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Torts--Statutes and Ordinance Obligation as Evidence of Landlord's Duty to Trespass

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of a church, in trust to be used for church purposes, the deed provided that the property should not be conveyed to a private individual. The court held the clause invalid, because repugnant to the estate created. *Deepwater Ry. v. Honaker*, 66 W. Va. 136, 66 S.E. 104 (1909).

Although three possible rationale have been presented for the court's position in the principal case, it is difficult to escape the conclusion that the court for some reason failed to consider the possible illegality of the restraint on alienation. There were other issues in the case which could have diverted the court's attention to the exclusion of the question of an illegal restraint on alienation. Even if the restraint had been held invalid, it would not have changed the results of the case as far as the ownership of the property is concerned. The property would still have been owned in fee simple by *T*, but had the court found the restraint on alienation void, the court then might have found that the property was the subject of a still valid trust. However, the question of the continuance of the trust is beyond the scope of this comment. Assume that the heirs of *A* had not executed the quit claim deed to *T*, the municipality, and that they made a direct attack on the title of *T*, claiming the property was their's because of *H*'s alienation to *M*. *T* would then be forced to defend its title on the ground that the clause forbidding alienation was illegal and void. The court in such a case would be forced to face the issue squarely, without other issues to divert its attention from the possible illegality of the restraint on alienation. If and when such a case is properly presented, the court will of necessity either explain, qualify, or overrule the principal case. Meanwhile, it is difficult to forecast what impact the principal case will have as precedent on future cases involving restraints on alienation.

Charles Edward Barnett

Torts—Statute and Ordinance Obligations as Evidence of Landlord's Duty to Trespassers

The *Ds* leased an apartment to *X*. *P*, a small child, and his mother moved in with *X* contrary to a provision in *X*'s lease. *X*'s uncontradicted testimony showed that there was a defective screen in a window in the apartment and that the *Ds* had been notified

several times concerning this defective condition. A city ordinance required screens to be kept in all windows. *P* fell through the screen and was injured. The jury rendered a verdict in favor of *P* for injuries suffered in the fall. *Held*, affirmed. *P* was not such an intruder upon the *D*'s premises to be beyond the reach of the *D*'s duty. Thus, the failure of *D* to correct the defective screen could be found by the jury to be wilful or wanton conduct proximately causing *P*'s injuries. *Gould v. DeBeve*, 330 F.2d 826 (D.C. Cir. 1964).

The principal case raises two questions: (1) the duty owed by a landlord to a trespasser and (2) the noncompliance with an ordinance as violation of this duty. *P* is classified as a trespasser by the court in the principal case. A trespasser is a person who enters upon the premises of another without license, invitation, or other right. *Kelley v. Sportsmen's Speedway*, 224 Miss. 632, 80 So. 2d 785 (1955). At common law the landlord's only duty in regard to a trespasser was not to wilfully or intentionally injure him. *Porreca v. Atlantic Ref. Co.*, 403 Pa. 171, 168 A.2d 564 (1961). This common law rule is still applicable in most jurisdictions. The trespasser enters at his own risk, *Laube v. Stevenson*, 137 Conn. 469, 78 A.2d 693 (1951), and takes the property as he finds it. *Palmquist v. Mercer*, 43 Cal. 2d 92, 272 P.2d 26 (1954).

In a recent federal case arising in West Virginia, *Buckley v. Valley Camp Coal Co.*, 324 F.2d 244 (4th Cir. 1963), an eight year-old child was warned by the *D*'s employees to stay away from a pit. She did not heed their warning and later fell into the pit. In holding for the *D*, the court stated that unless the owner does the trespasser an intentional harm, he is not liable for any injury the trespasser may sustain. In *Waddell v. New River Co.*, 141 W. Va. 880, 93 S.E.2d 473 (1956), a young boy grasped an electric wire of the *D*s and suffered serious burns. The court overruled the trial court's verdict for the *P* and awarded the *D*s a new trial, noting that generally West Virginia has followed the common law rule in regard to trespassers. Thus, the strict rule concerning the property owner's duty to trespassers is still in effect in West Virginia.

This rule has not been revoked, but certain exceptions and limitations have developed. These exceptions usually concern child trespassers. One of these exceptions is the attractive nuisance doctrine, which the West Virginia court has rejected. *Tiller v. Baisden*,

128 W. Va. 126, 35 S.E.2d 728 (1945). West Virginia has adopted the dangerous instrumentality doctrine which is similar to, though less rigid than, the attractive nuisance doctrine. *Elk Ref. Co. v. Majher*, 227 F.2d 816 (4th Cir. 1955).

Since *P* in the principal case did not come under one of the exceptions and was classified as a trespasser, wilful and wanton conduct by the *D* must be shown for recovery. Thus the court had to determine first, whether *P* was protected by the ordinance and second, whether the violation of the ordinance was such as to be wanton and wilful conduct on the part of *D*. The city ordinance in the principal case required the owners of buildings to place screens in windows and to keep them in good condition in order to keep flies and mosquitoes out. The majority opinion cited the violation of the ordinance as evidence of wilful and wanton misconduct on the part of the *Ds*. The dissenting judge stated that the ordinance was adopted for an entirely different purpose than to prevent the type of accident suffered by the *P*.

Various courts have presented several requirements that must be satisfied before a person can recover for injuries sustained as a result of a violation of an ordinance or statute:

(1) The violation of the statute or ordinance must be the proximate cause of the injury. In *Woodcock v. Trailways of New England, Inc.*, 340 Mass. 36, 162 N.E.2d 658 (1959), *P* was riding as a guest in a car which struck *D's* bus stopped in the middle of a highway. An Interstate Commerce Commission regulation required a driver of a vehicle stopped in a highway to put out lighted fuses or red emergency reflectors which the driver failed to do. The court held for *P*, stating that the violation was shown to have actually been a proximate cause of the injury.

In *Smith v. New Dixie Lines, Inc.*, 201 Va. 466, 111 S.E.2d 434 (1959), *P* was riding in a car struck by *D's* tractor which had entered a wrong lane in an effort to pass a co-defendant's tractor trailer. The *Ds* had violated statutes relating to improper passing and also the dimming of headlights. *P* contended that these violations were the proximate cause of his injuries. The lower court ruled for the *Ds*. It was reversed on appeal, the court stating that it was a question of fact for the jury to determine whether the violations of the statutes were a proximate cause of the injury.

(2) The injury must be such as the statute or ordinance was intended to prevent. In *Courtell v. McEachen*, 51 Cal. 2d 448, 334 P.2d 870 (1959), a small boy was trespassing on a lot when he was burned by a fire started by the owner, which violated an ordinance relating to open fires. The court held that the boy, though a trespasser, could recover since the ordinance was designed to protect against this sort of peril.

In *Noonan v. Galick*, 19 Conn. Supp. 308, 310, 112 A.2d 892, 894 (1955), *D* served *P* liquor after hours and in such a quantity to make *P* intoxicated. Later *P* was run over while lying in the highway. The court upheld the verdict for the *D* stating that the provisions of the statute respecting the sale of liquor to an intoxicated person and selling liquor after hours were not intended to guard an intoxicated person from personal injury but were passed for the protection of the public at large. "[I]t must appear that the injury suffered was of a nature which the statute was intended to guard against."

(3) The person must be a member of the class intended to be protected by the statute or ordinance. In *Dini v. Naiditch*, 20 Ill. 2d 406, 170 N.E.2d 881 (1960), several firemen were burned in a fire on the *D*'s premises caused by oily rags and other rubbish which the *D* had left on the floors in violation of a municipal ordinance. The trial court ruled for the *D* stating that the ordinances violated by the *D* were not enacted for the benefit of firemen. But the court on appeal stated that the firemen were among the class protected by the ordinance and violation of the ordinance showed a failure of *D* to exercise reasonable care.

In *Davy v. Greenlaw*, 101 N.H. 134, 135 A.2d 900 (1957), a police officer chasing a burglar was injured in a fall from the fire escape on the *D*'s building. A statute required fire escapes to be constructed in such a manner as to allow safe and easy passage from the building. The court held that the police officer was not one of the class intended to be protected by the statute.

Since the jury found that *D*'s violation of the ordinance was wilful and wanton it must have concluded that the violation of the ordinance was the proximate cause of the injury, a questionable conclusion in light of the three tests discussed above. It does not appear that the ordinance was intended to prevent this type of injury. It is questionable whether *P* was within the class in-

tended to be protected by the ordinance. There is certainly a contrast between the court's construction of the ordinance in the principal case and the strict and perhaps more reasonable construction given to statutes in the *Noonan* and *Davy* cases.

It is doubtful whether most courts would give such a broad interpretation to the ordinance in the principal case. The dissent expressed the opinion that the majority greatly expanded the purpose of the ordinance as to the nature of the injury sought to be prevented by the statute, in order to afford *P* redress. It would also seem that the class of persons contemplated by the statute was enlarged to benefit *P*. It appears that the ordinance was adopted primarily to protect the public at large in regard to sanitary conditions, that is to keep flies out and not children in. The three requirements, applied together, appear to be excellent guides in determining whether the violation of a statute or ordinance imposes liability. The uniform application of such guides would serve to eliminate much of the confusion which obviously exists in this area.

John Payne Scherer

ABSTRACTS

Constitutional Law—Discrimination in Selection of Grand Jurors

Appellant, a Negro, was convicted of rape in Louisiana. Six Negroes were purposely included in the list of twenty individuals from whom twelve were to be selected for the grand jury, although prior lists had contained no more than one. The state courts and the United States district court held this was not discrimination. *Held*, reversed. The deliberate inclusion of six Negroes in the list of twenty from whom the grand jury was to be picked and the knowledge of the jury commissioners that this grand jury was to consider appellant's case alone constituted discrimination against him because of his race, in violation of the equal protection guaranteed by the Constitution. *Collins v. Walker*, 329 F.2d 100 (5th Cir. 1964).

The decision in the principal case is consistent in principle with earlier decisions on impartiality in jury selection. It has been consistently held, since *Strauder v. West Virginia*, 100 U.S. 303 (1879),