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CASE NOTES

NUISANCE—NO RIGHT TO INTERFERENCE-FREE TELEVISION RECEPTION

The John Hancock Center had scarcely reached its completion and been able to savor the distinction of being the world's tallest building in 1970 when Sears, Roebuck and Company announced its intention to erect a 110 story structure, ten stories above Hancock's century mark, on a full city block near Chicago's Loop. Construction of the Sears Tower became the subject of litigation in the spring of 1972 after the disclosure that the building would reflect television broadcast signals from transmitters on lower Chicago buildings causing distorted reception in suburban areas. The State's Attorney¹ of Lake County, the northeastern most county in Illinois, brought an action to enjoin the completion of the building as it approached the sixtieth floor, arguing that the structure would constitute a public nuisance by distorting television reception and would lead to depressed property values. On appeal, after defendant Sears' motion to dismiss for failure to state a cause of action was granted,² the Illinois Supreme Court held that, notwithstanding interference with television reception in certain metropolitan areas, the landowner's right to construct a building was subject only to restrictive legislation. Furthermore, injunctive relief was not warranted for television reception interference because it did not constitute an actionable nuisance. *People ex rel. Hoogasian v. Sears, Roebuck and Co.*³

In a day of split-second communications, millions of persons have come to rely upon radio and television as modes of promulgation or reception of information, current news, entertainment and educational material. Yet, no matter how reliant the public may be upon its television and radio,

1. On the duty of the State's Attorney to bring actions on behalf of the citizenry in Illinois, see ILL. REV. STAT. ch. 14, § 5(1) (1971).

2. A second action was brought in the Circuit Court of Cook County by the Villages of Deerfield, Northbrook and Skokie and officials thereof on behalf of their respective residents making substantially the same allegations as the Lake County officials. After the Lake County dismissal, this action was dismissed for failure to state a cause of action and as being barred by *res judicata*. Appeals were joined.

3. 52 Ill.2d 301, 287 N.E.2d 677 (1972), *cert. denied*, 409 U.S. 1001 (1972).

there has been no development of a public or private right to receive broadcasts without interference. The *Sears* case is the first to have a plaintiff viewer assert a claim for the public against a party interfering with television reception. In spite of the outcome, it is significant that as the public's protection in environmental and consumer matters expands, steps have been taken to determine whether the vast American viewing public will have any right to maintain or demand interference-free television reception. The public, which has recognized and begun to utilize the extensive resources of television broadcasting in the past several decades, was given a fleeting opportunity to assert its interests though they were not ultimately supported.

The purpose of this note shall be to briefly consider nuisance and the role of equity in nuisance cases. The development of private and public rights in airspace will be studied to delineate the boundaries within which those rights exist and might, *arguendo*, be applied to broadcast signals. Particular attention will be paid to those cases which have dealt with emitted or reflected light as a nuisance. Finally, the *Sears* case will be analyzed with consideration given to the lack of available remedies for broadcast interference and to the litigation involving the broadcast industry.

It is well settled that a land owner has free use of his property so long as the use is within the bounds of applicable zoning, public health and public welfare statutory provisions and so long as the use is not so unreasonable that it creates a nuisance to others.⁴ Nuisance has been used to describe "everything that endangers life or health, gives offense to the senses, violates the laws of decency or obstructs the reasonable and comfortable use of property."⁵ The term, which courts have held to be incapable of precise definition to fit all fact situations,⁶ might be defined as being

applied to that class of wrongs which arises from the unreasonable, unwarrantable, or unlawful use by a person of his own property [which] produces such material annoyance, inconvenience, discomfort, or hurt that the law will presume a consequent damage.⁷

4. *Kentucky-Ohio Gas Co. v. Bowling*, 264 Ky. 470, 95 S.W.2d 1 (1936). One court asserts that "the proposition that a man may use his property as he sees fit, [is] subject to restriction (1) if he violates any provision of the state or federal constitutions, or (2) if he uses his property so as to create a nuisance, or (3) if he violates any restrictive covenant, or (4) if he violates any valid laws, including zoning ordinances." *Derry Borough v. Shomo*, 5 Pa. Cmwlth. 216, 221, 289 A.2d 513, 516 (1972). The ancient maxim *sic utere tuo ut alienum non laedas*—use your own property in such a manner as not to injure the property of another—should be recalled. See *Musumeci v. Leonardo*, 77 R.I. 255, 75 A.2d 175 (1950).

5. *Hall v. Putney*, 291 Ill. App. 508, 516, 10 N.E.2d 204, 207 (1937).

6. See, e.g., *Engle v. State*, 53 Ariz. 458, 90 P.2d 988 (1939); *Patterson v.*

By itself, that statement covers a rather broad spectrum which must of necessity be narrowed.

Finding interference with the reasonable use and enjoyment of one's property alone is not quite enough to maintain an action for nuisance. With that interference, one must scrutinize the reasonableness of the use of the offender's property and the gravity of the injury to the complainant.⁸ This investigation is made in light of the neighborhood,⁹ the degree of sensitivity of ordinary persons to the act,¹⁰ and the value to the public, if any, of the offender's action or business.¹¹

It is clearly understood that inhabitants of our cities, industrial communities and densely populated suburbs "must submit to the annoyance of city life"¹² and endure some amount of nuisance from noise, dirt, smoke and other discomforts. As one court has written, "the only way in which [such nuisances] can be avoided is by seclusion from . . . the busy activities of the age . . ." ¹³ While damages may ensue from a nuisance, balancing with locale often yields *damnum absque injuria*—a damage without actionable legal injury.¹⁴

Peabody Coal Co., 3 Ill. App.2d 311, 122 N.E.2d 48 (1954); Lehmkuhl v. Junction City, 179 Kan. 389, 295 P.2d 621 (1956).

7. Gardner v. Int'l Shoe Co., 319 Ill. App. 416, 433, 49 N.E.2d 328, 335 (1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944). See also Rosehill Cemetery Co. v. City of Chicago, 352 Ill. 11, 185 N.E. 170 (1933); City of Somerset v. Sears, 313 Ky. 784, 233 S.W.2d 530 (1950); Hood v. Slefkin, 88 R.I. 178, 143 A.2d 683 (1958).

8. Louisville Refining Co. v. Mudd, 339 S.W.2d 181, 186 (Ky. 1960).

9. Strachan v. Beacon Oil Co., 251 Mass. 479, 486, 146 N.E. 787, 789 (1925).

10. Munie v. Millner, 245 Ill.App. 257 (1924). There can be no recovery for delicate or sensitive use of property. Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n, 34 Ill.2d 544, 216 N.E.2d 788 (1966); Dep't of Pub. Works & Bldgs. v. Bloomer, 28 Ill.2d 267, 191 N.E.2d 245 (1963).

11. See generally Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

12. City of Pana v. Central Washed Coal Co., 260 Ill. 111, 130, 102 N.E. 992, 999 (1913).

13. Hamm v. Gunn, 113 S.W. 304, 306 (Tex. Civ. App. 1908). Generally, the Maryland Court of Appeals explained that, "[t]here are certain inconveniences and discomforts incident to living in a city or in a thickly settled suburban community. These discomforts must be endured as part of the privilege [or at least of the fulfillment of the desire] of living in close proximity to other people. But these discomforts must not be more than those ordinarily to be expected in the community, and incident to the lawful use of the offending property or business." Five Oaks Corp. v. Gathman, 190 Md. 348, 355, 58 A.2d 656, 659 (1948). *Accord*, Merriam v. McConnell, 31 Ill.App.2d 241, 175 N.E.2d 293 (1961) (box elder trees); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932) (wholesale poultry factory); Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 A. 280 (1931) (wire mill). See RESTATEMENT (SECOND) OF TORTS § 822, comment g at 70 (Tent. Draft No. 16, 1970).

14. Alabama Power Co. v. Ickes, 302 U.S. 464, 479 (1938).

The peculiar hypersensitivity of a person may not be considered because the sense test for an actionable nuisance is objective. Therefore, trifling inconveniences suffered by persons having fastidious habits and delicate sensibilities are set aside to allow the habits and senses of ordinary persons to determine the standard. Application of the standard will yield a determination whether the complainant's physical comfort and enjoyment has been subjected to an actionable, substantial and material interference.¹⁵ Finally, a public policy consideration may be taken into account to balance the injury with the relative public necessity of the alleged offender's conduct. Unless the activity is an unreasonable and unnecessary public annoyance of greater measure than its service to the public, then that "interference restraining normal industrial activities is contrary to public policy. . . ."¹⁶

Generally, nuisances may be subdivided into those which are private, interfering with the use and enjoyment of the property of an individual or small group of individuals,¹⁷ and those which are public, causing annoyance, inconvenience or injury to the community as a whole.¹⁸ While public nuisances are generally subject to abatement only by public authorities through civil or criminal action,¹⁹ a private action may lie for a public nuisance where the complainant can show that his property has sustained some special injury not common to the public.²⁰ The distinction between public and private nuisances must be considered with each new fact situation so that proper remedial action may be selected.

To augment or supplant the legal remedy of damages, courts of chancery

15. *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 126, 102 N.E. 992, 998 (1913). See RESTATEMENT (SECOND) OF TORTS § 821 F, comment c at 59-60 and comment d at 60-61 (Tent. Draft No. 16, 1970) and note the recent revisions to the general rule of § 822 (Tent. Draft No. 18, 1972).

16. *Gardner v. Int'l Shoe Co.*, 319 Ill.App. 416, 433, 49 N.E.2d 328, 335 (1943), *aff'd*, 386 Ill. 418, 54 N.E.2d 482 (1944).

17. *Merriam v. McConnell*, 31 Ill.App.2d 241, 175 N.E.2d 293 (1961). See ALA. CODE tit. 7, § 1084 (1960); CAL. CIV. CODE § 3481 (West 1970); RESTATEMENT (SECOND) OF TORTS § 821 D (Tent. Draft No. 16, 1970).

18. *People v. Rubenfeld*, 254 N.Y. 245, 247, 172 N.E. 485, 486 (1930). See ARIZ. REV. STAT. ANN. § 13-601 (1956); CAL. CIV. CODE § 3480 (West 1970); RESTATEMENT (SECOND) OF TORTS § 821 B (Tent. Draft No. 16, 1970).

19. See ALA. CODE tit. 7, § 1085 (1960); CAL. CIV. CODE §§ 3493-95, CAL. GOV'T CODE § 26528 (West 1970); FLA. STAT. ANN. § 60.05 (1969), *as amended*, (Supp. IV, 1972); ILL. REV. STAT. ch. 24, §§ 11-60-2, 21-20, ch. 100½ §§ 2, 16, 19 (1971).

20. *Klump v. Rhoads*, 362 Ill. 412, 200 N.E. 153 (1936). See CAL. CIV. CODE §§ 3493, 3495 (West 1970); RESTATEMENT (SECOND) OF TORTS § 821 C (Tent. Draft No. 16, 1970); Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).

have acted to abate nuisances.²¹

Courts of equity have power to give relief, whether against public or private nuisances, by compelling their abatement or restraining the continuance of their existence Wherever the legal right is clearly established and the unreasonable and unlawful use of property to the injury of others is clearly proved, it is not necessary that the question should be first determined in a suit at law.²²

Public interest is a key to the extent of equitable relief available. In *Virginia Railway v. System Federation*,²³ Mr. Justice Stone expressed the often quoted view that: "[c]ourts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."²⁴

As previously indicated, courts look for clearly established cases of actual, substantial injury before granting equitable relief.²⁵ To that point, there is a reluctance to exercise the extreme powers of abatement.²⁶ Regardless, injunctive relief will be granted for abatement of public nuisances as found at common law or within criminal statutory provisions.²⁷

While equity generally will not enjoin a threatened or anticipated nuisance in advance of actual injury,²⁸ mandatory injunctions have been used to cause removal of structures which have become nuisances by violation of zoning regulations²⁹ or by encroachment upon the property of another.³⁰

21. Equity will not grant injunctive relief as a matter of course on every showing of relief at law. *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 67 U.S. (2 Black) 545 (1862); *Haack v. Lindsay Light & Chem. Co.*, 393 Ill. 367, 66 N.E.2d 391 (1946).

22. *City of Pana v. Central Washed Coal Co.*, 260 Ill. 111, 122-24, 102 N.E. 992, 997 (1913).

23. 300 U.S. 515 (1937).

24. *Id.* at 552. See also *Public Utilities Comm'n v. Capital Transit Co.*, 214 F.2d 242 (D.C. Cir. 1954); *DuPage County v. Henderson*, 402 Ill. 179, 83 N.E.2d 720 (1949).

25. *Nichols v. City of Rock Island*, 3 Ill.2d 531, 538, 121 N.E.2d 799, 803 (1954).

26. *Bauman v. Piser Undertakers Co.*, 34 Ill.App.2d 145, 180 N.E.2d 705 (1962).

27. *City of Chicago v. Fritz*, 36 Ill. App. 2d 457, 184 N.E.2d 713 (1962).

28. *Kubby v. Hammond*, 68 Ariz. 17, 198 P.2d 134 (1948) (automobile wrecking plant). But see *Patton v. Carter*, 197 S.W.2d 168 (Tex. Civ. App. 1946) (livestock auction barns and pens). As to anticipatory nuisance from erection of structures, see *Annotts.*, 7 A.L.R. 749, 763 (1920); 26 A.L.R. 937, 940 (1923); 55 A.L.R. 880, 884 (1928).

29. *Welton v. 40 E. Oak St. Bldg. Corp.*, 70 F.2d 377 (7th Cir. 1934). See *MINN. STAT. ANN.* § 462.17 (1963).

30. *Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785 (1921). See also *Gerstley v.*

Where, however, the conduct of the alleged offender's business and the construction of his building are within the terms of appropriate licensing, if any, and in compliance with applicable statutory provisions, there is no actionable nuisance.³¹ It is settled that the authority of state or local government to establish zoning regulations arises from the exercise of its police power.³² Based upon a premise of common public welfare, regulations must reasonably and substantially relate to the health, safety, comfort and morals of the public.³³

These principles were applied in *Welton v. 40 East Oak St. Building Corporation*³⁴ where the defendant erected a twenty-story building which failed to comply with a Chicago zoning requirement that for every nine feet of rise above seventy-two feet, a structure was to have a one foot set-back. The building was completed in spite of litigation in state courts. Coming ultimately before the Court of Appeals for the Seventh Circuit, the case was remanded for issuance of a mandatory injunction compelling reconstruction of the building in conformance with local regulations. The court grounded injunctive relief in the special damage suffered by owners of adjoining premises found to be the result of the mere violation of the ordinance.³⁵

In spite of defendant's argument that the equities should be balanced to consider the great financial loss he would suffer by issuance of the mandatory injunction, the court held that there would be no balancing.³⁶ A view on city life dissimilar to that held by many courts was presented:

Globe Wernicke Co., 340 Ill. 270, 172 N.E. 829 (1930) (bridge between buildings over public alley); *Field v. Barling*, 149 Ill. 556, 37 N.E. 850 (1894) (same); *The Fair v. Evergreen Park Shopping Plaza*, 4 Ill. App.2d 454, 124 N.E.2d 649 (1954) (portion of building erected on land held by tenant under easement); ILL. REV. STAT. ch. 100½, § 26(5) (1971). *But see* *Methodist Episcopal Soc'y v. Akers*, 167 Mass. 560, 46 N.E. 381 (1897); *Crocker v. Manhattan Life Ins. Co.*, 61 App. Div. 226, 70 N.Y.S. 492 (1901).

31. *Strachan v. Beacon Oil Co.*, 251 Mass. 479, 146 N.E. 787 (1925).

32. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), *rev'g* 297 F. 307 (N.D. Ohio 1924).

33. *See* *Liebling v. Village of Deerfield*, 21 Ill.2d 196, 171 N.E.2d 585 (1961); *City of Loves Park v. Woodward Governor Co.*, 14 Ill.2d 623, 153 N.E.2d 560 (1958); *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971).

34. 70 F.2d 377 (7th Cir. 1934).

35. *Id.* at 380. *See also* *Fitzgerald v. Merard Holding Co.*, 106 Conn. 475, 138 A. 483 (1927) for the proposition that a structure is a public nuisance when in a place forbidden by law.

