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# Crimes--Prescription Does Not Run Against the Public

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negligence is presumed, while an inference of negligence is an inference that is drawn by the jury from the facts. *Res ipsa loquitur* is a question of law. The cases are collected in 20 R. C. L. 157.

In conclusion we would say that Kentucky follows the general rule, that negligence may be inferred from proven facts, and the evidence need not be such as would tend to exclude any other cause, but only such as would permit a reasonable inference to be drawn.

EDWARD DUVAL.

CRIMES—PRESCRIPTION DOES NOT RUN AGAINST THE PUBLIC.—A prescriptive right to maintain a public nuisance does not exist. *Ashbrook v. Commonwealth*, 64 Ky. (1 Bush) 139 (1866), *Kraver v. Smith*, 164 Ky. 674, 177 S. W 286 (1915), *Joyce's Law on Nuisances*, Sec. 50. This general, and long existing rule of law, was laid down as early as 1699. *Anonymous*, 12 Mod. 342. In this case, the defendant was indicted for keeping gunpowder in a house in town. Holt, C. J., in deciding that case, did so on four points: (1) Evidence—"to support this indictment there must be apparent danger, or mischief already done;" (2) Time—"though it had been done for fifty or sixty years, yet if it be a nuisance, time will not make it lawful;" (3) Place—"if at the time of setting up this house in which the gunpowder was kept there had been no houses near enough to be prejudiced by it, but some were built since, it would be at the peril of the builder;" (4) Benefit—"though gunpowder be a necessary thing, and for defense of the kingdom, yet if it be kept in such a place as it is dangerous to the inhabitants, it will be a nuisance."

Although place is indeed a vital element in deciding whether a thing may, or does, constitute a nuisance, the untenable position that one might build a house in the wilderness and continue to keep a dangerous substance in it to the peril of the public, who later build around the house, was soon destroyed. *Commonwealth v. Upton*, 6 Gray (Mass.) 473 (1856), *Ashbrook v. Commonwealth*, 64 Ky (1 Bush) 139 (1866), *Sexton v. Youngkau*, 202 Ky. 256, 259 S. W 335 (1924). The basis for these decisions is, of course, public policy. As the court said in the second of the foregoing cases, "A contumacious holder of real estate cannot retard the public of a city, by refusing to let a street car run through his land; nor can he, by a noxious trade or pursuit, deprive the public of its use after its appropriation."

How, then, do so many courts find a way of sanctioning the continuance of public nuisances? What is there that so often makes a mockery of this strong, unhesitant, unequivocal language?

It is in the first of Mr. Chief Justice Holt's four points that the courts find the necessary loophole. It appears a very narrow loophole. Used rightly, it would no doubt prove an elastic, useful tool, whereby the ends of justice might be more nearly served. But, also, it is an opening through which a number of judges have unconcernedly driven a team of horses. Thus, in *Richmond v. House*, 177 Ky. 814, 198 S. W 218, (1917), a stockyard was held not to be a nuisance *per se* although

located within a partial residential district and but twenty feet from a church. In contrast to this decision, see *Colton v. South Dakota Cent. Land Co.*, 25 S. D. 309, 126 N. W. 507 (1910), wherein it was held that a stockyard in a residential district may constitute a nuisance irrespective of the condition in which it is kept.

The importance which attaches to the element of evidence in the decisions on nuisance cases is nowhere better emphasized than in the case of *Commonwealth v. Miller*, 21 Atl. 139 (1891). In that case the defendant was charged with maintaining a public nuisance by operating an oil refinery in a city. It was alleged that from the refinery emanated noxious and offensive vapours and that in the refinery were stored inflammable, explosive and dangerous oils. The defendants denied that the refinery was a common nuisance and pleaded the capital invested, the length of time in operation, and the influence of the business upon the prosperity and growth of the community. Adhering to the fourth principle laid down by Holt, C. J., the lower court decided against the defendants, holding. "It is no defense to an indictment for a common nuisance that the business complained of has been in operation many years. Neither is it a defense in any measure that the business is a useful one."

The upper court reversed this decision, saying: "If it had been an admitted or an established fact that the business of the defendant's was a common nuisance, these instructions would have been appropriate, but the question before the jury was whether the business was a nuisance. People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts by reason of noise, dust, smoke and odors, more or less disagreeable, produced by and resulting from the business that supports the city."

To put the question a bit baldly, "When is a nuisance not a nuisance?" According to this case, "the right to pure air is, in one sense, an absolute one, for all persons have the right to life and health, and such a contamination of the air as is injurious to health cannot be justified; but in another sense it is relative, and depends upon one's surroundings."

But are the varied interpretations of what constitutes evidence of a public nuisance the sole and only reason why the right to maintain a nuisance is often sustained?

An eminent authority on crimes lays down the rule that long acquiescence by the public in conditions may prevent or bar an indictment for nuisance based upon such conditions. Clark and Marshall, Sec. 456c. If this statement is true, then this is an exception to the general rule that prescription does not run against the public, and not, as in the element of evidence, merely a means of escape through the rule itself. American authorities do not sustain this proposition. 1 Russel on Crimes, Sec. 330; Joyce's Law on Nuisances, Sec. 50; *State v. Franklin Falls*, 49 N. H. 240 (1870), *Ashbrook v. Commonwealth*, 64 Ky (1 Bush) 139 (1866). Clark and Marshall cite only the English

case of *Ree v. Neville*, Peake, 93, per Lord Kenyon, as authority for their statement. However, long acquiescence might well be considered as evidence tending to show that a certain thing, or condition, does not constitute a nuisance.

Clark and Marshall make the further statement that whether an indictment will lie where the thing complained of was not a nuisance when first erected, but became so afterwards, is not clearly settled. Clark and Marshall, Sec. 457e. This was the third principle laid down by Holt, C. J., and as has been shown previously, is clearly not in question today. *Commonwealth v. Upton*, 6 Gray (Mass.) 473 (1856), *Sexton v. Youngkau*, 202 Ky. 256, 259 S. W. 335 (1924). Were this proposition true, it, likewise, would constitute an exception to the rule that prescription does not run against the public. With this exception, however, the fundamental points laid down by Chief Justice Holt in the Anonymous case of 1699 (12 Mod. 342) are still followed today.

It may now be pertinent to inquire what we mean by "the public."

In the case of *Jones v. City of Chanute*, 63 Kan. 243, 65 Pac. 243 (1901), we discover the following definition: "By the words, 'the public,' used with respect to the collective body in whose behalf a prosecution to abate a common nuisance must be brought, is meant all those who are affected by the nuisance in the same way, or who, having occasion to come into contact with it, may be affected in the same way, though differing to the extent or degree to which they may be injured."

Thus, where a city is injured in a particular, or special way, as the proprietor of property, it is not deemed an injury to "the public." *Scarborough*, 12 Ky. Law Journal 69; *Metropolitan Railroad Co. v. District of Columbia*, 132 U. S. 1 (1889), 28 Michigan Law Review 86.

This distinction, to our mind, is not a good one. One can of course see how property held by the city might be injured by a nuisance, and yet the public generally not be annoyed by the nuisance. But has not the nuisance impaired the value of the property? And is not the impaired value of this property a loss to the public as a whole? But we have found no authority for this view of the matter, and apparently the view taken by Mr. Scarborough is the general one.

It would not be proper to close this note without giving some attention to the unusual case of *Freedman v. Borough of W Hazelton*, 146 Atl. 564 (1929). In this case an injunction was sought by the plaintiff in his private capacity to restrain the defendant borough from the further discharge of sewage onto the plaintiff's land. Thus we witness the unique spectacle of the public defending the existence of a public nuisance through their alleged prescriptive right to do so. The lower court found, as a conclusion of law, that this condition constituted a public nuisance. This finding was affirmed by the higher court, which ruled that where a public nuisance works a private injury, no prescriptive right can be urged against private action for such injury.

The writer of a note in the Michigan Law Review, 28 Mich. Law Review 86, regards this as an extension of the general rule. He cites, in support of his position, the case of *Ireland & C. v. Bowman & Cockrell*, 130 Ky. 153, 113 S. W 56 (1908), wherein it was held that "the person injured in the case of a public nuisance may lose his right of action or right to complain of the nuisance in precisely the same time that he may lose his right to complain of a private nuisance, for the thing for which the action is brought is the wrong to his rights." See, also, the case of *Charnley v. Shawano Water-Power & River Improvement Co.*, 109 Wis. 563, 85 N. W 507 (1901).

