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Nuisance - Injunction - Enjoining Operation of Used Car Lot

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quent danger.[11] The reasoning seems to be based on the fear of establishing an unjustified means for evasion of liability.[12]

Several courts have allowed recovery on the theory that the beneficiary derives his rights through contract rather than from the estate of the insured.[13] Courts also say that when the insured purchases his policy, the beneficiary obtains a vested interest which should not later be divested or jeopardized by any wrongful act of the insured, not excluded from the policy, for which the beneficiary was not responsible,[14] unless it is positively shown that the policy was obtained in contemplation of the crime.[15]

It seems that the contractual right of the beneficiary presents the best argument in favor of recovery. The insured usually does not purchase the policy for his own benefit, but rather for that of a third party; and since ample consideration is paid for the indemnity, the third party should not be deprived of his rights under the contract merely because one of the original parties has died or been injured as the result of an unlawful act. The court in the instant case apparently avoided the necessity of adopting one of the theories set out above by reasoning that the accident occured before the actual commission of the felony.

JOHN M. RILEY.

NUISANCE — INJUNCTION — ENJOINING OPERATION OF USED CAR LOT.—Plaintiffs, home owners in a zoned residential district were granted a perpetual injunction prohibiting the defendants operation of a "used car lot" which was located on an adjacent unincorporated area and separated from the zoned district by a federal highway. The plaintiffs alleged that the defendant's business diminished the value of their property, created excessive noise and illumination, and was unsightly. In affirming the decree of the lower court the Supreme Court of Appeals *held* that the evidence was sufficient to justify a finding that the used car lot constituted a nuisance in fact. *Martin v. Williams,* 93 S.E.2d 835 (W. Va. 1956).

A person may use his property as he sees fit so long as he does not invade the rights of others, based upon the ordinary standards of life and the conceptions of reasonable men.[1] When the use of property is unreasonable, unlawful, or when it unwarrantably impairs the rights of another it becomes a nuisance,[2] depending upon the particular facts of each case. A common conception of a nuisance is that it is anything which results in the disturbance or annoyance of one in lawful use, possession, or enjoyment of his property or which renders its ordinary use or occupation physically uncomfortable.[3] Nuisances have been

11. Domico v. Metropolitan Life Ins. Co., 191 Minn. 215, 253 N.W. 538 (1934); Home State Life Ins. Co. v. Russell, 175 Okla. 492, 53 P.2d 562 (1936).

12. Zurich Gen. Acc. & Liab. Ins. Co. v. Flukinger, 33 F.2d 853 (4th Cir. 1929); Sanders v. Metropolitan Life Ins. Co., 104 Utah 75, 138 P.2d 239, 243 (1943) (dictum).

13. Home State Life Ins. Co. v. Russell, 175 Okla. 492 53 P.2d 562 (1936); Collins v. Metropolitan Life Ins. Co., 232 Ill. 37, 83 N.E. 542, 544 (1907) (dictum).

14. Mutual Life Ins. Co. v. Guller, 68 Ind. App. 544, 119 N.E. 173 (1918); Payne v. Louisiana Industrial Life Ins. Co., 33 So.2d 444 (La. 1948).

15. Home State Life Ins. Co. v. Russell, 175 Okla. 492, 53 P.2d 562 (1936).

1. Wilson v. Evans Hotel Co., 188 Ga. 498, 4 S.E.2d 155 (1939).

2. Kramer v. Pittsburgh Coal Co., 341 Pa. 379, 19 A.2d 362 (1941); *accord,* City of Temple v. Mitchell, 180 S.W.2d 959, 962 (Tex. Civ. App. 1944) (the invasion must be substantial).

