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The Drive-in Theater; Is It a Nuisance

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Hedges, the court held that the willful abandonment of the contract precludes recovery upon the contract; and unless the plaintiff can show something from which a new contract or agreement can be inferred, there may be no recovery on the count of quantum meruit.[13] The fact that the owner takes possession of the building or structure constructed upon his land will not of itself raise an implied promise to pay for which a count of quantum meruit would lie since the ownership of the land necessarily involves the possession of the improvement.[14] Having lost his right to enforce the owner's obligation under the contract, the contractor no longer has an essential element of his right to enforce the mechanics' lien, *i.e.* an obligation of the owner to pay arising from the performance of the contract by the mechanic.[15]

The denial of a mechanics' lien to the contractor who has willfully abandoned his contract may seem restrictive upon this statutory remedy. However, it should be remembered that the main purpose for which the statute was created is to prevent the unjust enrichment of the property owner. If the contractor cannot bring his act of willful abandonment within one of the principal exceptions to the rule of this case, there has more than likely been no actual unjust enrichment of the property owner. The rule, then, would obtain the proper result in the majority of the cases.

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THE DRIVE-IN THEATER; IS IT A NUISANCE?

Plaintiffs brought suit to enjoin the city from issuing a permit for the construction of a conventional drive-in theater within the city limits, and to enjoin the construction and operation of this theater. Plaintiffs contended that, should this drive-in theater be constructed, the lights, crowds, congestions, and noises would constitute a nuisance, would depreciate the value of their property, would be injurious to the health of those residing within the community, and would destroy the quiet and peaceful use and enjoyment of their homes. The site of the proposed theatre was in quiet residential neighborhood. The city has no zoning ordinance. *Held*: that where it is sought to enjoin an anticipated nuisance arising out of the prospective operation of a lawful business, it must be alleged and proved that the proposed use to be made of the property will constitute it a nuisance per se, or that a nuisance must necessarily result from the contemplated act or thing; that the essential elements of a nuisance are the

13. Sumpter v. Hedges, 1 Q.B. 673 (1898); Walling v. Warren, 2 Colo. 434 (1874).
14. Elliott v. Caldwell, 43 Minn. 357, 45 N.W. 845 (1890).
15. See note 6 supra.

unreasonable use of property, which causes *material* annoyance, inconvenience, or discomfort; and that since the evidence failed to establish these elements the injunction would be denied. It is not enough that the proposed activity may result in inconvenience or annoyance, or that it may make the plaintiffs' homes a less desirable place in which to live. The sole invasion of plaintiffs' rights in this instance would consist of heavier traffic in the neighborhood, which does not constitute an unreasonble invasion. *City of Somerset v. Sears,* 223 S.W. (2d) 530 (Ky. 1950).

The drive-in theater is a new form of open air amusement, and there are as yet no other cases dealing directly with the nuisance aspects of such a theater.[1] The problem must be resolved through a consideration of the general principles of the law of Nuisances, together with a consideration of other comparable forms of entertainment.

A nuisance has been aptly defined as that class of wrongs which arises from the unlawful, unreasonable, or unwarranted use by a person of his property, and produces such a material annoyance, inconvenience, discomfort, or hurt, that the law will presume a consequent damage.[2]

Courts have not infrequently enjoined the conducting, or prospective conducting, of amusements as nuisances. An injunction to prevent the taking place of a prize fight was issued when, in the view of the court, to allow the prize fight to take place would substantially and materially affect the rights and welfare of citizens individually and the community collectively.[3] The use of land for the purpose of conducting entertainment such as circuses and carnivals has been enjoyed when, in considering all attendant circumstances, citizens in residence close by are prevented from exercising their right to enjoy a peaceful and reasonable use of their property.[4] Thus, courts have enjoined the conduct of entertainment enterprises prior to their actual commencement when the activity proposed would almost certainly cause an injury. It will, of course, depend upon attendant circumstances as to whether or not the court will feel that the rights of the nearby landowner reasonably outweigh those of the defendant. Generally, amusements, shows, exhibitions, and public performances are not nuisances per se, but they may be conducted without sufficient decorum and decency, and thus become a nuisance, and it is within the power of the municipality to suppress these amusements.[5]

In the principal case, the plaintiff mentioned as objectionable the resultant lights, crowds, congestions, and noises. Generally speaking,

1. Abbott v. Zoning Board of Review of Warwick, 79 A. (2d) 620 (R.I. 1951); Hertzch Zoning Board of Bloomfield, 79 A. (2d) 767 (Conn. 1951).
2. Kinney v. Koopman, 116 Ala. 310, 22 So. 593 (1897); Bailey v. Kelley, 93 Kan. 723, 145 Pac. 556 (1915).
3. Commonwealth v. McGovern, 116 Ky. 212, 75 S.W. 261 (1903).
4. Dulaney et al. v. Fitzgerald et al., 13 S.W. (2d) 767 (1929).
5. Commonwealth v. Cincinnati, N.O. and T.P.R. Co., 139 Ky. 429, 112 S.W. 613 (1908); State ex rel. Attorney General v. Canty et al., 207 Mo. 439, 105 S.W. 1078 (1907).

noise in itself is not a nuisance per se, but surrounding circumstances may render it an actionable nuisance.[6] In deciding whether or not noise constitutes a nuisance, it is not sufficent that a person who, for some reason, has become more sensitive to the noise than the average person suffers harm, but the noise must of a character as to be of actual physical discomfort to persons or ordinary sensibilities.[7]

In a suit to restrain the operation of a scenic railway as a nuisance, evidence was again held not sufficient to show that the operation substantially interfered with the physical comfort of persons of ordinary sensibilities occuping nearby property. The objection related to the very considerable noise made by the railway and its passengers.[8]

The presence of light alone has also been a source of objection. In considering light as objectionable, it has been held that light was a nuisance when, by its shining into bedrooms, it materially interfers with the ordinary comfort of human beings. Time of occurrence of the light and similar circumstances must be considered.[9] It has been held that the lights and other attendant noises of operating a filling station may cause a physical invasion of the property of others.[10]

In one case, plaintiff objected to the playing of a game of croquet on a lot next to his dwelling. The game was played at night, and the light therefrom was of particular annoyance to the plaintiff, who was in a delicate state of health. It was not conducted in a boisterous or disorderly manner, nor with malicious motives. Here again the court held that there was insufficient evidence to justify the interference of the court by injunction.[11]

But another element has been injected into these cases, the element of the nature of the district in which the station was built. While it was held that the lights and noises were of such a nature as to be a nuisance due to the character of the surroundings, the contemplated construction of a gasoline filling station in an area largely given over to commercial and public purposes was not enjoined in absence of controlling zoning ordinance or statute.[12] Thus, in determining whether or not the light and noise are a nuisance, the rights of the respective parties are weighed, protected, or disregarded in view of the nature of the surroundings. And again, in such

6. Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Austin v. Augusta Terminal R. Co., 108 Ga. 671, 34 S.E. 852 (1899); Phelps v. Winch, 309 Ill. 158, 140 N.E. 847 (1923).
7. Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932); Ditmann v. Repp. 50 Md. 516, 33 Am. Rep. 325 (1878).
8. Akers v. Marsh, 19 App. D.C. 28 (1921).
9. Burroughs v. City of Dallas, 276 F. 812, C. C. of App. (5th Cir. 1921).
10. Shelburne, Inc. v. Crossam Corp., 95 N.J. Eq. 188, 122 A. 749 (1923).
11. National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924).
12. Hazlett v. Marland Refining Co. of Ponca City, 30 F. (2d) 808 (1929).

cases, to enjoin the threatened nuisance, facts must be so stated in the petition so as to enable the courts to determine whether or not the apprehension of an irreparable injury is well founded.

The plaintiff in the instant case complained also of prospective crowds and congestion. An amusement which provides a good example of crowds and congestions (as well as lights and noises) is the game of baseball. A consideration of the various decisions governing this amusement will provide a valuable analogy to the problem of when a drive-in theater is, or is not, a nuisance. The playing of a game of baseball is not a nuisance per se.[13] An allegation which states the plaintiff has merely a fear that the game will not be conducted properly is not sufficient to cause an injunction to be issued. The presumption must, in all fairness, be that the game will be conducted properly.[14] It may easily result, however, that the privilege of conducting a baseball game will be voided when the damage to the plaintiff's property is comparatively great. For instance, when balls are driven onto the plaintiff's property,[15] and obscene language from the ball park[16] and disorderly persons in attendance harass the plaintiff and his family, injunction has been allowed.[17] From these cases, the more logical and compromising conclusion would be that an ordinary game of baseball, conducted under the usual circumstances, is a legitimate amusement. In absence of unnusual conditions which would lead to a nuisance, injunction will not lie against the operation of the ball game.[18]

It has been said by a court, and wisely so, that it is, or at least should be, the policy of the courts to guard and protect the rights of all persons to assemble for purposes of amusement, and this right should not be placed in jeopardy by selfish private interests which suffer mere annoyances.[19] The problem must ultimately resolve itself into a matter of balancing of interests. It will always be difficult to strike a true medium between the conflicting interests and tastes of the people of the city.[20] Among the rights possessed by everyone is the privilege of attending places of open air amusement. If the operation of these amusements is so carried on that a nuisance will result, then the privilege to attend an open air amusement has infringed upon the right to the peaceful enjoyment of property, and the nuisance will be abated. The decisions will always depend upon the facts arising from the nature of the structure, and the surrounding area.

In reviewing the cited cases, it seems logical to conclude that a drive-in should not be allowed in an area adjacent to land dedicated to a hospital,

13. Alexander v. Tebeau, 132 Ky. 487, 116 S.W. 356 (1909).
14. Spiker v. Eikenberry, 135 Ia. 79, 110 N.W. 457 (1907).
15. Hennessy v. City of Boston, 265 Mass. 559, 164 N.E. 470 (1929).
16. Cronin v. Bloemecke, 58 N.J. Eq. 313, 43 A. 605 (1899).
17. See note 13, supra.
18. Royse Independent School District v. Reinhardt, 1913 Texas Civ. App. 159 S.W. 1010 (1913).
19. Village of Des Plaines v. Poyer, 123 Ill. 348, 14 N.E. 677 (1888).
20. Rhodes v. Dunbar, 57 Pa. St. 274 (1868).

or a rest home, or other such purposes. It is possible that where there is an area occupied entirely by residential buildings, with little space for a drive-in, such a structure will not be allowed. The typical site for a drive-in, however, is one which has ample room, with open or semi-open lots surrounding it. In such a situation, complaints such as the one in the immediate case will probably be disallowed.

Wyoming has no cases bearing on this question, nor are there any statutes in effect which expressly govern such a situation.

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SEGREGATION IN PROFESSIONAL EDUCATION

Admission to the University of Texas Law School was denied to Heman Marion Sweatt, a negro, in accordance with the provisions of the state constitution which required segregation of white and colored students in state educational institutions.[1] Sweatt was otherwise qualified for admission, and the University officials frankly based their action upon the applicant's color. He instituted mandamus proceedings in a Texas state court to compel his admission. The court recognized that denying admission to plaintiff and granting it to others deprived him of equal protection of the laws, but granted a continuance of six months to permit the State to provide substantially equal facilities at a separate school. During the interim, the University officials established a Law School for Negroes at the University of Texas and invited plaintiff to enroll there, which he refused to do. Thereafter, the Texas trial court found that the opportunities for study in the new school were substantially equivalent to those offered by the state to white students at the state university and denied the writ. Application for a writ of error was denied by the state courts, and plaintiff went to the U.S. Supreme Court on certiorari. *Held,* by a unanimous court, that the equal protection clause of the Fourteenth Amendment required the plaintiff be admitted to the University of Texas Law School. *Sweatt v. Painter,* 339 U.S. 629, 70 S.Ct. 848, 94 L. Ed. 1114 (1950).

The court did not expressly invalidate the segregation provisions of the Texas Constitution, nor directly question the "separate but equal" doctrine. Assuming the validity of these, the opinion merely found that the facilities offered by the law school at the Texas State University for Negroes were not equal to those existing at the University of Texas Law

1. See Tex. Const. Art. VII, secs. 7, 14; Tex. Civ. Stat., secs. 2643b, 2719, 2900 (Vernon, 1925, Supp. 1949).