 332, and *Stewart* v. *Comm.* (1840), 10 Watts (Pa.) 307, but these are not at all cases of summary abatement but prosecutions for violation of the fire regulations. Upon the question of repair or extensive alterations, the Pennsylvania Court declared the latter within the prohibition and the tenant liable to an indictment: *Douglass* v. *The Comm.* (1830), 2 Rawle (Pa.) 262.

The subject must be dropped here, as the legality of fire ordinances is not under examination, but merely their summary execution.

The attempt to enforce a municipal regulation of steam boilers, which would make their use dependent upon official caprice, has, of course, failed; and an injunction would issue unless the municipality could establish a nuisance: *The Mayor etc. of Baltimore* v. *Radecke* (1878), 49 Md. 217, where the only complaints were liability of explosion and of fire from a boiler used in a box factory. The defendant refused to remove the boiler in obedience to a notice issued under the authority of an Ordinance prescribing neither guide nor limits to the Mayor's discretion. An injunction was issued against the City, the Court declaring the ordinance void as a clearly unreasonable, arbitrary and oppressive regulation of a necessary instrument in the prosecution of urban business enterprises.

Lime kilns cannot be put under the ban of a prohibitive municipal regulation, without regard to any facts: *State* v. *Mott* (1883), 61 Md. 297, 305, where a demurrer to an indictment was held good, because no averments were made of such facts as would constitute a nuisance:

> And not being nuisances in their nature, irrespective of their local surroundings, it is very clear that there has been no authority conferred upon the Mayor and City Council to make them nuisances, either to health,

comfort, or property, by simply declaring them so. In the absence of such express authority, the principle is too well settled to require the citation of authorities for its support, that a particular use of property declared a nuisance by an ordinance of a municipal corporation, does not make such use a nuisance, unless it be so in fact, according to the common law or statutory definition of nuisance: ALVEY, C. J., *State* v. *Mott* (1883), 61 Md. 297, 306.

X.

The summary removal of obstructions in streets, roads and other highways, is a police or public ministerial power, designed to operate for the relief of the public, and without the necessity of adjudication upon things which are apparent obstructions and evident nuisances: MAGIE, J., *State, Dawes, prosecutor* v. *Hightstown* (1883), 45 N. J. Law 501, 504 (building condemned); LYON, J., *Goodsell* v. *Fleming* (1883), 59 Wis. 52, 53 (shed); EGAN, J., *Sheen* v. *Stothart* (1877), 29 La. Ann. 630 (fences). The exercise of such power depends upon the existence of a lawful street, of an obstruction in that street, and of such an obstruction as may be reasonably known (for instance, by sight,) without the settlement of doubtful rights of property; it is not a power to interfere with private ownership further than to regulate the use of individual property in the community: BEDLE, J., *State, Associates etc. prosecutors* v. *Jersey City* (1869), 34 N. J. Law 31, 39, 41 (opening streets). So that even if the determination of a road supervisor be within his powers, still the execution of this lawful determination cannot escape judicial control, whenever the court is shown that wanton or even unnecessary injury is the result: *Bills* v. *Belknap* (1873), 36 Iowa 583, 586, where an injunction was granted against the unnecessary improvement of a country road by cutting down adjacent forest trees.

That the statutes place the original responsibility of declaring such a nuisance upon the local officer, is, in fact, for the interest of the individual charged with such offense; so that an information by the State's attorney, of having committed an indictable offense at common law within the category of "a high crime and misdemeanor," by building a stone wall in a highway, was held bad upon demurrer, as a justice of

the peace could punish the person, or the selectmen remove the thing: *State* v. *Knapp* (1827), 6 Conn. 415 (stone wall); *State* v. *Smith* (1829), 7 Id. 428 (stone wall); *State* v. *Hyde* (1836), 11 Id. 541, 544 (building). Otherwise—

Is it possible, that a wise legislator, or a learned, humane and independent judge, would doom a fellow citizen to the gallows, or the cells of Newgate, for erecting a pig pen, or planting a tobacco patch on the highway, without impeding the public travel? As well might *Hercules* be called upon, by the indolent wagoner, to give him a lift, as the Superior Court to abate nuisances and remove encroachments from the highways. "*Nec deus intersit, nisi dignus vindice nodus.*" (Hor. de Art. Poet.): PETERS, J., *State* v. *Knapp* (1827), 6 Conn. 415, 418.

