

2-1-1949

## Torts -- Nuisance -- Casting of Light on Adjoining Land as Nuisance

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### Recommended Citation

*Torts -- Nuisance -- Casting of Light on Adjoining Land as Nuisance*, 3 U. Miami L. Rev. 316 (1949)

Available at: <http://repository.law.miami.edu/umlr/vol3/iss2/16>

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despite it. That which Connecticut regards as active continuing negligence<sup>10</sup> (active negligent acts subsequent to the contributory negligence which caused the perilous situation) seems to be in reality but a continuation of that original contributory negligence rather than what is meant by continuing negligence.

### TORTS—NUISANCE—CASTING OF LIGHT ON ADJOINING LAND AS NUISANCE

Plaintiff, operator of a drive-in, outdoor, motion picture theater, brought a suit in trespass<sup>1</sup> and nuisance against a race track operator, alleging that the light cast from defendant's race track invaded his property and interfered with the reasonable use of his land in its natural condition, i.e., darkness. Defendant claimed that a reasonable use of his land caused injury to the plaintiff only because of the delicate use to which the plaintiff had put his land. The defendant had a directed verdict in the trial court. *Held*, on appeal, judgment affirmed. Since plaintiff's use of his land was of a peculiarly delicate and sensitive nature, there was neither trespass nor nuisance. *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847 (Ore. 1948).

There are few cases discussing this type of interference when it results from a clash of commercial interests.<sup>2</sup> Most of the precedents involve the conflict between a commercial interest and the enjoyment of residential property.<sup>3</sup> In the instant case, the court drew a distinction on the basis of whether the property was being put to a residential or a commercial use.<sup>4</sup> The real distinction, it would seem, should be the effect on the user. Assuming that the adjoining landowner is making a reasonable use of his land, a residential user "highly susceptible" to smoke,<sup>5</sup> sounds<sup>6</sup> or similar interference is analogous to commercial user engaged in a particular enterprise which may demand

10. *Ibid.*

1. 39 Am. Jur. 282: "Thus, where there is no actual physical invasion of the plaintiff's property, the cause of action is for nuisance rather than trespass."

2. *The Shelburne, Inc. v. Crossan*, 95 N.J. Eq. 188, 122 Atl. 749 (1923); *Wallace & Tiernan, Inc. v. United States Cutlery Co.*, 97 N.J. Eq. 408, 128 Atl. 872 (1925); *Bradbury Marble Co. v. Laclede Gas Light Co.*, 128 Mo. App. 96, 106 S.W. 594 (1907); *Noyes v. Huron & Erie Mtg. Corp.*, [1932] Ont. L. R. 426, 3 D.L.R. 143; *Kine v. Jolly*, 1 Ch. D. 480 (1905); *Eastern & South African Telegraph Co. v. Cape Town Tramways Companies, L.R.*, A.C. 381, 36 Digest 188, 313 (1902); *Robinson v. Kilvert*, 41 Ch. D. 88 (1889).

3. *Kellogg v. Mertens*, 30 So.2d 777 (La. App. 1947); *Nugent v. Melville Shoe Corp.*, 280 Mass. 469, 182 N.E. 825 (1932), noted 7 U. OF CIN. L. REV. 192 (1933); *Shepler v. Kansas Milling Co.*, 128 Kan. 554, 278 Pac. 757 (1929). The usual situation is that of a property owner versus night spectator sports, *Board of Education of Louisville v. Klein*, 303 Ky. 234, 197 S.W.2d 427 (1946); *Hansen v. Independent School Dist. No. 1*, 61 Idaho 109, 98 P.2d 959 (1939); *Casteel v. Town of Afton*, 277 Iowa 61, 287 N.W. 245 (1939); *Warren Co. v. Dickson*, 185 Ga. 481, 195 S.E. 568 (1938); *Russell v. Nostrand Athletic Club*, 212 App. Div. 543, 209 N.Y. Supp. 76 (1925). Or again, the disturbance of sleep resulting from lights shining into sixty hotel rooms from a sign, *The Shelburne, Inc. v. Crossan, Corp.*, *supra*.

4. Cases cited note 3 *supra*; in each case cited the court based its decision on the effect of a reasonable use of the property to persons of ordinary sensibilities.

5. *Bradbury Marble Co. v. Laclede Gas Light Co.*, *supra*.

6. *Russell v. Nostrand Athletic Club*, *supra*.

freedom from heat invasions<sup>7</sup> or ordinary vibration from a generator,<sup>8</sup> here called a *delicate user*.

The principal case relied upon English and Empire cases<sup>9</sup> in explaining delicate use of property. "A person cannot, by applying his property to special and extraordinary uses or purposes, whether for business or pleasure, restrict the right of his neighbour in the ordinary and legitimate enjoyment of his property . . . or impose upon his neighbour burdens which in the ordinary course of things, he is not called upon to bear. . . ." <sup>9a</sup> An extraordinary user includes a non-natural user.<sup>10</sup> This definition appears to apply to both parties in the instant litigation. Further, such a definition imposes liability when an owner or occupier by his active agency interferes with the normal state of, or imposes an additional burden upon the premises of his neighbor.<sup>11</sup> It would appear that defendant's lights created an additional burden upon the premises of the plaintiff. The court should have discarded its artificial approach for one which emphasized the equities involved from the statement of facts. By its very nature, light will affect the normal operations of an outdoor theater dependent upon the natural darkness of the premises after nightfall. By subjecting the premises to such outside influences, it is submitted that the court penalized a modern, highly developed enterprise.

The court upheld the directed verdict for the defendant, on the basis of a crystallization of legal opinion as to the gravity of the harm as opposed to the utility of the actor's conduct<sup>12</sup> when the doctrine of *delicate user* applies, though the legitimacy of applying the doctrine to this set of facts seems doubtful. It would appear that a jury determination based upon a balancing of the conflicting interests would be preferable to a judicial determination relying upon a mechanistic application of legal theory in this type situation.

The question also arises as to whether darkness<sup>13</sup> is the natural condition, any disturbance of which may constitute a nuisance if it interferes with the enjoyment of the land. The courts do not seem to have approached the problem from this point of view but have considered only whether there was an oppressive imposition of a burden on a residential user which would occasion a right to damages or injunctive relief.<sup>14</sup> The court in the instant case reasoned

7. *Robinson v. Kilvert, supra.*

8. *Wallace & Tiernan, Inc. v. United States Cutlery Co., supra*, where there was disturbance of delicate instruments.

9. *Eastern & South African Telegraph Co. v. Cape Town Tramways Companies, supra*; *Robinson v. Kilvert, supra*; *Kine v. Jolly, supra.*

9a. *Halsbury's Laws of England*, vol. VVIV, p. 45 § 78 (Hailsham ed. 1937).

10. *Id.* at § 79, p. 45: "Extraordinary user. . . [ includes ] . . . the alteration or use of the premises for unusual or non-natural purposes. . . ."

11. *Halsbury's Laws*, § 80.

12. *RESTATEMENT, TORTS* § 826, comment *d* (1939).

13. "The fact that the plaintiff in this case loves darkness rather than light does not mean that light can be classed as a noxious or generally injurious instrumentality." *Amphitheaters, Inc. v. Portland Meadows*, 198 P.2d 847, 854 (Ore. 1948).

14. *Nugent v. Melville Shoe Corp., supra*. Refused in *Casteel v. Town of Afton, supra*, where the court in rejecting the plea of nuisance caused by lights in a playground,

that any business, no matter how highly developed,<sup>15</sup> requiring freedom from such outside interferences as noise, light, and vibration, is to be classified as a delicate business and thus not entitled to relief unless the burdens are of a special and unreasonable nature. It would seem that darkness is a natural state which all landowners are entitled to enjoy if they so choose. In the instant case, the artificial light used was not the ordinary illumination to which one might expect to be subjected as an incident to societal life. Rather, it was an unusually strong glow. Such distinction, however, was rejected by the court which said: "The conditions of modern city life imposed upon the city dweller and his property many burdens more severe than that of light reflected upon him or it."<sup>16</sup> Such a view appears severe when its result is to deprive a business of the reasonable use of its land.<sup>17</sup>

It is submitted that the courts, in determining the problems of a modern industrial enterprise requiring freedom from outside interferences, should consider the nature of the interests involved, rather than predicate their decisions upon formalized reasoning.

#### TORTS—RIGHT OF PRIVACY IN SURVIVORS OF DECEASED PUBLIC FIGURE AFTER CONSIDERABLE TIME LAPSE

In 1905, plaintiffs' father disappeared under suspicious circumstances from his home in Tuscaloosa, Alabama. A member of the community was imprisoned as a murder suspect for five months and then released because the body could not be traced or found.

Twenty five years later, in 1930, the testator of a will probated in California proved to be plaintiffs' missing father, and his body was then returned to Tuscaloosa. In 1946, sixteen years thereafter, defendant radio station broadcast on a local commercial radio program a sketch, description, and history of the private and family life of the plaintiffs, including the peculiar circumstances of their father's disappearance and return.

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said, "The lights referred to are necessary to night games and would not constitute a great inconvenience to the ordinary dweller in a town." *Id.* at 246.

15. In *Eastern & South African Telegraph Company v. Cape Town Tramways Companies*, *supra*, the plaintiff was injured by escaping electric currents from defendant's lines until he took the precaution of installing modern equipment. The case of *Noyes v. Huron & Erie Mtg. Corp.*, *supra*, had to do with the application of an experimental device called the projectorscope, to outdoor advertising. The court called attention to the experimental nature of the equipment in refusing damages to the plaintiff due to dispersal of light caused by defendant's floodlights illuminating his own building.

16. *Amphitheaters, Inc. v. Portland Meadows*, *supra* at 858.

17. *Wallace & Tiernan, Inc. v. United States Cutlery Co.*, *supra*, where it was held that the nature of the plaintiff's business was not a defense to vibration caused by defendant which interfered with the calibration of delicate instruments; *accord*, *Western Silver Fox Ranch v. Ross & Cromarty County Council*, S.C. 601-Scot. (1940), where the Scottish court applied *Rylands v. Fletcher* (1868), L.R., H.L. 330, to a case of blasting by a contractor employed by the county, which frightened vixens on a silver fox farm causing them to destroy their cubs or abort. That court rejected the non-natural use of the land by the plaintiff as a defense.