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GARAGES AND AUTOMOBILE SUPPLY STATIONS AS NUISANCES.

In the language of the Civilians, dominium includes, jus possidendi, jus utendi, jus fruendi, just abutendi, jus disponendi and jus prohibendi. When one has dominion over property his common conception is that he has the right of possession, the right to the use, the right to the produce, the right to abuse, and the right to dispose of and to exclude all others from any interference with his ownership. It is conceivable that these elements of ownership claimed by every property owner were possible during the early stages of our civilization and development, but as man continues to multiply, develop, and build, his society becomes more complicated than that of his forefathers, and those who have complete dominion over property are confronted with the problem of excluding others from interfering with their ownership, or the problem of using his ownership as he desires. It is the purpose of this article to consider that right, called in the civil law, "jus prohibendi," that is, the right a property owner has to the quiet, uninterrupted enjoyment of his property and the power to prevent others from interfering with him in so using and enjoying his possession.

The rights enumerated above may be classified as the inherent rights connected with ownership of property and unless voluntarily transferred by the owner, limited by the courts, or taken away by legislative authority, these rights exist in their true sense when one has gained dominion over property by the means of ownership. After society has developed to the extent that it has established great centers of population composed of property owners, each claiming absolute dominion over his property, and clinging to his inherent rights connected with ownership, these rights soon begin to conflict and if not curtailed or controlled by the state, that is, if the rights of ownership do not become subservient to the common good, and if society by the use of its courts and its legislative agencies fails to limit and control the various uses of property so as to prevent one from using his ownership in a manner detrimental to the rights of his fellow citizens or to the common good of the citizenry of the state, the civilization of that state is reduced to a condition of chaos.

The inhabitants of a state own property for agricultural, manufacturing, commercial, residential and recreational purposes. In addition to the above named uses, through a system of common or state ownership, property is owned for the establishment of places of worship, for educational purposes and for numerous other institutions common to a modern state. If ownership of property is for agricultural purposes, located far from the congestion of a modern center of population, there is little or no conflict between the one having dominion over the property and his neighbor, but when one owns property in a modern city his use is by necessity limited to that use which will not conflict with the rights of his neighbors, and as he has numerous neighbors within a small area, his use is limited to a greater extent than that of the agriculturist. The following illustrates a common conflict incidental to property ownership in a congested center of population: "A" owns a lot of ground located in the midst of a growing city, "A's" neighbors through common ownership erect a place of worship adjoining his property and all the available space in this section of the city other than "A's" lot is used for residential purposes. "A" desires to go into the livery stable business and as his lot is located on the main highway leading into the city and as it is a comparatively short distance to the business district he builds a livery barn on his lot. In building this barn "A" acts upon the assumption, that having the right of the use, he may use or abuse his property as he so desires. Soon after the erection of his stable, on account of the natural accumulation of manure and rubbish common to such establishments, this property becomes a breeder of flies and offensive odors. Those who desire to attend the place of worship and those who have established homes in the vicinity of the livery stable find that "A's" use interferes with their use, that is, "A's" use is such as produces a tangible and appreciable injury to neighboring property and is such as renders its enjoyment physically uncomfortable and inconvenient. To institute a tort action at law for damages would not abate the nuisance, so the neighbors of "A" will apply to a court of equity and the court upon finding the facts to be as above stated will abate the nuisance and enjoin "A" from putting his property to a use which interferes with the use of his neighbors. To restate the principle, equity limits the use of "A's" property to that use

which will not encroach upon the enjoyment of his neighbors in the use of their property and as "A's" property is located in an exclusive residential district adjoining a place of worship, "A's" use is limited to a use which is in keeping with the character of the neighborhood. If "A" desires to establish a livery stable he must establish it in a section of the city where it will not be a nuisance. This protection granted by a court of equity is protecting the *jus prohibendi* of "A's" neighbors, but in the protection granted to others it has limited the use of "A's" dominion, and such is the effect on the property rights of those who have ownership under our modern state.

Due to the inventive genius of man the automobile, a new species of property, has been brought into being and as a result of its general use a new business allied to the automobile industry has been created, that of supplying fuel, storage, accessories and repairs for automobile owners. The automobile industry, possibly the greatest in America, in fact one of the newest, presents many complicated problems to modern society and the courts to solve. Within the last decade the business of supplying the needs of automobile owners has so multiplied and competition is becoming so keen, that in any city, those who are using their property for this purpose of commerce often exceed that of any other commercial pursuit. In many instances the garage and automobile supply stations have been established in residential districts which have heretofore been free from the commercial pursuits of man. During the last few years, possibly not more than five, a new type of automobile supply station has been devised for the purpose of occupying a small lot of ground at the intersection of two streets. These stations are used for the exclusive purpose of supplying oil and gasoline to automobile owners. Large quantities of gasoline are stored in underground tanks and is pumped from these tanks as sold. The rubbish often collected around these places of business, the offensive and noxious odors resulting from the handling of oil and gasoline, the continuous noise resulting from starting and stopping of automobiles and the furnishing of an attractive dangerous place where children of tender age desire to play and congregate, make these establishments undesirable to all who own property for residential purposes or to those who have established churches or schools.

The term nuisance as defined by the Standard Dictionary is a term meaning, "That which annoys, vexes, or harms, or that which by its use or existence works annoyance or damage to another." This is the literal meaning of the term which has been somewhat limited by judicial construction, that is, a thing constituting a nuisance according to the ordinary definition of the term may not be considered as such when the judicial principle defining nuisance is applied. In the judicial sense a nuisance is an unlawful use by a person of his property in such a manner as to cause material annoyance, discomfort, or hurt to other persons or the public generally, and in addition to this every enjoyment by one of his own property which violates the rights of another in an essential degree, constitutes a nuisance.¹ Blackstone defines a nuisance as being, "anything done to the hurt, or annoyance of the lands, testaments or hereditaments of another."

When the above named elements are present, as shown by the illustration previously recited, equity will take jurisdiction and abate the nuisance or limit the use of the property to such an extent that its use will not interfere with the rights of the neighboring property owners. Justice Story in discussing private nuisance states that, "The interference of courts of equity by way of injunction is undoubtedly founded upon the ground of restraining irreparable mischief, or of suppressing oppressive and interminable litigation, or of preventing multiplicity of suits. It is not every case which will furnish a right of action against a party for a nuisance, which will justify the interposition of courts of equity to redress the injury or to remove the annoyance. But there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction."²

An analysis of the cases on this subject which apply the principles recited, show that equity will enjoin the following uses of property when they have interfered with the use of adjoining property: ball games, barns, the keeping of bees, ringing

¹ *Davis v. Sawyer*, 133 Mass. 289; *Grady v. Wolser*, 46 Ala. 381; *Pennsylvania Lead Co.'s Appeal*, 96 Pa. St. 116; *Albany Christian Church v. Wilborn*, 112 Ky. 507.

² Story's Equity Jurisprudence, Sec. 925.

of bells, the operation of billiard or pool rooms, blacksmith shops, blast furnaces, bone or fat boiling establishments, bowling alleys, breweries, brick making establishments, car barns, carpet cleaning establishments, cattle pens, hog pens, stock yards, cement works, coke ovens, cotton gins, dyeing establishments, electric light plants, factories, fertilizer factories, foundries or other metal works, garbage plants, gas works, gold or silver beating establishments, hospitals, laundries, livery stables, marble works, merry-go-rounds, oil tanks, planing mills, skating rinks, slaughterhouses, smelting works, steam hammers, tallow factories, tobacco drying houses and undertaking establishments. In addition to this list equity has enjoined various other occupations and uses of property. The location of the property and the use sought to be enjoined are the controlling influences, that is, the use of property considered as a nuisance in one section of a city may not be considered as such in another. The various occupations and businesses listed above are within themselves lawful, legitimate and necessary, but due to the fact that these uses were applied to property where such a use is considered as a nuisance, or the use was not conducted with the proper consideration and respect for the rights of adjoining property owners, the courts of equity enjoined their use or restrained it to the extent that it should not interfere with the use of neighboring property.

In accordance with the above stated principles and illustrations, courts of equity have power to compel the abatement or restrain the continuance of an existing nuisance, or enjoin the commission or establishment of a contemplated nuisance, where its nature is such that it cannot be adequately compensated for in damages and it would occasion a constant recurrence of litigation.³

If redress is sought because of a threatened injury to one's property rights by the establishment of a nuisance, he must be prepared to show that the contemplated use complained of will establish a nuisance in fact, for a court of equity will not interfere where the threatened nuisance is not inevitable, but only

³ *Codigan v. Brown*, 120 Mass. 493; *Bowben v. Edison Electric Illuminating Co.*, 60 N. Y. S. 835; *Coasow Mining Co. v. South Carolina*, 144 U. S. 550; *Dunning v. Aurora*, 49 Ill. 481; *Pfingst v. Senn*, 94 Ky. 556.

contingent, depending on the manner of operation, use, or other future circumstances.⁴

The operation of a garage or automobile supply station is not considered as being per se a nuisance; nor will a court take judicial notice that the nature of the business is such that its establishment in a residential section will within itself constitute a nuisance. When an action is maintained to enjoin the building of a garage or automobile supply station, those applying for the relief must be prepared to show that the erection of the structure sought to be restrained will constitute a nuisance.⁵

Where an injunction has been denied when applied for to restrain the building of a garage or automobile supply station, the character of the neighborhood is generally the criterion upon which the court's decision is based. In *Lansing v. Perry*,⁶ a suit was brought to enjoin the construction and operation of a garage. The court denied the injunction because the evidence showed that there was a large amount of traffic and noise on the street where the defendants planned to establish a garage, caused by street cars, freight cars, trains and automobiles, and that this section was one in which business buildings were encroaching on residences. This case turned upon the question of fact as to the nature of the location in question and the court finding that a garage in this particular locality would not constitute a nuisance, the injunction was denied.

In *Julian v. Golden Rule Oil Co.*,⁷ the court held, "that a temporary injunction to restrain the establishment of a gasoline filling station should not be granted where the location was practically a business district, near railroad tracks, and in the vicinity of a mill and elevator, ice plant, and shops."

In *Smith v. Wenger*,⁸ the court denied the injunction where it appeared that the location was one which was changing from a residential to a business district, and was already occupied to a considerable extent by restaurants, lodging houses, clubs, and stores.

⁴ *Dumesnil v. Dupont*, 18 B. Mon. 800; *Pfingst v. Senn*, 94 Ky. 556; *Thornton v. Pall*, 118 Ill. 350; *Wolcott v. Melick*, 11 N. J. E. 240; *Morgan v. Binghamton*, 102 N. Y. 500.

⁵ 79 Okla. (191 Pac. 166).

⁶ 216 Mich. 23 (184 N. W. 473).

⁷ 112 Kan. 671 (212 Pac. 884).

⁸ 29 Pa. St. 244 (112 Atl. 236).

In *Sherman v. Livingston*,⁹ it was held, that the establishment of a public automobile garage on the opposite side of the street from complainant's residence, and about seventy feet therefrom would not be enjoined, where it appeared that the residence was a brick, slate roofed building, that the garage was a substantial fireproof structure of brick and concrete, and it did not appear that the defendant proposed to store gasoline in quantities, especially where the evidence failed to establish the alleged strictly residential character of the district.

The principle deducible from the above cases is, that equity will not enjoin the building of a garage or gasoline filling station when the location in question is in a business district, or in a district where business buildings are encroaching upon a residential district, to the extent that the character of the neighborhood has changed from a strictly residential section to that of a business section.¹⁰

In *Phillips v. Donaldson*,¹¹ it was held that an injunction should be granted to restrain the establishment of a public garage in a residential district in violation of a covenant in the deed that the grantee would not establish or carry on upon the premises granted any noxious or offensive trade or business to the damage or annoyance of others who had purchased or who might thereafter purchase, in the plot in question. The court in his decision stated, "that although a public garage is not a nuisance per se, such a garage had been determined to be a nuisance in a residential district, and that this would be the case whether it was in violation of a building restriction or an annoyance to the general community."

In *Raymond v. Sheperd*,¹² the erection of a public garage in a district devoted to residences and apartment houses was enjoined. It was found that if the garage were erected and operated according to the plans and specifications there would necessarily be noise, odors, and dangers, together with congestion of traffic, and that the garage would be a nuisance, distinctly prejudicial to the welfare, safety, and peace of persons residing in the immediate vicinity.

⁹ 128 N. Y. S. 581.

¹⁰ See *Siegel v. Wayne Circuit Judge*, 155 Mich. 459 (119 N. W. 645); *Hanes v. Carolina Cadillac Co.*, 176 N. C. 350 (97 S. E. 162); *Bourgeois v. Miller, N. J. Eq.*, 140 Atl. 383.

¹¹ 269 Pa. 244 (112 Atl. 236).

¹² 29 Pa. Dist. R. 37.

In *Church of St. Luke v. McShain*,¹³ the court held, "that the noises, odors, and dangers which would necessarily arise if the garage were erected and operated according to the plans adopted for it would constitute a nuisance distinctly prejudicial to the welfare, comfort, and safety of persons residing in the immediate vicinity, as well as those attending religious services." And in *Hunter v. Wood*,¹⁴ the maintenance of a public garage in a residential district was held to be a nuisance.

In *Lewis v. Berney*,¹⁵ the construction and operation of a public garage, filling station and repair shop in a residential section, and in the immediate neighborhood of the homes of the plaintiffs, and particularly within a few feet of one of them, was enjoined. In this case the court held, "that the petition was not demurrable, which, in addition to alleging the above facts, contained allegations as to the invalid state of residents near the proposed structure, and as to the noises, odors, and smoke which would necessarily arise therefrom, and the increase of fire risk, congestion of traffic, and menace to health which would result."

The above considered cases establish the principle that equity will enjoin the erection of a garage or automobile supply station from being erected in a residential district upon the theory, that the establishment of a garage or automobile supply business in a residential section, due to the noise, odors, and dangers connected with the business, is a nuisance and a menace to the welfare, safety, and peace of the persons residing in the district.

In the consideration of the property rights one is vested with when he has ownership over property the illustrations and the cases digested above establish, that equity will intervene and protect the right a property owner has to the quiet, uninterrupted enjoyment of his property when this right has been violated by the building of a garage or automobile supply station, or when this right is threatened by the contemplated erection of such structure adjoining one's property. The legislative powers in some jurisdictions have taken notice of the fact that the establishment of such businesses is a nuisance to certain sec-

¹³ 29 Pa. Dist. R. 353.

¹⁴ Pa. 120 Atl. 781.

¹⁵ Tex. 230 S. W. 246.

tions of a municipality and have vested municipalities with the authority to legislate against their establishment in residential districts. (The constitutionality of such enactments will be discussed in a later issue of the Kentucky Law Journal.)

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