36. *See* *Gerstley v. Globe Wernicke Co.*, 340 Ill. 270, 172 N.E. 829 (1930); *Pradelt v. Lewis*, 297 Ill. 374, 130 N.E. 785 (1921); *Curtis Mfg. Co. v. Spencer Wire Co.*, 203 Mass. 448, 89 N.E. 534 (1909). *Contra*, *Golden Press Inc. v. Rylands*, 124 Colo. 122, 235 P.2d 592 (1951).

In the fight for better living conditions in large cities, in the contest for more light and air, more health and comfort—the scales are not well balanced if dividends to the individuals outweigh health and happiness to the community.³⁷

It is clear then that upon the finding of an actionable nuisance, public or private, equitable relief may be available to abate the nuisance even where a great expense is suffered by the offending party.

As television signals are transmitted through the air without regard to ownership of the property beneath, it is important to review the law of air ownership. The ancient doctrine of air ownership, *cujus est solum ejus est usque ad coelum*—he who owns the soil owns the sky above it³⁸—has been subjected to diminished application since the advent of air transportation³⁹ with its subsequent acquisition of the heavens.⁴⁰ Who owns the vast expanses of the air above this nation? By statute, the Congress has vested airspace with national sovereignty.⁴¹ A sequence of cases did much to provide the nexus between the decline of the maxim noted and the foundation of national sovereignty.

The Ninth Circuit was called upon in 1936 to consider an action for alleged trespass and imposition of servitude on the plaintiff's land by the aircraft belonging to the defendants.⁴² The court in *Hinman* made the following finding:

Title to the airspace unconnected with the use of land is inconceivable. Such a right has never been asserted.

. . . .

This formula 'from the center of the earth to the sky' was invented at some remote time in the past when the use of space above land actual or conceivable was confined to narrow limits, and simply meant that the owner of the land could use the overlying space to such an extent as he was able, and that no one could ever interfere with that use.

This formula was never taken literally, but was a figurative phrase to express the

37. *Welton v. 40 E. Oak St. Bldg. Corp.*, 70 F.2d 377, 383 (7th Cir. 1934).

38. 2 W. BLACKSTONE, COMMENTARIES, *18.

39. Among older cases see *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (where the Court found servitude on plaintiff's property taken by firing of defendant's guns); *Butler v. Frontier Telephone Co.*, 186 N.Y. 486, 79 N.E. 716 (1906) (ejectment action against telephone wire above plaintiff's land).

40. *Allegheny Airlines v. Village of Cedarhurst*, 132 F. Supp. 871 (E.D. N.Y. 1955) (holding, *inter alia*, that the doctrine of private ownership of air is no longer the law).

41. Federal Aviation Act of 1958 § 1108, 49 U.S.C. § 1508 (1970). *But see* *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal.2d 582, 394 P.2d 548 (1964) (finding federal aviation legislation non-exclusive); Illinois Aeronautics Act of 1945, ILL. REV. STAT. ch. 15½, §§ 22 *et seq.* (1971).

42. *Hinman v. Pacific Air Transport*, 84 F.2d 755 (9th Cir. 1936), *cert. denied*, 300 U.S. 655 (1937).

full and complete ownership of land and the right to whatever superadjacent airspace was necessary or convenient to the enjoyment of the land.⁴³

Grounded upon this argument, the court affirmed the lower court's decision that the plaintiff had suffered no actionable injury.

Mr. Justice Douglas, speaking for the majority in *United States v. Causby*,⁴⁴ allowed that there was no place in the modern world for the doctrine: "To recognize such private claims to the airspace would clog these [air] highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim."⁴⁵ Even with this, the problem of airspace was not completely settled. While the public domain was affirmatively asserted for navigable airspace, there remained the dilemma surrounding the use of air immediately above the land:

[I]t is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the *immediate reaches* of the enveloping atmosphere. Otherwise buildings could not be erected The landowner owns at least as much of the space above the ground *as he can occupy or use in connection with the land*.⁴⁶

Though national sovereignty gives to the government ownership of airspace, it does not thereby cause any divesting of rights incident to the ownership of the surface inuring to the landowner.⁴⁷ In recent years, decisions on actions brought by private landowners charging proprietary taking through easement⁴⁸ or inverse condemnation⁴⁹ by air traffic nuisances have reflected the principles set down in *Causby*. So, with the exception of airspace which is used and enjoyed as an incident of land ownership, the air above us is the navigable airspace of the public domain. Therefore, while the Federal Aviation Administration is empowered to control the use of airspace,⁵⁰ one would certainly hope that public senti-

43. *Id.* at 757.

44. 328 U.S. 256 (1946) (low-flying military aircraft over plaintiff's chicken farm).

45. *Id.* at 261. See also *Chicago & S. Airlines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948) wherein Justice Jackson noted that "ancient doctrines of private ownership of the air as appurtenant to land titles had to be revised to make aviation practically serviceable to our society." *Id.* at 107. But see *Dettmar v. County Bd. of Zoning Appeals*, 28 Ohio Misc. 35, 273 N.E.2d 921 (1971).

46. 328 U.S. at 264 [emphasis added].

47. *Anderson v. Souza*, 38 Cal.2d 825, 243 P.2d 497 (1952), *aff'g* in part, 232 P.2d 274 (Cal. App. 1951).

48. *Griggs v. Allegheny County*, 369 U.S. 84 (1962), *rev'g* 402 Pa. 411, 168 A.2d 123 (1961).

