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Torts--Scope of Discretion of County Court in Licensing Drive-In Theaters

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of the contracting party's mind at the time of the ceremony must govern the question of capacity,[9] rather than his state of mind at times prior to or after the marriage. There is a strong presumption in favor of the validity of a marriage in Kentucky.[10] The presumption raised by a previous adjudication of incompetency would not of itself overcome the presumption of validity of the marriage, unless perhaps the adjudication of idiocy or lunacy was at a time reasonably contemporaneous with the marriage. Other evidence in addition to the adjudication would therefore generally be required to prove incapacity to contract a valid marriage.

An adjudication of lunacy may not be conclusive as to the future, since it is possible that a lunatic may later go through a lucid interval sufficient to contract a valid marriage. It is submitted, however, that it should be different in the case of an adjudged idiot, that is, one declared by the court to have been destitute of all reasoning since birth. Such an adjudication should be conclusive of incapacity to marry, since it is logical to assume that a person who never had a mind will never acquire one.

In the principal case since the nature of the adjudication was unknown, it is quite possible that the husband was adjudged of unsound mind for reasons other than idiocy or lunacy. And if the husband was declared of unsound mind for other reasons, the adjudication would not even raise a presumption of mental incapacity at the time of the inquest or any future time. The only other evidence of his mental incapacity was the statement of a doctor that at one time he had only the mind of a six year old, and the statement of the committee that he believed him to be unsound,[11] but this was prior to or after the marriage and did not establish his mental capacity at the time of the marriage. The effect of such a retarded mind at the date of marriage is an interesting question not here presented. The evidence being of such nature, it would seem that the Court of Appeals was entirely justified in reversing the decree of the chancellor.

JAMES T. YOUNGBLOOD

TORTS—SCOPE OF DISCRETION OF COUNTY COURT IN LICENSING DRIVE-IN THEATERS

The securing of a permit to operate a drive-in motion picture theatre has become a very important issue in many cities in Kentucky today and seems to be giving the lower courts some difficulty. Just

[9] 35 AM. JUR. 191 (1941).
[10] *Supra* note 1, at 249.
[11] *Ibid.*

what an applicant must show in order to be entitled to such permit has not been clear. This uncertainty is due to a failure to recognize the regulations which have a direct bearing upon the subject as well as the character of the court when acting in this capacity.

The statute[1] under which permits to operate places of entertainment are granted vests such power in the county judge. One should keep in mind that the county judge, while acting under this statute, is exercising a quasi-judicial or administrative function,[2] and has broad discretionary power. Just how much discretion an administrative body such as this has depends primarily upon the terms of the controlling state legislation. In addition an implied limitation which has been put upon courts or individuals acting in this capacity is that they must act fairly and not arbitrarily.[3] The main difficulty in Kentucky arises from the fact that the statute under which the county court is authorized to grant these permits makes almost no provision for factors that the court should consider in determining whether or not a place of amusement should be permitted to operate. Since the statute gives the court no criteria to follow in considering the application other than the "morality"[4] of the applicant, what are the reasonable inferences to be drawn therefrom? Did the legislature contemplate that the county court should consider the morality of the applicant and nothing else? Or is it reasonable to say that under this statute the judge is given unguided discretion as long as it is not exercised arbitrarily? Or is it more reasonable to say that the legislators knew that from time to time there would be other legislation and regulations which the court would be bound to consider as limits on its discretion?

The question of granting or refusing permits to operate drive-in theatres, while falling under the general staute regulating all places of entertainment,[5] presents several distinct problems not found in connection with other places of amusement. In order to discuss them with some clarity and form, they will be considered in four parts:

1. Threatened nuisance where there is no zoning.
2. Threatened nuisance where there is zoning.
3. The morality of the applicant.
4. Things other than morality of applicant and threatened nuisance in the absence of zoning regulations.

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[1] KY. REV. STAT. c. 231 (1953).

[2] 42 AM. JUR. 376 (1942). See also 124 A.L.R. 247 (1940) for general dis- 52 AM. JUR. 274 (1944).

[3] Pineville v. Helton, 300 Ky. 170, 188 S.W. 2d 101 (1945) (clerk not allowed, under Section 2 of Kentucky Constitution, to arbitrarily refuse to grant an amusement license merely because the mayor thought it best for the community); 52 AM. JUR. 274 (1944).

[4] KY. REV. STAT. sec. 231.030 (1953).

[5] *Supra* note 1.