The question is one of interference with private property and must be distinguished from what amounts to the revocation of a license to use the public highway for private purposes: *Emerson* v. *Babcock* (1885), 66 Iowa 257, where a platform scale was declared a nuisance and the Court refused an injunction on the ground that the fee in the street in question was in the town and there was no legal right to maintain the scales in the street: moreover there was no public benefit. This case is probably of no more weight than given to it in the general statement above, as COOLEY, C. J., in *Everett* v. *The City of Marquette* (1884), 53 Mich. 450, 453, pointed out the revocation of the license did not convert the structure (in that case, basement steps) into a nuisance, which was a question for a jury to decide upon consideration of evidence of inconvenience to the public. Consequently an injunction was granted in that case.

By the terms of the preceding definition, there must be no substantial doubt of the existence and limits of the highway; because—

Where a person has been in peaceable possession of lands, under color and claim of right, it is not consistent with legal policy to allow him to be forcibly ejected without legal process: CAMPBELL, J., *Sheldon* v. *Kalamazoo* (1872), 24 Mich. 383, 388 (fence in the highway).

No one can be disturbed on his estate, without the right to have his rights determined by legal process: CAMPBELL, J., *Gregory* v. *Knight* (1883), 50 Mich. 61, 63.

In the latter case, a proceeding to remove a "rail fence, stone row, rail piles, hay barn and sheds," as encroachments, failed, because a claim of right to the ground was interposed, and the legislature had provided an action of trespass in such case, in lieu of summary proceedings: CAMPBELL, J., *Township of Lebanon* v. *Burch* (1889), 78 Mich. 641, 645–6 (fence in the highway). But generally, the conclusion may be justly drawn from the principle stated above, that evidence may be required of the fact of a lawful highway: *Nixon* v. *Town of Biloxi* (1889), Sup. Ct. Miss., 5 S. Repr. 621 (fence across a street); *Cook* v. *Harris* (1875), 61 N. Y. 448 (a case of alleged dedication); *Sterling Village* v. *Pearson* (1889), 25 Neb. 684 (where a fence had been erected across an alley not proved to the court and jury to have a legal existence). Similarly, *Soule* v. *The State* (1865), 19 Wis. 593. Dependent upon this fact, the question of the power to summarily abate an obstruction as a nuisance can alone be decided by the court trying the question of an injury to an owner, resulting from the exercise of municipal power: *Hubbard* v. *Mason City* (1884), 64 Iowa 243, where an indictment for obstructing a highway failed from want of proof of the lawful establishment of the way: *Sheldon* v. *Kalamazoo* (1872), 24 Mich. 383, 386, where the municipality unsuccessfully sought to escape on the technical objection that the municipal officers were not the agents of the village.

Hence, this power over nuisances cannot be prostituted to the opening of public access to a private wharf; the right of access must be legally established: *State, Associates etc. prosecutors* v. *Jersey City, supra;* nor to the opening of a street whose exact location is in doubt: *State, Bodine et al. Pros.* v. *Common Council of Trenton* (1873), 36 N. J. Law 198, 202; nor the opening of a street without paying or securing payment for the land taken: *Peckham* v. *Henderson* (1858), 27 Barb. (N. Y.) 207, 213.

An important consequence ensues from the application of the above statement to alleys not opened by public authority. Where such a passage had been dedicated but not fully opened, and the supposed obstruction was a fence maintained

in the alley under claim of a freehold title, the municipality could not indict for maintaining an obstruction against proof of no interruption of the accustomed passage: *Jackson* v. *The People* (1860), 9 Mich. 111, 122. There was a dissent in this case; moreover the position of the Court, that the municipality could not make an ordinance *ex post facto*, was untenable. But the judgment was correct, as the fence would now be considered an encroachment and not an obstruction, and therefore beyond the summary powers of the municipality.

The statement just made must be remembered with the limitation that questions of dedication are not considered here; nor those of nonuser, such as arose in *Comm.* v. *Moorehead* (1888), 118 Pa. 344. Here, nothing finds a place but the defenses and remedies of a property owner, who has had a fence, house or other tangible thing summarily condemned by a local authority.

The disputable question being fairly raised, as if it is shown to the court that a fence has been maintained within the lines of a lawful highway, then, in support of his contention, the land owner may defeat the summary power of abatement and obtain damages for its exercise, by showing that the public use of the street has not been incommoded: *Pauer* v. *Albrecht* (1882), 72 Wis. 416 (fence condemned); *Hopkins* v. *Crombrie et al.* (1829), 4 N. H. 520. In this latter case, no injury had actually been suffered by the filling up of a cellar dug in the highway, and therefore merely nominal damages were recovered.