But that this is the general rule is questionable. In Joyce's Law on Nuisances, Sec. 50, it is stated: "So, where the use of a stream constitutes a public nuisance, no right by prescription to continue such use can be acquired as against an individual who has sustained special injury as a result of such use." *Bowen v. Wendt*, 103 Cal. 236, 37 Pac. 149 (1894). And in the case of *Meiners v. Frederick Miller Brewing Co.*, 78 Wis. 364, 47 N. W 430 (1890), which was a private action to abate a public nuisance, it was held that the defense of prescription is not available. The court in this case ruled that, "In the case of a public nuisance, it never becomes in itself lawful. It is not unlawful as to the whole public, and lawful as to its constituents. It is absolutely and wholly unlawful."

That the court, on the facts of the case, really decided this point in *Freedman v. Borough of W Hazelton* is, moreover, highly doubtful. We quote the following: "Although the ditch has been openly used for that purpose since 1902, that fact constitutes no defense to a proceeding by an individual for the removal of an unlawful nuisance which developed in later years from such use." Under the facts of the case, in fine, the statutory period for prescription, even of a common nuisance, had not run against the plaintiff.

It might, we think, safely be said that thus far precedent has not bound the courts to decide either way in such cases. In most jurisdictions the courts are thus left free to take that course which is to the best interest of the public.

That there are good and sufficient reasons for guarding jealously the doctrine of prescription scarcely need be mentioned here. As has often been pointed out, public rights would otherwise be whittled gradually away, for public officials cannot be trusted to exercise that vigilance which the individual exercises in this respect; and individual citizens "would be too slightly interested to make objections, preferring rather to tolerate encroachments upon public property than to dispute the right of their neighbors."

How many examples can you not call to mind to illustrate the truth of this? It is only when some positive injury threatens that citizens bestir themselves. And even in these instances they often-times do so at the cost of running counter to an organized, often prominent group of men, who exercise every means within their power to convince the public that those who are attempting to serve the

public are mere busybodies. And this usually small group often succeeds in making dupes of other men, equally prominent, but not fully informed as to the matter in issue. The average citizen becomes hopelessly confused. It is a fortunate thing, in such instances, that prescription cannot be maintained against the public, and that these citizens have at least a fighting chance of abating a nuisance, or of repossessing themselves of public property.

BYRON H. PUMPHREY.

COUNTY AND MUNICIPAL INDEBTEDNESS.—In composing this note no distinction between the indebtedness of a county and that of municipalities of the various classes will be attempted.

The Court of Appeals of Kentucky held in a recent case, that a municipality of the third class, without a vote of the people, may issue bonds to fund a floating indebtedness, if legally incurred, which has accumulated through a course of years, even though the aggregate amount of the indebtedness is in excess of the amount of revenue "provided" for the year in which the bonds are issued. *Hall v. City of Hopkinsville, et al.*, 46 S. W (2d) 497 (Ky. 1932).

The decision is based upon both constitutional and statutory provisions, together with a long line of previous decisions, all of which shall be discussed subsequently. Sections 157, 158 of the Kentucky Constitution; Kentucky Statutes, 3284; *Vaughn v. City of Corbin*, 217 Ky. 521, 289 S. W 1104; *Wilson v. Covington*, 220 Ky. 798, 295 S. W 1068; *Baker, et al. v. Rockcastle County Court*, 225 Ky. 99, 7 S. W (2d) 846.

Section 157 of the Kentucky Constitution was passed for the purpose of curbing such gross indebtedness as was sure to come and the language there used appears to be very clear and conclusive.

Section 157 provides as follows: "No county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void. Nor shall such contract be enforceable by the person with whom made; nor shall such municipality ever be authorized to assume the same."

Even though the language is distinct, the Court of Appeals of Kentucky, by "seizing" upon two words in the provision, has almost destroyed the entire meaning and effect of the section. The words which have afforded them the loophole are: "provided," and "indebtedness." In *City of Providence v. Providence Electric Light Company*, 122 Ky. 237, 91 S. W. 664, Carrol, J., said as to the meaning of the word "provided:" "it is the amount of tax that *may be levied* and raised under the Constitution that must be looked to in determining whether or not the indebtedness 'exceeds in any year the income and