Threatened Nuisance Where There Is No Zoning

There is some confusion in the law today as to whether a license to operate a place of amusement can be refused on the ground that it is a threatened nuisance.[6] The Kentucky rule was recently stated in *City of Somerset* v. *Sears*[7] where the lower court permanently enjoined the officials of the city from issuing a permit to operate a drive-in theatre. The question before the Kentucky Court of Appeals was whether or not neighboring property owners could enjoin the proposed operation of a conventional drive-in on the ground that it would constitute a nuisance. The court made clear its standing on anticipated nuisance when it said:

> Where it is sought to enjoin an anticipated nuisance, it must be alleged and proven that the proposed construction or the use to be made of the property will be a nuisance per se, or that a nuisance must necessarily result from the contemplated act or thing.[8]

The court further stated that the mere increase of traffic and operation in a residential neighborhood were not enough to constitute a nuisance. Where the proposed business is legitimate, these things are not such material annoyance and discomfort as to be deemed an invasion of the property owners' rights.

This opinion seems to be correct if but for one reason alone: a drive-in movie is a lawful business enterprise, and any complaint which alleges that it will be conducted improperly is based on mere speculation. It seems unfair to condemn as a threatened nuisance the proposed operation of a legitimate business on the ground that there is a possibility of its being operated in an improper manner.[9] It seems reasonably evident that where an applicant applies for a permit to operate a drive-in movie, such permit should not be refused on grounds of threatened nuisance, unless it be shown that under the particular circumstances its operation must necessarily constitute a nuisance in the place where it is to be located. The burden is upon the applicant to operate it in a proper manner. He must assume the risk of losing his business if he does not do so. Therefore, there seems

[6] State ex rel. Bayless v. Clinton County Court, 193 Mo. App. 373, 185 S.W. 1149 (1916) (County Court has no authority to refuse to grant license to operate pool room on grounds, inter alia, that they are a nuisance); but see State ex rel. Hawkins v. Harris, 239 S.W. 564 (Mo. 1922) (court says above opinion is erroneous).

[7] 233 S.W. 2d 530 (Ky. 1950).

[8] *Id.* at 532, where the court quoted from Hamlin v. Durham, 235 Ky. 842, 32 S.W. 2d at 414.

[9] Pfingst v. Senn, 94 Ky. 556, 23 S.W. 358 (1893) (pleasure resort not nuisance per se and being only threatened, could not be enjoined; 9 FORD L. REV. 438 (1939-40).

to be no reason to deny him this right until after operation has begun and it is clear that it is a nuisance.[10]

Threatened Nuisance Where There Is Zoning

The question of granting or refusing a permit becomes much more complex where zoning regulations[11] enter the picture. The lower courts seem to be having the most difficulty where this situation exists. It has been held that where a place of entertainment is permitted in a designated zone under a municipal zoning law, it cannot be attacked as a nuisance per se.[12]

A recent Kentucky case[13] pertaining to a parking lot provides a helpful analogy. This was an action to compel city officials to issue a permit authorizing the applicant to construct and operate a parking lot. Although the applicant had complied with the provisions of the city zoning ordinance, the officials had denied the applicant the permit because they thought the proposed parking lot would create a traffic congestion. The Kentucky Court of Appeals held that such a possibility of increased traffic could not justify the court's depriving the applicant of the use of his property in the face of a zoning ordinance which had sanctioned the use of such property in that area for such purposes.

It is submitted that some courts have failed to recognize the purposes for which zoning regulations are enacted and have neglected to give them their proper significance, especially in the drive-in theatre cases. Zoning laws are enacted in pursuance of the police power to determine the proper use of property. Consequently for a business to be subject to an injunction, where authorized by a zoning ordinance, the infringement of the residents' property rights must be a very serious one.[14] Likewise, it is submitted that where an applicant appears before the county court for permission to operate a drive-in movie, the zoning ordinance should prevail in most cases,[15] as it has done with respect to other businesses.[16] In order for the true purpose of zoning to be carried out, the court should consider the purpose of

[10] Anderson v. Guerrein Skyway Amusement Co., 346 Pa. 80, 29 A. 2d 682 (1943).

[11] KY. REV. STAT. c. 100 (1953).

[12] Board of Education v. Klein, 303 Ky. 234, 197 S.W. 2d 427 (1946) (football game not nuisance per se.) Salvation Army v. Frankenstein, 22 Ohio App. 159, 153 N.E. 277 (1926).

[13] Parkrite Auto Park Inc. v. Shea, 235 S.W. 2d 986 (Ky. 1950).

[14] 9 FORD L. REV. 438 at 439 (1940).