3. Jones v. Trawick, 75 So.2d 785 (Fla. 1954).

classified as nuisance per se,[4] in fact,[5] and are also classified as being public[6] or private.[7]

No one has a legal right to absolute quiet, but can only insist upon quietness to a degree which is consistent with the prevailing standard of the surrounding locality.[8] It is to be noted that recurring noise may constitute a nuisance at night, but not during the day.[9] Thus courts have enjoined the manufacture of culverts,[10] the loading of milk wagons and the running of an ice crusher during the customary sleeping hours.[11] A court will not abate a nuisance on the ground of noise alone unless it causes a material and physical discomfort to a person of ordinary sensibilities.[12] This same reasoning is applicable to objections regarding excessive illumination,[13] but mere aesthetic considerations alone will not ordinarly give rise to an actionable nuisance.[14] The lawful use of one's property which causes adjoining property to depreciate in value is not ordinarily grounds for an injunction.[15]

Generally courts of equity are reluctant to bar the operation of a lawful business and will look for a remedy other than an injunction.[16] However, such lawful businesses as a garage[17] and an ice plant located in a residential district were held to constitute a nuisance under certain conditions which are enjoinable.[18]

It seems apparent that the granting of a perpetual injunction in the instant case is not in harmony with previous West Virginia decisions which have held

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4. Simpson v. DuPont Powder Co., 143 Ga. 465, 85 S.E. 344 (1915) ("nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances regardless of locality or surroundings".); *cf.* Beckwith v. Town of Stratford, 129 Conn. 506, 29 A.2d 775, 776 (1943) (Contributory negligence is no defense).

5. New Orleans v. Lenfant, 126 La. 455, 52 So. 575 (1910) ("Nuisances in fact are those which become nuisances by reason of circumstances".); High Penn Oil Co., 238 N. C. 185, 77 S.E.2d 682, 687 (1953), (dictum), (". . . a nuisance by reason of locality or by reason of the way they are constructed, maintained, or operated".).

6. Dean v. State, 151 Ga. 371, 106 S.E. 792 (1921) ("A public nuisance is one which damages all persons who come within the sphere of its operation though it may vary in its effect on individuals".); Commonwealth v. South Covington and D. St. Ry., 181 Ky. 459, 205 S.W. 581 (1918).

7. Black, Law Dictionary 1215 (4th ed. 1951) (A private nuisance is any wrongful act which destroys or deteriorates the property of a few persons or an individual or interferes with their lawful use or enjoyment thereof). But see Young v. Brown, 212 S. C. 156, 46 S.E.2d 673, 679 (1948) (There is a class of nuisances which may properly be denominated mixed nuisances in that while they injure the public at large they cause special injury to private individuals).

8. Collins v. Wayne Iron Works, 227 Pa. 326, 76 Atl. 24 (1910); *accord,* Nannum v. Gruber, 346 Pa. 417, 31 A.2d 99 (1943).

9. 82 U. Pa. L. Rev. 572 (1934).

10. Wheat Culvert Co. v. Jenkins, 246 Ky. 319, 55 S.W.2d 4 (1932).

11. Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 200 N.W. 350 (1924) (Decree modified in other respects.).

12. Schneider v. Fromm Laboratories, 262 Wis. 21, 53 N.W.2d 737, 740 (1952) (dictum).

13. See Amphitheatres Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948); See also Village of Wadena v. Folkestad, 194 Minn. 146, 260 N.W. 221 (1935) (concerning both light and noise.)

14. Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (1934) (claim of unsightliness is demurrable.); Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951) (dictum).

15. Swetland v. Curtiss Airports Corp., 41 F.2d 929, 933 (8th Cir. 1930) (dictum); Dawson v. Laufersweiler, 241 Iowa 850, 43 N.W.2d 726, 732 (1950) (dictum). *But see* Conway v. Gampel, 235 Mich. 511, 209 N.W. 562 (1926) (Evidence of the depreciation of the value of the property may be considered with respect to the fact of nuisance although there may be an adequate relief at law).

16. Ensign v. Walls, 323 Mich. 49, 34 N.W.2d 549, 555 (1948) (dictum) (Court should regulate future operations to eliminate claimed objections).