49. *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962).

50. Federal Aviation Act of 1958 §§ 301, 307, 49 U.S.C. §§ 1341, 1348 (1970). It should be noted that *Sears, Roebuck and Co.* applied to the Federal Communi-

ment would be afforded a hearing prior to the making of decisions adversely affecting that public domain.⁵¹

Cases which could provide one of the better analogies to distorted broadcast signals traveling over property boundaries would be those which considered allegations of nuisances attributed to illumination of another's property.⁵² An electric sign, seventy-two feet long and sixty-six feet high which contained more than one thousand electric bulbs varying in intensity from fifteen to one hundred watts, was held to be a nuisance in New Jersey in 1923.⁵³ The sign was constructed in such a manner as to face plaintiff's hotel, substantially illuminating some forty-five rooms therein. The court found that such positioning, coupled with such intensity, "may become a nuisance, if it (the light) materially interferes with the ordinary comfort, physically, of human existence."⁵⁴

Where an action was brought for interference with sleep and reasonable enjoyment of property caused by the use of adjacent school property for night baseball games, the trial court's ruling for the defendant school district was reversed and the emission of light was enjoined.⁵⁵ The reviewing court in the *Hansen* case was unable to agree that the nuisance *per accidens*, when balanced with the rights of the plaintiffs to freedom from interference in late-night hours, should not be the subject of injunctive relief. The school district was enjoined from late-evening use of the lighted ball field.

Other cases have arisen where the private property owner is faced with encroaching lights and noises from adjoining property.⁵⁶ Plaintiffs in the business of operating outdoor theatres have been unable to prevail as

cations Commission for permission to place antennae on its building. Approval was granted June 19, 1972.

51. *But see* Palisades Citizens Ass'n v. Civil Aeronautics Bd., 420 F.2d 188 (D.C. Cir. 1969) (denial of intervention request by group claiming an interest in air traffic noise, pollution and safety hazards).

52. *See* Shepler v. Kansas Milling Co., 128 Kan. 554, 278 P. 757 (1929) (natural light).

53. *The Shelburne, Inc. v. Crossan Corp.*, 95 N.J. Eq. 188, 122 A. 749 (1923).

54. *Id.* at 191, 122 A. at 750.

55. *Hansen v. Independent School Dist. No. 1*, 61 Idaho 109, 98 P.2d 959 (1940).

56. *See* Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A.2d 656 (1948) where defendant was permanently enjoined from operating bright electric lights around swimming pool and parking lot as well as nickelodeons and carry-out service after 10:00 p.m. as nuisance to adjoining residential property. *Nugent v. Melville Shoe Corp.*, 280 Mass. 469, 182 N.E. 825 (1932) (nuisance found where defendant maintained no preventive measure to keep construction noise low and illumination from nitrogen lights from shining into plaintiff's bedroom after midnight).

litigants.⁵⁷ The courts have found the plaintiffs' businesses too susceptible to injury and therefore have hesitated to find an actionable trespass or nuisance.

Theatre owners in *Amphitheaters, Inc. v. Portland Meadows*⁵⁸ sought to enjoin the nuisance caused by lighting around defendant's race track. In spite of claims that the natural darkness was destroyed, materially interfering with the showing of films, the court found the intensity of the lights to be no greater than the intensity of the full moon. Reaching the conclusion that the defendant's act was deemed merely to be a *damnum absque injuria*, the court held that reflection of lights was but one of the burdens placed upon a property owner by modern city living.⁵⁹ In addition, the court argued that it could not allow a man to prevail who increased his neighbor's liabilities by applying his own property to a special and delicate use whether as a business interest or merely for pleasure.⁶⁰

The Illinois Supreme Court made similar findings in the *Belmar Drive-In* case in 1966.⁶¹ Plaintiff theatre operator's claim against the Toll Highway Commission and concessionaires at a tollroad "oasis" service center was held to state no sufficient cause of action for nuisance from artificial lights interfering with the movie screen. For successful litigation, "the act, structure or device complained about must cause some injury, real and not fanciful, and must work some material annoyance, inconvenience or other injury to the person or property of another."⁶² Thus, the light cases show a desire of the courts to follow the principle of nuisance set out previously. Parties are protected against unreasonable interference with enjoyment of their property, but only so long as the use of their property is not unreasonably sensitive to outside vexations.

While these cases have involved light *transmitted* by the defendant, there have been nuisance suits attacking construction on defendant's property which acts to deprive the plaintiff of natural light.⁶³ In *Fontainebleau Hotel Corporation v. Forty-Five Twenty-Five, Inc.*,⁶⁴ a

57. See, e.g., *Ampitheaters, Inc. v. Portland Meadows*, 184 Ore. 336, 198 P.2d 847 (1948); *Sheridan Drive-In Theatre, Inc. v. State*, 384 P.2d 597 (Wyo. 1963).

58. 184 Ore. 336, 198 P.2d 847 (1948).

59. *Id.* at 362, 198 P.2d at 858.

60. *Id.* at 353, 198 P.2d at 854.

61. *Belmar Drive-In Theatre Co. v. Illinois State Toll Highway Comm'n*, 34 Ill. 2d 544, 216 N.E.2d 788 (1966).

62. *Id.* at 547, 216 N.E.2d at 790-91.

63. See *Irwin v. Dixion*, 50 U.S. (9 How.) 10 (1850).

64. 114 So.2d 357 (Fla. 1959). In *City of Miami Beach v. State ex rel.*

case discussed by the Illinois court in *Sears*, the owner of the Eden Roc Hotel brought action to enjoin the continuing construction of a fourteen-story addition to defendant's building. The addition would cause plaintiff's tourist swimming pool and sunbathing area to be shaded during afternoon hours.

The injunction granted by the trial court was reversed, the appellate court noting that in the absence of an American decision granting landowners a legal right to free light and air flow across his neighbor's adjoining land, the court would be constrained to adhere to the rule that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state⁶⁵

In essence, we are again faced with the proposition that not every injury will result in recovery because no legal right is injured—*damnum absque injuria*.

The right to "ancient," or natural lights has been declared to have been repudiated today.⁶⁶ The *Musumeci* decision, which related to an action to enjoin a spite fence on the ground that the complainant was deprived of access to the natural flow of light and air, recognized that the maxim *sic utere tuo ut alienum non laedas* was "sound and salutary" in the ultimate, expeditious furtherance of justice but warned that it "should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction."⁶⁷

As a case of first instance, the plaintiffs in *Sears*⁶⁸ made use of the analogies to freedom from interference from light and to public interest in the interference-free use of airspace to build the foundation for their asserted claim.⁶⁹ Whereas, *arguendo*, the 1,450 foot Sears Tower would

Fontainebleau Hotel Corp., 108 So.2d 614 (Fla. Dist. Ct. App. 1959), *cert. denied*, 111 So.2d 437 (Fla. 1959) ordinance limiting height of buildings along ocean held invalid, mandamus to compel building permit granted.

65. 114 So.2d at 359.

66. *Id.* See also *Musumeci v. Leonardo*, 77 R.I. 255, 75 A.2d 175 (1950).

67. 77 R.I. at 260, 75 A.2d at 177.

68. 52 Ill.2d 301, 287 N.E.2d 677 (1972).

69. Note that plaintiff Hoogasian also made an analogy between public right to freedom from broadcast interference via the airways and public right to freedom from interference of navigable waters, a public nuisance in Illinois. ILL. REV. STAT. ch. 100½, § 26 (1971). See *Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1851); *But see David M. Swain & Son v. Chicago, B. & Q. R.*, 252 Ill. 622, 97 N.E. 247 (1911).

“transmit” distorted signals in the sense that it would convey them by reflection, the court found that a more homogeneous definition of transmission would have to be applied to this fact situation. As a result, noting that defendant’s property was not the direct “source” of the transmission, but merely the property over which signals initiated by third parties travelled, the court concluded that the artificial light cases were inapplicable to these facts.⁷⁰

No attempt was made in the court’s discussion of the *Belmar Drive-In* case to compare the delicate nature of television reception to the hypersensitive use doctrine of nuisance. Nor did it specifically declare the interference *damnum absque injuria*. It should also be noted that the light cases dealt with private nuisances, while the *Sears* case was based upon a public nuisance theory, but the court did not indicate that this was a deciding factor.

Instead, the Illinois court preferred to rely upon the rationale in the *Fontainebleau Hotel*⁷¹ case. It found that the interference *with* light, rather than interference *by* light, was more analogous to distortion of television broadcast reception. The court adopted the rationale against relief arguing that “otherwise one party would have the right to enjoin his neighbor from building a home or any other structure on adjacent property if such building interfered with television reception.”⁷² The problem to which the court addressed itself is one with some measure of gravity. Probably every large metropolitan area has reception problems where adjacent buildings are much taller than reception antennae. Indeed, one could anticipate innumerable private actions between residents of five-story buildings and owners of nearby twenty-story structures. However, these would be private rather than public nuisance actions. But the courts could have declared the *Sears Tower* to be a *public nuisance* based upon the unique fact that this building is taller than all others in Chicago and that injunctive relief would be remedial for at least 105,000 citizens,⁷³ if not more.

Certainly, in private suits relying upon a *Sears* public nuisance argument, keen application of the special damage rule would circumvent the possibility of multiple litigation between neighbors. Plaintiffs would fail to show either that special damage was suffered or, indeed, even that the commun-

70. 52 Ill.2d at 304, 287 N.E.2d at 678.

71. 114 So.2d 357 (Fla. Dist. Ct. App. 1959).

72. 52 Ill.2d at 305, 287 N.E.2d at 679.

73. State’s Attorney Hoogasian alleged that some 105,000 Lake County residents would suffer impaired reception.

ity was injured thereby making the alleged nuisance public. Had the *Sears* court found an actionable public nuisance, the resulting litigation would have attacked other Chicago buildings which dwarf television broadcast antennae. For instance, the Hancock Center, which will have signals emitted from its broadcast facilities distorted by the taller Sears Tower, is itself taller than the broadcast towers on Marina City, the Board of Trade Building and others.

The case most nearly on point which was cited by the court in *Sears* is *Richmond Brothers, Inc. v. Hagemann*.⁷⁴ Plaintiff operated a radio broadcasting station with a transmitting tower located in a marsh adjacent to the land on which the defendants planned to build a five-story building. The plaintiff sought a bill to enjoin the creation of a private nuisance by erection of a structure adjacent to plaintiff's tower. The structure would reflect and distort radio signals to an unascertainable degree.⁷⁵ Finding no contrary statutory provisions, the court held that the broadcast station had not used its property in such a manner as to condemn adjoining premises to a servitude, and allowed the construction to proceed.

The lower court in *Richmond* had ruled in the words of the reviewing court, that the broadcast station had "no express or implied easement or easement by prescription and no right by virtue of its FCC license to interfere with the use to which the adjoining owners may put their land."⁷⁶ Since neither the easement nor the federal right claims had been presented for review, the reviewing court made no further consideration of those issues.

Making use of the *Richmond* decision, the *Sears* court contended that "[t]he responsibility . . . for inadequate television reception in certain areas rests more with the broadcasters' choice of location than with the height of defendant's building."⁷⁷ So long as the actual transmission came totally from independent third persons, the defendant's use of his property could not be restricted.⁷⁸ Further, the Illinois court agreed with the *Richmond* decision and general rule that buildings may be erected to any

74. — Mass. —, 268 N.E.2d 680 (1971).

75. Plaintiff also contended defendant would maintain a private nuisance by filling part and diverting part of a creek which the plaintiff contended was a "navigable stream" and would diminish the electrical conductivity of the land. Finding the stream to be without water at low tide, the lower court held that plaintiff had no riparian rights to be injured. This decision was affirmed. *Id.* at —, 268 N.E.2d at 681-82.

76. *Id.* at —, 268 N.E.2d at 682.

77. 52 Ill.2d at 305, 287 N.E.2d at 679.

78. *Id.* at 305-06, 287 N.E.2d at 679.

height in the absence of reasonable police regulations enacted to protect the public health, safety and welfare.⁷⁹ Sears had complied with all such regulations under municipal and state provisions.

Richmond allowed no recovery for the broadcaster. What about the receiver? On plaintiff's argument regarding the use of airspace and the public interest involved in keeping it free from interference, the *Sears* court admitted that *United States v. Causby*⁸⁰ stood for the proposition that a property owner had no claim to unlimited use of airspace. However, the court reasserted the *Causby* principle that, where there is no interference with aircraft, "[t]he landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land."⁸¹ By complying with local zoning and federal aviation regulations, Sears' proposed occupation of 1,450 feet above the ground was entirely lawful and within the public interest.

There being no public nuisance in Sears' action, where might a remedy lie? From the premise that broadcasting is in the public interest, consideration may be given to the federal government and its jurisdiction over communications. The Communications Act of 1934⁸² provides that the Federal Communications Commission (FCC) shall be entrusted with a duty of safeguarding the public interest in communications.⁸³ While this duty has been recognized by the courts,⁸⁴ the Supreme Court has suggested that the only public interest with which the FCC is charged is that involving the granting of licenses to broadcasters.⁸⁵

Whereas licenses are to be granted with the public interest in mind and whereas the FCC is empowered to "make such regulations not inconsistent

79. See *City of Nokomis v. Sullivan*, 14 Ill.2d 417, 153 N.E.2d 48 (1958); *Atty. Gen'l. v. Williams*, 174 Mass. 476, 55 N.E. 77 (1899).

80. 328 U.S. 256 (1946).

81. 52 Ill.2d at 306, 287 N.E.2d at 679.

82. 47 U.S.C. §§ 151 *et seq.* (1970). Designed to regulate radio and telegraph, the Act has been applied to control of television transmission. *Radio Corp. of America v. United States*, 341 U.S. 412 (1951), *aff'g* 95 F. Supp. 660 (N.D. Ill. 1950).

83. Communications Act of 1934, 47 U.S.C. §§ 151, 309(a) (1970). See K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 4.03 (1958).

84. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942). See also *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *Voliva v. WCBD, Inc.*, 313 Ill. App. 177, 39 N.E.2d 685 (1942).

85. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 131-32 (1945). *But see Deep South Broadcasting Co. v. FCC*, 278 F.2d 264, 267 (D.C. Cir. 1960) suggesting that the FCC has statutory authority [47 U.S.C. § 303(n)] to inquire into the tower structure of a licensee to determine whether it "will be safe and will provide uninterrupted service [which] is a clearly relevant public interest consideration." *Id.* at 267.

with law as it may deem necessary to prevent interference between stations,"⁸⁶ yet, indeed, FCC regulations specify that "television broadcast stations are not protected from *any* interference . . . caused by the grant of a new station. . . ."⁸⁷ By providing for regulations in the public interest, the "Communications Act of 1934 did not create new private rights."⁸⁸ As a result, private actions do not accrue to candidates for public office demanding equal broadcast time⁸⁹ or to the staff and listeners of a campus radio station closed by university officials.⁹⁰ Finally, decisions also provide that there is no actionable trespass in the transmission of signals and impulses.⁹¹ So, public interest considered or not, the Communications Act is hardly a source of remedy for actions by transmitters or receivers of ultimately distorted signals.

Provided that appropriate zoning ordinances and aviation regulations⁹² are followed, *Sears* will stand for the rule that building construction may not be enjoined upon an allegation sounding in nuisance that television signal distortion will ensue. Nor does it seem that a court of equity will use its power to grant mandatory injunctions ordering buildings razed or reconstructed as in *Welton*,⁹³ in the absence of legislative action making construction of buildings which will reflect broadcast signals an abatable public nuisance. In preparing such legislation, television viewers as a community should be protected, while private application to single household or localized neighborhood interference should be discouraged.

What other relief might the viewer seek if litigation or legislation will not solve the problem? The continued growth of community antenna television systems (CATV)⁹⁴—commonly known as cable TV—may be an answer. Designed to bring clear reception by cable to areas where reception was nonexistent or difficult, CATV was introduced in 1949⁹⁵

86. Communications Act of 1934, 47 U.S.C. § 303(f) (1970). See also *Indiana Broadcasting Corp. v. FCC*, 407 F.2d 681 (D.C. Cir. 1968) where public interest is equated with reasonable television service.