[15] Goelet v. Moss, 248 App. Div. 499, 290 N.Y. Supp. 573 (1936) (zoning law controlling over protestants' contention that their property values would depreciate by operation of theater.

[16] White v. Old York Road Country Club, 322 Pa. 147, 185 Atl. 316 (1936) (zoning ordinance decisive of issue in doubtful cases of nuisance).

the ordinance and the reasonableness of the overall zoning plan.[17] It is difficult to see how it may be shown before operation begins that a legal business will be operated so as to seriously impair the rights of residents and others in the vicinity, when the zoning commission has taken all these things into consideration before presenting a plan for adoption, and has designated a certain area as a proper place for the operation of drive-in movies and the like. There is something manifestly unfair in allowing the applicant to select and pay for his site, design his building, and even build, before he can obtain any degree of certainty that he will be permitted to operate. If the drive-in proves to be a nuisance under the particular circumstances after operation begins, the aggrieved property owners can always maintain an action for equitable relief.[18]

The Morality Of The Applicant

Kentucky's entertainment statute contains some personal qualifications which an applicant must meet in order to be entitled to a permit to operate a place of entertainment.[19] Such statutes have been held to be unconstitutional where they contained no qualifications (moral) which the applicant must possess,[20] but where a standard is provided the statutes have been held to be constitutional even though worded in general terms.[21]

It is not difficult to see why an applicant should have to assume the risk of being denied a permit for operation under the morality requirements of the entertainment statute. The statute clearly manifests an intention to vest in the county court full discretion in this matter. The prospective operator is put on notice by the statute that in order to be granted a permit he must be a person of good moral character, and not have been convicted of maintaining a public nuisance within the past two years.[22] If drive-ins were operated by persons of low moral character, then the mothers of our children might have reason to cry out that such places are truly "dens of iniquity."

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[17] 17 VA. L. REV. 202, at 204 (1930-31).

[18] Bruskland v. Oak Theater, 254 P. 2d 1035 (Wash. 1953).

[19] *Supra* note 4.

[20] Devereaux v. Genesee Township, 211 Mich. 38, 177 N.W. 967 (1920) (statute attempted to confer upon township arbitrary power to grant or refuse dancehall license).

[21] Grove v. Piatt County, 246 Ill. App. 241 (1927) (not objectionable as leaving it optional with county board to refuse to grant dancehall permit, since applicant must comply with certain qualifications); Dwyer v. People, 82 Colo. 574, 261 P. 858 (1927) (statute not violative of due process since dancehall license could be refused if board determined that public morals, safety and health of community required such).

[22] *Supra* note 4.

However, the statute places in a court of justice final arbitration and leaves it to decide whether such applicant is a law-abiding citizen.

Things Other Than the Morality of Applicants and Threatened Nuisance in the Absence of Zoning Regulations

The decisive question here is whether, in the absence of zoning restrictions, the county court may consider other matters which could have a bearing on the granting of the permit. As previously stated, the court cannot flatly and arbitrarily decide that drive-ins are not a good thing for the community. On the other hand, it is clear that the court should take into consideration factors other than the morality of the applicant. This brings us to the crucial question of whether the court may refuse to grant the permit on consideration of conditions which would not amount to a nuisance per se or would not necessarily constitute a nuisance under the particular circumstances.

When the court comes to consider such a matter as the location of the particular business and decides the merits on such factors as location on a main highway or location on a street where traffic speed is low, or location apart from industrial and residential neighborhoods or similar areas, it is properly exercising its administrative or quasi-judicial function, and in doing so it has very broad discretion. The necessary conclusion, then, is that the court may consider such other circumstances which do not amount to a nuisance in arriving at a decision. It is suggested only that the court should weigh the evidence carefully and find on the basis of the location of the drive-in that it is dangerous to public safety or health before refusing to issue a permit. The court should have a genuine and valid reason for refusal and must not decide flatly, on the application of the people of the vicinity, that drive-ins are a bad thing for the community and should not be permitted to operate. It is submitted that such a denial is unconstitutional as an unreasonable regulation of the applicant's right to use his property as he sees fit, as well as grossly unfair to a prospective businessman who wishes to carry on a legitimate business which the public has sanctioned throughout the United States.

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APPELLATE PROCEDURE—JURISDICTIONAL AMOUNT IN KENTUCKY—INJUNCTIONS AND DECLARATORY JUDGMENTS

Kentucky Revised Statutes, section 21.060, provides as follows:

(1) Appeals may be taken to the Court of Appeals as a matter of right from all final orders and judgments of circuit courts in civil cases except: