DEPARTMENT OF TORTS.

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GERDES *v.* CHRISTOPHER AND SIMPSON ARCHITECTURAL IRON AND FOUNDRY CO. ET AL.[1]

STATEMENT OF THE CASE.

Plaintiff recovered judgment for $5000 against the said company and the city of St. Louis for injuries received on account of alleged negligence of defendants in obstructing the street in the city of St. Louis, by depositing thereon a lot of iron pillars by said company with which his wagon collided, in consequence whereof he lost his leg. The petition charged negligence of said company in placing the iron on the street, and of the defendant city of St. Louis in permitting it to remain thereon. The answer was a general denial and a plea of contributory negligence.

DECISION.

The Supreme Court, MacFarlane, J., delivering the opinion said: There can be no doubt that the manufacturing company had the right to make reasonable use of these streets for the deposit of their manufactured goods, for the purpose of loading and unloading them, though not directly authorized by an ordinance of the city. But it had no right to make a permanent use of the streets for storing its property, or to make such temporary use as would unreasonably interfere with travel. The reasonableness of the use should be measured by the character of the articles to be handled. It

[1] Reported in 27 S. W. Rep. 615.

appeared from the evidence that some of the iron pillars, which is the obstruction in question, had been on the streets for a number of days, and it was a proper question for the jury to say whether they were allowed to remain an unreasonable length of time. We think that defendants could fairly have been charged with negligence under the evidence.

Obstruction to Highways for Business Purposes.

The question passed upon in the above case is of no little interest and importance. It arose by reason of the duty of "municipal corporations to keep their streets and highways in a proper state of repair, and free from obstructions, so that they will be reasonably safe for travel; and if, having notice of such defects or obstructions, they neglect to repair or remove them, they will be liable for all injuries: provided that he who received the injury was himself at the time, in the exercise of due care."

To this strict rule, there is a well-recognized qualification, which is declared by Judge Dillon in this language: "But it is not every obstruction, irrespective of its character or purpose, that is illegal, even though not sanctioned by any express legislative or municipal authority. On the contrary, the right of the public to the free and unobstructed use of a street or way is subject to reasonable and necessary limitations and restrictions. The carriage and delivery of fuel, grain, goods, etc., are legitimate uses of a street, and may result in a temporary obstruction of the right of public travel. Temporary obstructions of this kind are not invasions of the public easement, but simply incident to or limitations of it. They can be justified when, and only so long as they are reasonable and necessary. There need be no absolute necessity. It suffices that the necessity be a reasonable one:" *Dillon Munic. Corp.*, § 730.

At the common law, the obstruction of the highway by the use of it for business purposes, for a long and unreasonable time, was indictable as a nuisance. The earliest case, probably, that decided this was that of *The King* v. *Russell*, 6 East. 427. The defendant was charged with permitting his wagons

to stand in the street before his warehouse for several hours at a time both day and night, whereby the king's subjects were, during that time, much impeded and obstructed. The court said that the defendant could not legally carry on any part of his business in the public street, to the annoyance of the public; that the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance; that if the nature of the defendant's business were such as to require the loading and unloading of so many more wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot: See also *Rex* v. *Jones*, 3 Campbell, 230 (1812).

A reasonable necessity justifies the use of the street for a reasonable time. In 1814, ten years after the above case was decided, the question as to what use of the public streets is indictable as a nuisance, arose in Pennsylvania in the case of *Commonwealth* v. *Passmore*, 1 S. & R. 217. Tilghman, C. J., said: It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute, it is enough if it be reasonable. No man has a right to throw wood or stones into the street at his pleasure. But inasmuch as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, bricks, lime, sand and other materials may be placed in the street, provided it be done in the most convenient manner. On the same principle, a merchant may have his goods placed in the street, for the purpose of removing them to his store in a reasonable time. But he has no right to keep them in the street for the purpose of selling them there, because there is no necessity for it. I can easily perceive that it is for the convenience and the interest of an auctioneer to place his goods in the street, because it saves the expense of storage. But I see no more necessity in his case than that of a private merchant. It is equally in the power of the auctioneer and the merchant to

procure warehouses and places of deposit in proportion to the extent of their business.

The consideration that the property or persons causing the obstruction is not under the direct control of the defendant or that the business is a lawful one, does not excuse him. So in *Rex* v. *Carlile*, 6 Carr & Payne, 636, Baron Park said: "If a party, having a house in the street, exhibit effigies at his windows, and thereby attract a crowd to look at them, which causes the footway to be obstructed so that the public cannot pass as they ought to do, this is an indictable nuisance. This decision was followed by the Supreme Court of New York in the case of *The People* v. *Cunningham*, 1 Denio, 524 (1845). The defendants owned a brewery, from which extended a pipe about two feet over the curbstone, through which the swill was emptied into the carts and wagons of their customers. The number of teams collected there was so great that the street was frequently blocked from morning to night, so that others were prevented from passing. The court held it to be a nuisance and said: "The fact that the defendants's business was a lawful one does not afford them a justification in annoying the public in transacting it. The defendants take possession of one side of a public street from which to supply their customers with an article furnished from their distillery. By that act they invite those who deal with them to come to that place to receive it with such vehicles as they used; and the effect is to obstruct the street in the manner complained of. This effect was, it seems to me, the probable consequence of the defendants's acts. They furnished the occasion and gave out the invitation, and no obstruction of this kind would have taken place or would be likely to take place in that street, if the occasion of the assembling of such persons for the object mentioned was removed.

Building materials placed before a building in course of erection is a legitimate use of the highway; provided a free and easy passage for all business and travelling purposes is left.

In *Palmer* v. *Silverthorn*, 32 Pa. 65, the plaintiff claimed that defendant was answerable for the loss of his ox, which had its leg broken in running over the building materials

that defendant had placed in the highway. The court affirmed the plaintiff's second point, which was a prayer for instruction that, if the injury was occasioned by obstructions placed in the highway by the defendant, he would be liable, with the qualification that if the defendant was at the time putting up a building, and in doing so he used a reasonable part of the highway, but no more than was conveniently necessary to enable him to complete the erection, and there was ample and sufficient room left for the passage of cattle and persons travelling, it would be otherwise. The necessity of the case was probably the foundation of the rule, and is the foundation of most laws and municipal investigations. In Philadelphia, the occupation of a street by building materials is regulated by an ordinance passed May 3, 1855, § 1, 144: "When any person or persons shall be about to erect or repair any house or building within the city of Philadelphia, and shall be desirous to occupy a part of the public street or road for placing building materials thereon, he or they shall make application to the license clerk, stating the number and extent of such building, etc., and thereupon the license clerk shall issue a written or printed permit to occupy such part of any public street, etc., not exceeding in extent the dimensions of the front of the premises about to be built upon or repaired, and eighty feet in addition thereto, and not exceeding nine feet in breadth, for any time, not exceeding four months, as shall be deemed necessary and reasonable. *Provided*, That a sufficient passage or cartway shall at all times be left unencumbered between said building materials and the opposite curbstone for the passage of vehicles. And, *provided, further*, That no building materials be placed within four feet of any fire-plug, pump, or flagstone crossing, or within twelve inches of any curbstone." Section 2 of the above ordinance provides that the permit allows the use of the highway only for the materials to be used in the said building. Section 3 provides for the erection of a wooden platform to extend along the front of the building. Similar ordinances exist in most of our large cities.

In Massachusetts, the placing or maintaining stones or

other obstructions in a public highway, without lawful authority, is a nuisance at common law and indictable as such: *Commonwealth* v. *Blaisdell*, 107 Mass. 234; *Commonwealth* v. *King*, 13 Met. 115.

In the recent case of *Loberg* v. *Amherst* (Wis.), 58 N. W. 1048, it was decided that the deposit of mortar boxes, necessarily in use in plastering a house, upon a public highway, by one having the rights of an abutting owner, is not an unlawful use of the highway where it is not unreasonably prolonged, although they might have been placed in the owner's yard.

In the two cases of *Mallory* v. *Griffey*, 85 Pa. 275, and *Piollett* v. *Simmons*, we see how injuries result by horses taking fright at obstructions in the highway. In such instances the negligence of the plaintiff in contributing to the injury is a matter of defence, and ordinarily the burthen of proving it is on the defendant.

