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Torts: Defense of Coming to a Nuisance

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Florida rule 1.11 (b), the party aggrieved has an adequate ordinary remedy. The emphatic language of the *Lilly* case leaves no doubt that prohibition will no longer lie to test the trial court's jurisdiction over the person of the defendant.

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TORTS: DEFENSE OF COMING TO A NUISANCE

Lawrence v. Eastern Air Lines, 81 So.2d 632 (Fla. 1955)

Shortly after defendant had filled, paved, and substantially elevated its land, plaintiffs acquired a home on adjoining property. As the result of defendant's failure to provide adequate drainage facilities, the natural flow of surface waters was diverted onto plaintiffs' property, causing extensive damage to their house and grounds. In an action for damages on the theory of private nuisance, plaintiffs appealed an order and final judgment dismissing their complaint for failure to state a cause of action. HELD, one who diverts the natural flow of surface waters onto another's property is liable for any resulting damage; the fact that plaintiffs came to the nuisance is no defense. Judgment reversed and case remanded.

The defense of coming to the nuisance, otherwise referred to as priority of occupation, has not been accepted in England for over a hundred years.[1] Nevertheless, a small minority of courts in the United States still hold, sometimes on the principle of *volente non fit injuria*,[2] that this factor alone is sufficient to deny relief.[3] Some cases that are often cited for this position, however, will on close analysis reveal that relief was denied because of unclean hands[4] or on other equitable grounds.[5]

[1]See Bliss v. Hall, 4 Bing. N.C. 183, 132 Eng. Rep. 758 (1838).

[2]*E.g.*, Oetjen v. Goff Kirby Co., 49 N.E.2d 95 (Ohio App. 1942); East St. Johns Shingle Co. v. Portland, 195 Ore. 505, 246 P.2d 554 (1952).

[3]East St. Johns Shingle Co. v. Portland, *supra* note 2; Powell v. Superior Portland Cement, Inc., 15 Wash.2d 14, 129 P.2d 536 (1942); Barth v. Christian Psychopathic Hospital Ass'n, 196 Mich. 642, 646, 163 N.W. 62, 63 (1917) (dictum).

[4]See, *e.g.*, Davies v. New Orleans, 40 La. Ann. 806, 6 So. 100 (1888).

[5]*E.g.*, W. G. Duncan Coal Co. v. Jones, 254 S.W.2d 720 (Ky. 1953) (defendant had acquired a prescriptive right); see Edwards v. Allouez Mining Co., 38 Mich. 46, 31 Am. Rep. 301 (1878).

Some jurisdictions subscribe to a reasonableness test in determining whether the defendant's use of his property constitutes a nuisance. These courts regard priority of occupation as one important, though not necessarily controlling,[6] factor to be considered along with such matters as location of property and social utility.[7] Although most decisions employing this view have dealt with equitable relief,[8] the rule would apply equally as well to actions at law.

Most courts purport to follow the rule adopted in the instant case that coming to a nuisance is no defense.[9] The supportive reasoning for this view is that a person "cannot place upon his land anything which the law would pronounce a nuisance, and thus compel his neighbor to leave his land vacant, or to use it in such way only as the neighboring nuisance will allow."[10] Courts have, on occasion, stated that to allow the prior occupant such control would not only be detrimental to private owners but to industrial expansion as well.[11] Yet if no consideration were given to the fact of priority of occupation, industry could be equally hampered by injunctions or actions for damages brought by those who subsequently move into the area.

Some courts have resorted to the nuisance concept itself in dealing with the problem of priority of occupation. Historically, a nuisance must involve an injury to the use and enjoyment of property or to the property itself.[12] Thus an offensive activity is not a nuisance if it is conducted in a vacant area beyond the reach of harm to others.[13] A nuisance is created only when the activity begins to injure those

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[6]*E.g.*, Martin Bldg. Co. v. Imperial Laundry Co., 220 Ala. 90, 124 So. 82 (1929); McIntosh v. Brimmer, 68 Cal. App. 770, 777, 230 Pac. 203, 204 (1924) (dictum); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 46, 91 N.E. 549, 550 (1907) (dictum).

[7]*E.g.*, Martin Bldg. Co. v. Imperial Laundry Co., 220 Ala. 90, 124 So. 82 (1929); Hall v. Budde, 293 Ky. 436, 169 S.W.2d 33 (1943); Schott v. Brewery Co., 205 S.W.2d 917 (Mo. 1947); McIntosh v. Brimmer, *supra* note 6 (dictum).

[8]See note 7 *supra*.

[9]*E.g.*, United States v. Luce, 141 Fed. 385 (D. Del. 1905); Cain v. Roggero, 28 Del. Ch. 131, 38 A.2d 735 (Ch. 1944); Ellis v. Blanchard, 45 So.2d 100 (La. App. 1950); Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900 (1890); Forbes v. City of Durant, 209 Miss. 246, 46 So.2d 551 (1950); Campbell v. Seaman, 63 N.Y. 568, 20 Am. Rep. 567 (1875).

[10]Campbell v. Seaman, 63 N.Y. 568, 584, 20 Am. Rep. 567, 582 (1875).

[11]*E.g.*, Ellis v. Blanchard, 45 So.2d 100, 104 (La. App. 1950) (dictum).

[12]WALSH, EQUITY 170-74 (1930).

[13]See Sooy v. Giacomucci, 31 Del. Co. 345 (Pa. 1942); Sturges v. Bridgman, 11 Ch. D. 852 (1879); Georgia R.R. & Banking Co. v. Maddox, 116 Ga. 64, 42 S.E. 315 (1902) (dictum); Wier's Appeal, 74 Pa. 230, 241 (1873) (dictum).