The underlying principle of the recovery of damages in such cases, is the fact that not every encroachment upon a public highway is a nuisance. The fence, or whatever it may be, must first become a source of annoyance and inconvenience to the public, as the duty of the supervisors is to cause the removal of obstructions "which seriously interfere with or impede the" public right of uninterrupted passage: COLE, J., *Veff* v. *Paddock et al.* (1870), 26 Wis. 546, 552 (fence in the highway). This is a question of fact, and not of law alone, in every case: *Beecher* v. *The People* (1878),

38 Mich. 289, where an alley had been roofed over, and the Recorder of Detroit had ruled, as a matter of law, that this roof created an obstruction. The conviction was quashed for this error, on an opinion by CAMPBELL, C. J., following *Clark* v. *The Ice Co.* (1872), 24 Mich. 508, 512, a case of the destruction of an ice house standing ten feet from the traveled road. Damages were recovered for this trespass.

The opinion of Chancellor WALWORTH, in *Hart et al.* v. *Mayor &c. of Albany* (1832), 3 Paige Chan. (N. Y.) 213 (floating store-house in the canal basin), is often quoted in support of this principle, and so far as the Chancellor asserted that "The question of nuisance or no nuisance, however, is always a question of fact, in relation to which the opinions of individuals will necessarily differ," he was correct: WHIPPLE, C. J., *The People* v. *Carpenter* (1849), 1 Mich. 273, 289. The Chancellor therefore properly remitted the complainants to their legal remedy, notwithstanding his conclusion that police ordinances were valid, because necessary, amidst the differing individual opinions.

The People v. *Carpenter* (1849), 1 Mich. 273, was an indictment for obstructing Woodward Avenue in the City of Detroit, by a stairway occupying a space of four feet square on the side of the highway next to the house of the defendant. The jury found a special verdict, and the judgment of the Court below was reserved for the opinion of the Supreme Court upon this question, which will be seen to go to the foundation of these supposed municipal rights:

> Can the Court pronounce judgment upon such a finding? A nuisance is defined by Blackstone to be "the doing of a thing to the annoyance of the King's subjects:" 4 Commen. 167. In the case before us, the *thing done* was the erection of the steps mentioned in the verdict: Whether *the thing* thus done *is an annoyance* to the inhabitants of this State, is referred by the jury to the determination of this Court.
>
> Ordinarily, an indictment for a nuisance cannot be supported unless the thing complained of is productive of inconvenience to the public. * * * This *inconvenience* or *annoyance* to the public, enters into the definition of the offence, *and must in all cases be proved.* These positions are not questioned by the counsel who represents the people; but it is contended that the question of inconvenience is a question of law, arising from the facts stated in the special verdict; that the jury having found that Woodward avenue is a highway, and that the defendant erected a flight of steps

the Court can arrive at a certain conclusion respecting the question of annoyance: in other words, that such an obstruction must necessarily be an annoyance to the public.

But to warrant this position, it would seem necessary to establish another,—that every obstruction in a highway is a nuisance. The reasoning of counsel is, that the public have a right to the use of every part of the highway; and, having this right, any obstruction must be a nuisance. As a general legal proposition, it is true that the public have the right to use every part of a common and public highway; but it by no means follows, that *every obstruction is necessarily a nuisance.* * * * Trees, awning-posts, hay-scales, and hydrants meet the traveller at every step, and yet no one regards them as nuisances.

Whether an obstruction be a nuisance, must, then, be a question of fact for a jury, and not of law for the court: WHIPPLE, C. J., *The People* v. *Carpenter* (1849), 1 Mich. 273, 287–8, 289.

Similarly, that a question of fact for the determination of jury, always arises in cases of an encroachment upon a highway, was fully recognized by HINMAN, C. J., in *State* v. *Merritt* (1868), 35 Conn. 314, 318 (fence in the highway), explaining *Burnham* v. *Hotchkiss* (1841), 14 Conn. 311, 319 (stone wall in the highway), whose principles had followed *Hubbard* v. *Deming* (1851), 21 Conn. 356, 360 (fence in the highway), where WAITE, J., disssenting (page 322), pointed out that an ornament or improvement of a highway might not be summarily removed. Also, by MARVIN, J., in the fence cases of *Peckham* v. *Henderson et al.* (1858), 27 Barb. (N. Y.) 207, and *Griffith* v. *McCullum* (1866), 46 Id. 561.

