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Right of Property Owners to Enjoin a Mixed Nuisance - Bishop Processing Co. v. Davis

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Comments and Casenotes

Right Of Property Owners To Enjoin A Mixed Nuisance

Bishop Processing Co. v. Davis[1]

Defendant-appellant operates a plant in which it converts such materials as chicken feathers, offal, viscera, beef bones, etc., into fertilizer and poultry feed. The plant is located in a rural district, with three villages situated within a mile of the plant. Odors caused by the processing of these materials permeated the atmosphere surrounding the property of the plaintiffs-appellees, neighboring landowners situated at distances ranging from one-half to one mile from the site of the plant. So noxious were the odors that they produced nausea and sickness, preventing the enjoyment by plaintiffs of their properties and lessening the market value thereof. Honest efforts had been made by the defendant to control the escape of these odors, but all were unsuccessful, at least to within a very few days of the trial.

Suit was brought to enjoin the defendant from maintaining and operating its plant on the basis that the same constituted a nuisance. A decree was granted permanently enjoining defendant from so using its property as to result in the escape of offensive gases and odors which would affect plaintiffs in the rightful use and enjoyment of their properties. The case was affirmed on appeal.

The court found that whether defendant's conduct constituted a public or a private nuisance, plaintiffs, being persons of ordinary tastes, sensibilities and habits,[2] had shown sufficient discomfort to themselves, and injury to their dwellings, materially diminishing their value,[3] to entitle them to relief.

The injunction was issued on the ground that material injury had been done to the plaintiffs' property, which lessened its value and rendered the enjoyment of it less comfortable. This view of the law is not new to Maryland

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[1] 213 Md. 465, 132 A. 2d 445 (1957).
[2] *Ibid*, 474.
[3] *Ibid.*

cases,[4] and a very good statement of it is found in the recent case of *Feldstein v. Kammauf*,[5] where it is said:

> " 'The rule which must control is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities, tastes, and habits, such as in view of the circumstances of the case is unreasonable and in derogation of the rights of the party . . . subject to the qualification that it is not every inconvenience that will call forth the restraining power of a court. The injury must be of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it'."

Aside from the injury to property it is also important, in determining whether or not a given set of facts constitutes such a nuisance as will be restrained, to bear in mind the locality of the acts complained of. An act which takes place in a densely populated industrial city may not constitute a nuisance whereas the same act taking place in a rural district may be of an enjoinable nature.[6] "It must be borne in mind, . . . that living in a city entails the endurance of certain inconveniences and discomforts, and those who have established their residences there cannot expect to have the quiet and peace of the countryside."[7]

Nuisances are either public or private depending upon the interests invaded; a public nuisance is an invasion of rights of the public in general, while a private nuisance is an invasion of individual rights.[8] A nuisance which is public, but which at the same time injures the property of private individuals, has been termed a mixed nuisance,

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[4] Feldstein v. Kammauf, 209 Md. 479, 121 A. 2d 716 (1956), noted 17 Md. L. Rev. 345 (1957); N. C. Ry. Co. v. Oldenburg & Kelley, 122 Md. 236, 89 A. 601 (1914); Washington Cleaners v. Albrecht, 157 Md. 389, 146 A. 233 (1929); Swimming Club v. Albert, 173 Md. 641, 197 A. 146 (1938); Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A. 2d 656 (1948); Fox v. Ewers, 195 Md. 650, 75 A. 2d 357 (1950) and Dittman v. Repp, 50 Md. 516 (1879).

[5] *Ibid*, 484, quoting from Swimming Club v. Albert.

[6] Washington Cleaners v. Albrecht, *supra*, n. 4, 395.

[7] Green v. Garrett, 192 Md. 52, 64, 63 A. 2d 326 (1949), where the Court refused to enjoin use of municipal stadium for professional baseball, but did order correction of particular practices. See also Washington Cleaners v. Albrecht, *ibid;* Adams v. Michael, 38 Md. 123 (1873); Horner v. State, 49 Md. 277 (1878). However, once the act complained of is determined to be a nuisance, its location cannot prevent the bringing of an action; see Euler v. Sullivan, 75 Md. 616, 23 A. 845 (1892); Susquehanna Fertz. Co. v. Malone, 73 Md. 268, 20 A. 900 (1890).