17. Ballstadt v. Pagel, 202 Wis. 484, 232 N.W. 862 (1930).

18. Brickley v. Morgan Util. Co., 173 Ark. 1038, 294 S.W. 38 (1927).

that a lawful business does not constitute a nuisance per se.[19] A business not a nuisance per se should not be perpetually enjoined from operating, but only from operating as a nuisance in fact. If the facts can be altered the businessman should be allowed to change and remove those elements which would make it a nuisance in fact under an interlocutory decree.

RONALD SPLITT.

REAL PROPERTY — JOINT TENANCY — CONTRACT FOR SALE BY ALL JOINT TENANTS SEVERS JOINT TENANCY. — Husband and wife contracted to sell land which they held in joint tenancy without specifying how the proceeds were to be held. While the agreement was still executory the husband died intestate, whereupon his estate claimed one-half the proceeds due on the contract. In an action in equity seeking a declaration of rights as to the proceeds the Supreme Court affirmed the decision of the lower court and *held* that a contract for deed executed by both joint tenants who had not specified how the proceeds were to be held, effected a severance of the joint tenancy. The doctrine of equitable conversion applied to convert the estate into personalty which was held by the husband and wife as tenants in common with no right of survivorship. *In Re Baker's Estate,* 78 N.W.2d 863 (Iowa 1956).

In Iowa as in the majority of jurisdictions, joint tenancies are disfavored.[1] Hence a conveyance to two or more parties, in the absence of expressed intent to create a joint tenancy, results in the creation of a tenancy in common.[2] The existence of the joint tenancy depends on the presence of the four unities of time, title, interest, and possession.[3] If any of the unities are destroyed, during the lifetime of the joint tenants the estate is severed, thus extinguishing the right of survivorship.[4]

The court in the instant case reasoned that a conveyance by one joint tenant to a third party effects a severance of the joint tenancy. They then concluded that as a necessary corollary the joint tenancy is severed where both joint tenants enter into a contract to sell all their interest, even though they retain legal title,[5] although it has been held in another jurisdiction that the execution of a contract for the sale of land by all joint tenants, does not of itself effect a severence.[6]

It is arguable that if equitable conversion is applicable to the situation in the instant case it does not effect a severance of the joint tenancy, since it does not

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19. State *ex rel.* Ammerman v. City of Philippi, 136 W. Va. 120, 65 S.E.2d 713 (1951) (tire recapping); Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 191 S.E. 368, (1937) (auto wrecking establishment); Chambers v. Cramer, 49 W. Va. 395, 38 S.E. 691 (1901) (blacksmith shop); The Central National Bank v. City of Buckhannon, 118 W. Va. 26, 188 S.E. 661, 662 (1936) (dictum) (service station).

1. Switzer v. Pratt, 257 Iowa 788, 23 N.W.2d 837 (1946); Shipley v. Shipley, 324 Ill. 560, 155 N.E. 334 (1927); De Forge v. Patrick, 162 Neb. 568, 76 N.W.2d 733, 736 (1956) (dictum).

2. Iowa Code § 557.15 (1950); N. D. Rev. Code § 47-0206 (1943).

3. Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444, 447 (1950) (dictum). *But see* Conlee v. Conlee, 222 Iowa 561, 269 N.W. 259 (1936) (Wherein Iowa apparently repudiates the "unity test" in favor of an "intent of the parties test.").

4. Gau v. Hyland, 230 Minn. 235, 41 N.W.2d 444, 447 (1950) (dictum).

5. See *In re* Sprague's Estate, 44 Iowa 540, 57 N.W.2d 212 (1953) (Which is apparently distinguishable from the instant case in that there was a will involved and it was stipulated that the proceeds were held as tenants in common—here there was no will nor any other provision for the proceeds.)

6. Chartier v. Simon, 250 Wis. 642, 27 N.W. 752 (1947). *Contra,* Buford v. Dahlke, 158 Neb. 39, 62 N.W.2d 252 (1954).