87. 47 C.F.R. § 73.612(a) (1972) [emphasis added]. See also *Pikes Peak Broadcasting Co. v. FCC*, 422 F.2d 671 (D.C. Cir. 1969).

88. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 14 (1942).

89. *Daly v. Columbia Broadcasting System, Inc.*, 309 F.2d 83, 85 (7th Cir. 1962).

90. *Post v. Payton*, 323 F. Supp. 799 (E.D.N.Y. 1971).

91. See, e.g., *Brannan v. American Tel. & Tel. Co.*, 210 Tenn. 697, 362 S.W.2d 236 (1962).

92. See, e.g., FAA Reg., 14 C.F.R. §§ 77.13(a)(1), 77.17(c), 77.71 (1973).

93. *Welton v. 40 E. Oak St. Bldg. Corp.*, 70 F.2d 377 (7th Cir. 1934).

94. See generally 86 C.J.S. *Tels. & Tels., Radio & Television* § 316.1 (Supp. 1973).

95. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

and has also been subjected to FCC regulation.⁹⁶ On the state level, Illinois grants the power of control over CATV by statute to the corporate authority of individual cities and villages.⁹⁷ In retrospect, this apparent remedy has not escaped being the subject of litigation itself concerning the validity of regulatory ordinances,⁹⁸ copyright,⁹⁹ antitrust and interference with contract.¹⁰⁰ One result of that litigation is further foundation for the idea that "there is no property right in the television signal. . . ."¹⁰¹

CONCLUSION

It has been said "that the common law is not a static but a dynamic and growing thing"¹⁰² and that, "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."¹⁰³ There has not yet been enough growth to protect the television viewer, nor enough flexibility. There have been those instances where society has surpassed the expectations of its legal forefathers as to cry out for growth in the law. The reply has not uncommonly been a proclivity toward gradual action.

96. See *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *Valley Vision, Inc. v. FCC*, 399 F.2d 511 (9th Cir. 1968).

97. ILL. REV. STAT. ch. 24, § 11-42-11 (1971). Also note municipal authority over streets and public ways, ILL. REV. STAT. ch. 24, §§ 11-80-2, -3, -8, -11 (1971).

98. See *Illinois Broadcasting Co. v. City of Decatur*, 96 Ill.App.2d 454, 238 N.E.2d 261 (1968); *Community Antenna v. City of Wichita*, 205 Kan. 537, 471 P.2d 360 (1970).

99. *Intermountain Broadcasting & Television Corp. v. Idaho Microwave, Inc.*, 196 F. Supp. 315 (D. Idaho 1961). See also *United Artists Television, Inc. v. Fortnightly Corp.*, 377 F.2d 872 (2d Cir. 1967), *rev'd*, 392 U.S. 390 (1968).

100. *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965); *Herald Publishing Co. v. Florida Antennavision, Inc.*, 173 So. 2d 469 (Fla. 1965). See generally W. PROSSER, *LAW OF TORTS* § 129 (4th ed. 1971).

101. *Dispatch, Inc. v. City of Erie*, 249 F. Supp. 267, 272 (W.D. Pa. 1965), *vacated*, 364 F.2d 539 (3d Cir. 1966), *on remand*, *Lamb Enterprises, Inc. v. City of Erie*, 286 F. Supp. 865 (W.D. Pa. 1967), *aff'd*, 396 F.2d 752 (3d Cir. 1968). See also *Intermountain Electronics, Inc. v. Tintic School Dist.*, 14 Utah 2d 86, 377 P.2d 783 (1963) where the Utah court noted that "[t]he electro-magnetic waves existing in the space above the earth which carry . . . TV signals are of such a nature that they obviously cannot be reduced to physical possession like real or personal property, or be put to an exclusive beneficial use like water The right to use this signal-carrying capacity cannot properly be regarded as so possessed . . . by any one person to the exclusion of others, unless it is affirmatively so prescribed or regulated by law." *Id.* at 88, 377 P.2d at 785. *But see* *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (9th Cir. 1964), *cert. denied*, 379 U.S. 989 (1965).

102. *Barnes Coal Corp. v. Retail Coal Merchants Ass'n*, 128 F.2d 645, 648 (4th Cir. 1942).

103. *Hurtado v. California*, 110 U.S. 516, 530 (1884).

Today, the environmental boom is an excellent example that, as often happens, change has arrived at a leisurely gait. The smoke or dirty water which was once an unactionable nuisance incident to life in the city is now the subject of pollution legislation and successful litigation sounding in the public interest.¹⁰⁴ With the advent of the megalopolis in certain areas of this country, we can no longer clearly distinguish between city, suburb and what was not long ago the rural community. Some city environmental discomforts may be allowed to exist because of the public interest of the city itself, but what public interest is served for the rural property owner whose atmosphere and rivers are loaded with city waste that did not stay in the city where people must accept it? Or, for that matter, what public interest is served when a city building distorts reception of newsworthy, educational and entertainment matter in the homes of persons living upwards of fifty miles from the city?

We may only speculate as to the day when owners of spiraling buildings will not be allowed to build above broadcast antennae or will muster all available technology to perfectly contrive nonreflective building skins. Until that day, remedy lies in relatively expensive CATV, taller antennae, promulgation of other available entertainment and news sources or concession that, without an actionable legal right to freedom from the annoyance of reception interference, the ghosts on your screen will have to become part of a new American public incredulity.

Thomas K. Mc Queen

104. See generally Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).