The doctrine laid down in the earlier cases that the obstruction of the highway, to be lawful, must result from a necessary and reasonable use thereof, was somewhat extended in the case of *City of Allegheny* v. *Zimmerman*, 95 Pa. 293. Prior to the election of 1876, a Liberty Pole was erected in the street, and a piece of it subsequently fell upon, and injured the plaintiff. Justice Mercur said, in delivering the opinion: Any unreasonable obstruction of a highway is a public nuisance, for which an indictment will lie. It is not, however, every obstruction in a highway that constitutes a nuisance *per se*. When it is not, and whether a particular use, is an unreasonable use and a nuisance, is a question of fact to be submitted to a jury. . . . But the right to partially obstruct a street does not appear to be limited to a case of strict necessity; it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with public travel. Thus public hacks, by authority of the municipality, may stand in particular parts of the streets awaiting passengers, although the public are thereby excluded from using that part of the street most of the time. So shade trees may stand between the sidewalk and the central part of the street without constituting a nuisance *per se*. They may become a nuisance by

disease or decay, yet the mere partial obstruction of a part of the street, when in fact such obstruction does not interfere with the public use, does not create a nuisance. It does not work that hurt, inconvenience, or damage to the public, necessary to constitute the offence: See also *Walter* v. *McCormick*, 52 N. J. L. 470.

From recent decisions it would seem that the obstruction, to be a nuisance, must be continuous. In *Davis* v. *Curry*, 154 Pa. 598, it was left for the jury to determine whether the constant repetition of the act of placing machinery and castings upon the sidewalk was such as to amount to substantial continuity of obstruction as distinguished from the lawful, temporary use of the sidewalk: *Commonwealth* v. *Finley*, 15 Ky. L. Rep. 60.

The right of property owners to leave objects on or along a highway, in front of their premises, temporarily and for special purposes, is of equal grade, before the law, with the right of travellers to journey on the highway. Moreover it is an absolute right and may be exercised in derogation of the right of the travelling public: *Piollett* v. *Summers*, 106 Pa. 95.

What is a reasonable manner must always depend upon the circumstances. In *Vallo* v. *U. S. Express Co.*, 147 Pa. 404 (1892), the court said: "It might and doubtless would be unsafe to leave such an obstruction (a small dark green safe) as was described in this case, unguarded for a single moment upon a sidewalk near a railway station, thronged by people rushing to and from trains, while no inconvenience might be apprehended from leaving the same obstruction several hours upon a less frequented street. Hence, it is impossible to lay down any precise rule as to the length of time a person may allow his property to remain upon a highway without incurring the charge of negligence."

In the later case of *Davis* v. *Corry*, *supra*, it was said: Manufacturers, merchants, traders and carriers have their warehouses, stores and factories on the streets of cities and towns. It is to the interest of the public that these should be carried on in cities and towns; to successfully do this, necessarily the sidewalks and streets will be temporarily

obstructed with bales and boxes of goods and the products of the factory; they must ship and must move them; they cannot reach the dray, wagon or cart without moving them across the sidewalk.

In so far as this is a temporary and necessary obstruction of the walk, and an inconvenience to the public passing over it, the public in the common interest of trade and commerce must submit to it. But while this is the case, it must not be forgotten by municipal authorities that the sidewalks and streets are primarily for the use of the passing public. The merchants or manufacturer's right to the temporary, necessary use of them is permissive only, and subordinate to that of the public. See, also, *Hindman* v. *Timme* (Ind.), 35 N. E. Rep. 1046; *Illinois C. Ry. Co.* v. *State* (Miss.), 14 So. Rep. 459; *Taylor* v. *Bay City St. Ry. Co.* (Mich.), 59 N. W. Rep. 447.

As to obstructions suspended in the air by hoisting them from the street, see *Fuhrmeister* v. *Wilson et al.*, 30 Atl. Rep. 150, decided October 1, 1894.

From a review of the cases here discussed, then, we deduce these principles:

I. The primary purpose of a street or sidewalk is for the passage and travel of the public.

II. Any obstruction of the public highway, to be lawful, must be necessary, temporary, and reasonable. To this rule, there is this qualification: The use of the street is not limited to cases of strict necessity, but it may extend to purposes of convenience or ornament, provided it does not unreasonably interfere with the public rights.

H. GRAHAM BLEAKLY.