[8] PROSSER, TORTS (2nd ed. 1955), §70, 391.

that is, it is both public and private in character.[9] Although the principal case is the first in Maryland in which a nuisance has actually been termed "mixed", from very early times an individual could maintain an action to abate a public nuisance which caused substantial injury to his property.[10] It would seem that calling such a nuisance "mixed" is just another way of saying that an individual may have his action to abate a public nuisance from which he has sustained special damage,[11] or that *private* interests in the affected community have been materially damaged.[12] A discussion of some Maryland cases will help to illustrate the development of the law on this subject.

In the case of *Adams v. Michael,*[13] where an injunction was sought to prevent the erection of a factory which would allegedly pollute the air, it was recognized that the owner of a dwelling house has the right to pure and wholesome air — "as pure and wholesome as their local situation can reasonably supply".

A much later case, *Block v. Baltimore,*[14] dealt with what the court termed a nuisance partly public and partly private. It arose out of the transportation of garbage by Baltimore City to a reduction plant in Anne Arundel County where it was processed. Forty-four neighboring tenants and landowers living from 200 yards to several miles from the plant brought suit for an injunction complaining of, *inter alia,* odors so bad "that it is impossible for any person possessed of ordinary sensibilities, tastes, habits and refinement to live in a radius of three to five miles of the reduction company's plant without actual physical discomfort and inconvenience".[15] The bill was dismissed with prejudice for being multifarious, but on appeal it was held that the dismissal should have been without prejudice since the plaintiffs were entitled to relief from, among other things, the dissemination of disagreeable odors, gases and stenches:

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[9] 66 C. J. S. 730, Nuisances, §2; *supra*, n. 1, 472.

[10] Hamilton v. Whitridge, 11 Md. 128, 146 (1857); Harrison v. Sterett, 4 H. & McH. 540 (Md. 1774), in a suit for damages.

[11] See Euler v. Sullivan, *supra*, n. 7; Block v. Baltimore, 149 Md. 39, 129 A. 887 (1925); Washington Cleaners v. Albrecht, *supra*, n. 4; Cityco Realty Co. v. Annapolis, 159 Md. 148, 150 A. 273 (1930).

[12] *Supra*, n. 1, 474. For a case involving a public nuisance where the plaintiff failed to show damages different in kind from that suffered by the general public, see Smedberg v. Moxie Dam Co., 148 Me. 302, 92 A. 2d 606 (1952), where defendant's activities harmed fishing in a great pond.

[13] 38 Md. 123, 126 (1873).

[14] *Supra*, n. 11.

[15] *Ibid*, 47.

> "The mere fact that a nuisance injures one hundred instead of one, does not prevent it from being a private nuisance, . . . but the test is whether the damage of which the appellants complain is different in kind from that suffered by the general public, and in our opinion it cannot be said that conditions which prevent individuals from eating, sleeping or living in comfort in their own homes, and which substantially lessen the value of their properties, do not affect them differently from the general public."[16]

Very similar to the noxious vapors aspect of the preceding case, was the case of *Washington Cleaners v. Albrecht*,[17] where the Court of Appeals affirmed a decree enjoining the appellant from using gasoline or varnalene in its business in such quantity as to be deleterious to the health of the neighborhood. The suit was brought by residents of a neighborhood into which the appellant had moved its cleaning establishment. The allegations complained of fumes which caused severe headaches, affected the taste of food and destroyed property value.

It seems probable that in any of the foregoing cases it would have been appropriate for a public officer to proceed in the interest of the whole community. In *Horner v. State*[18] the appellant had been convicted of maintaining a *public* nuisance on facts nearly identical with those of the principal case. To appellant's argument that the indictment was insufficient for failure to aver that the offending installation was near "a *public* road or highway", the court replied, among other things, "[a]nd it fully appears from the precedents, that the allegation that the nuisance existed to the dwellings of *divers* citizens or inhabitants, is sufficient."[19]

An activity, then, which is inappropriate in view of the character of the neighborhood, and which threatens the health or comfort of the community may be enjoined at the instance of the proper public officials. If in addition the activity causes special damage to individual members of the community, relief may also be sought by the private interests thus affected.

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[16] *Ibid*, 55, 56. See also Hamilton v. Whitridge, *supra*, n. 10; Woodyear v. Schaefer, 57 Md. 1, 10 (1881).

[17] 157 Md. 389, 146 A. 233 (1929).

[18] 49 Md. 277 (1878). This case contains, *circa*, p. 284, an excellent discussion of what constitutes a public nuisance.

[19] *Ibid*, 287.