Again, from the character of this power, the discretion of the municipal authorities in opening a street to its full width, cannot be defeated at law, by a claim of right to the ground upon which the obstruction stands: *Childs* v. *Nelson* (1887), 69 Wis. 125, 136 (fences); though equity will restrain until an action at law can be tried, where the obstruction has been long tolerated and the public right to the ground appears uncertain: *Manchester Cotton Mills* v. *Town of Manchester* (1875), 25 Grat. (Va.) 825 (encroaching buildings), recognized as authority by BURKS, J., *Sanderlin* v. *Baxter* (1882), 76 Va. 299, 306 (appurtenant ditches). Perhaps this distinction may be more readily apprehended from the point of consideration taken in Wisconsin and Michigan. There, the disputable question of apparent nuisance or not,

is viewed by the legislature as one of obstruction, and not of encroachment: COLE, C. J., *State* v. *Pomeroy* (1889), 73 Wis. 664 (fence in the highway); SHERWOOD, J., *Gorham, Highway Com'r* v. *Withey* (1883), 52 Mich. 50, 51 (fences across the highway), following COOLEY, J., *City of Grand Rapids* v. *Hughes* (1866), 15 Id. 54 (fence and dwelling in a street), and was again recognized by CAMPBELL, J., *McArthur* v. *Saginaw* (1885), 58 Mich. 357, 360 (lumber pile causing death of a traveler).

> Our laws have always made a distinction between cumbering or obstructing a public way, and encroaching upon it. The former term has been applied to impediments to travel and passage placed in the open street, and tending to make its use difficult or dangerous; while the latter has embraced the actual enclosure of a portion of the street by fences or walks, or occupation by buildings. The mode of dealing with the two offenses has almost always been different, and the penalties also. * * The city charters have made the same distinction, and we are not at liberty to overlook it.
>
> Many reasons may have operated upon the legislative mind to induce them to make this distinction. Obstructions which "cumber" a street or walk are commonly the result of carelessness, negligence or mischief, and require prompt remedies; while encroachments usually proceed from a claim of legal right to the land occupied, and the ordinary legal remedies are sufficient for the trial of this right. The merchant who allows his boxes and barrels needlessly to cumber the street after notice to remove them, may properly be fined for his neglect; but we doubt if any legislature would intentionally authorize ordinances under which one who many years before, had erected a building upon what he claimed to be the line of the street, might be ruined by the accumulation of penalties against him at the rate of ten dollars a day, if he failed to acquiesce in the public right, and destroy or remove the building when the notice was served upon him: COOLEY, J., *City of Grand Rapids* v. *Hughes* (1866), 15 Mich. 54, 57–8, 58–9.

Still the Supreme Court of that State has recognized the difficulty of laying down a general rule for the determination of this discrimination: *The State* v. *Pomeroy* (1889), 73 Wis. 664, 665, and *The State* v. *Leaver* (1885), 62 Wis. 387, 392; though an obstruction need not be such as would necessarily stop travel, if it be something which has been unlawfully placed upon the highway, with the effect of at all interfering with the public use, as a barn standing within the lines of a street directed to be opened to its full width:

Id. 392, and intentionally maintained: ORTON, J., *Pauer* v. *Albrecht* (1888), 72 Wis. 416, 419; that is, where the owner wilfully kept the barn in the street: ORTON, J., *Childs* v. *Nelson* (1887), 69 Wis. 125, 136 (fence in a street), the revisers omitting the word "wilfully" from the statute for the purpose of reaching mere obstructions, instead of halting upon the question whether the thing had been obstinately, stubbornly, or perversely intruded: CASSODAY, J., *The State* v. *Smith* (1881), 52 Wis. 134, 137 (filling a ditch); that is, with legal malice or evil intent in some degree: DIXON, C. J., *State.* v *Preston* (1874), 34 Wis. 675, 683 (fence in the highway).

In New York, the statutory distinction between obstructing a highway and encroaching upon it, did not prevent the assertion that either of these evils would become a public nuisance when "annoyance of a real and substantial nature" ensued, and not the mere existence within the lines of the highway, of the fence or other thing complained of: MARVIN, J., in *Peckham* v. *Henderson* (1858), 27 Barb. (N. Y.) 207, 211, 212, distinguishing *Wetmore* v. *Tracy* (1835), 14 Wend. (N. Y.) 250, both cases of a fence in the highway.

In this aspect of such cases, the important thing is the liability of the municipality to respond in damages for removing street obstructions, or suffer an injunction, on proof of damage, notwithstanding the contrary opinion of the municipal authorities. For this reason, an injunction restraining a city and its marshal from removing a fence and storm door alleged by them to be street obstructions, was dissolved for want of proof of such injury as could not be compensated by damages in a suit at law: *Smith* v. *City of Oconomowoc* (1880), 49 Wis. 694; so that there is no distinction from the case of a private individual threatening to abate a nuisance: *Pennoyer* v. *Allen* (1881), 51 Wis. 360, 362 (tannery). The test is not the person acting, but whether or not a mere trespass is threatened: *The Kimberly & Clark Co.* v. *Hewitt et al.* (1890), 75 Wis. 371, 375 (water power), following *Wilson* v. *City of Mineral Point* (1875), 39 Wis. 160, where the City was enjoined from summarily

removing valuable trees and shrubbery alleged to be encroachments, because no sum of money could replace their growth: TAYLOR, J., *Smith* v. *City of Oconomowoc* (1880), 49 Wis. 694, 696, though the attempt to appropriate private land for public use under this summary power, would have been sufficient ground for an injunction: COLE, C. J., *Wren* v. *Walsh* (1883), 57 Wis. 98, 102 (encroaching fence), which was granted for this reason, in *Manchester Cotton Mills* v. *Town of Manchester* (1875), 25 Grat. (Va.) 825 (encroaching buildings); *Clark* v. *Mayor &c. of Syracuse* (1852), 13 Barb. (N. Y.) 32 (destruction of a dam).

XI.

The maintenance in good order as well as the first establishment of streets, alleys, sidewalks and other public passages, is peculiarly within the supervision of the local authorities: *Pedrick* v. *Bailey* (1858), 12 Gray (Mass.) 161, 163 (projecting awning), and *Bowman* v. *City of Boston* (1849), 5 Cush. (Mass.) 1, 8; *Treise* v. *St. Paul* (1887), 36 Minn. 526 (suits for defect in a street); and ordinarily the exercise of a lawful discretion in such matters is not interfered with by the courts: HOLT, C., *City of Emporia* v. *Gilchrist* (1887), 37 Kan. 532, 535 (plank driveway across the pavement), the citizen being remitted to his action at law where the damage inflicted will be compensated if done in violation of his rights: *Benson* v. *Waukesha* (1889), 74 Wis. 31, 33 (tearing up sidewalk).

The limits of this article forbid any direct consideration of the remedies for street encroachments, as distinguished from obstructions, or of the examples of the various kinds of nuisances, or of the compensation for the destruction of private property, which involves a discussion of the power of eminent domain, as some courts have regarded such actions as justified under that power as well as the so-called police power: *American Print Works* v. *Lawrence* (1847), 1 Zab. (N. J.) 248; *Hale* v. *Lawrence* (1848), Id. 714; *Field* v. *City of Des Moines* (1874), 39 Iowa 575.

The case of the *American Print Works*, just cited, is one of several which arose out of the destruction of certain warehouses in New York City by order of the Mayor, for the purpose of stopping the spread of the great fire of 1835. As already said on page 164, *supra*, the right of the Mayor to do such an act is not to be discussed here further than it involved the *quasi*-judicial function of deciding when the destruction should be ordered. The statute of New York neither did nor could pretend to take away the right to have the legal results of the Mayor's action tested in a court of justice: GREEN, C. J., 1 Zab. (N. J.) 259; NEVIUS, J., on appeal, Id. 733. Nothing in the subsequent stages of these cases altered this particular resolution: 2 Zab. 72–117. Looking into these cases, as well as those in New York (*Stone* v. *Mayor*, 1840, 25 Wend. 147 and 20 Id. 138; *Mayor* v. *Lord*, 1837, 18 Id. 126 and 17 Id. 285; *Mayor* v. *Pentz*, 1840, 24 Id. 668; *Russell* v. *Mayor*, 1845, 2 Denio 461, where the statute is printed; *Lawrence* v. *Mayor*, 1845, Id. 491, note), the *quasi*-judicial function is seen to be not the result of a new power, but merely of the designation of the actor under the general authority conferred by necessity. This, "by the common law," was "left to be exercised at the peril, and upon the personal accountability of him who shall resort to it, promising him no other reliance or dependence for immunity, than the verdict of his peers, to be founded upon clear and satisfactory evidence of the overwhelming nature of the approaching calamity, for the staying of which this hazardous and perilous right was by him exercised:" SHERMAN, Senator, in the Court of Errors, 2 Denio 475.

There can be little doubt, upon examining the preceding cases, that the citizen has ample remedy at law for compensation after the action of the municipality has been completed. If there were any need for assurance, the allusion (*supra*, page 176) to the effect of the Fourteenth Amendment to the Constitution of the United States, would furnish a clew to a full remedy. The possibilities of that Amendment are not even dimly recognized by the people of this country.

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