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Private Nuisance in Louisiana Law

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ing general rather than particular rules has much to be said in its favor. As no two cases present the same factual situation the end results of efforts to resolve conflicts by providing numerous solutions may be confusion rather than clarification. At the very least it seems fair to conclude that some changes in language should be made if the Code is to be adopted.

Neilson Jacobs

Private Nuisance in Louisiana Law

When one person's use of land interferes with another's use and enjoyment of a neighboring tract, courts seek the solution to the resulting controversy in that part of the law of torts called "nuisance" and characterize defendant's conduct as the maintenance of a nuisance if plaintiff is entitled to relief. A nuisance and a trespass are similar in that both interfere with the interests of an occupant of land. They differ, however, in that a trespass is usually a physical invasion of land complete in one instance, while a nuisance is ordinarily a continuing activity on a neighboring tract of land which produces such interferences as noise, smoke, or odors. The technique of resolving nuisance controversies differs greatly from that found in other areas of tort law. In the latter, the process of weighing the various interests involved in a given controversy has been transformed into the application of a body of relatively rigid rules, like those concerning intent, privilege, or negligence. In the field of nuisance, however, the factors considered appear on the surface and the courts weigh those factors against each other openly. For this reason, one finds no framework of fixed rules to refer to as the law of nuisance. One can only indicate the recurring factors considered by the courts in nuisance cases and suggest their relative weights in the balancing process which is the essence of deciding such cases.

The Magnitude of the Interference

One's right to the use and enjoyment of his land is of course limited by the rights of others to use and enjoy their own. On the basis of this broad generalization, courts refuse to consider an activity a nuisance unless the interference it creates is substantial in nature. To be deemed a nuisance, the defendant's conduct must be such as would interfere with an average man's

use and enjoyment of land or it must cause an appreciable diminution of the value of plaintiff's property. Activities offensive only to persons of eccentric tastes and feelings are not nuisances.[1] For example, the crowing of a rooster in the early morning,[2] the establishment of a funeral home,[3] and small amounts of smoke and noise[4] do not constitute nuisances.

Extent of Hardship Which Granting Plaintiff Relief Would Impose on Defendant

This factor in the balancing process is closely interwoven with society's interest in the continuance of enterprises representing large investments, employing many workers, and performing useful services. These considerations may lead courts to deny recovery altogether. For instance, in a case where defendant had invested several millions of dollars in his paper mill and was using the only stream available for waste disposal, the court denied plaintiff relief from the resulting pollution of his swampland.[5] In another case, plaintiff was denied relief from the disturbances caused by a city's operation of a garbage disposal plant. The court found that the city was disposing of garbage by the only available means.[6] Similar results were reached in cases involving a funeral home[7] and a cemetery.[8] If such considerations do not result in complete denial of relief, they may yet induce the court to limit the scope of the injunction issued or to confine plaintiff's remedy to an award of damages.

The Character of the Neighborhood

Sources of interference other than that of which plaintiff complains may exist in the neighborhood. Courts have accordingly been influenced by the extent to which an injunction against defendant's activities would tend to restore plaintiff to the normal enjoyment of his land. Thus, plaintiff has been refused relief where he complained of the erection of an ice plant in an area where a larger one was already in operation,[9] and, similarly, where he complained of the slight noises coming

1. Kellogg v. Mertens, 30 So.2d 777 (La. App. 1947). See also Froelicher v. Oswald Ironworks Ltd., 111 La. 705, 35 So. 821 (1903).
2. Myer v. Minard, 21 So.2d 72 (La. App. 1945).
3. Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 62 So.2d 100 (1952); Moss v. Burke and Trotti, Inc., 198 La. 76, 3 So.2d 281 (1941).
4. Lewis v. Behan, Thorn & Co., 28 La. Ann. 130 (1876).
5. Young v. International Paper Co., 179 La. 803, 155 So. 231 (1934).
6. Gibson v. Baton Rouge, 161 La. 637, 109 So. 339 (1926).
7. Moss v. Burke and Trotti, Inc., 198 La. 76, 3 So.2d 281 (1941).
8. Hardin v. Huckabay, 6 La. App. 640 (1927).
9. Graver v. Lepine, 161 La. 97, 108 So. 138 (1926).

from an industrial plant located in a neighborhood abounding in other noises and disturbances.[10]

It seems that, if defendant's interference with plaintiff's interests is slight and no other source of interference exists in the neighborhood, the courts are more likely to grant plaintiff relief than if such sources do exist. On the other hand, if defendant's interference is of a substantial nature, the courts are likely to minimize the importance of other disturbances. For instance, the Louisiana Supreme Court has said that industrial enterprises in industrial areas, although not frequently considered nuisances, may become nuisances if the disturbance they create is extreme in character.[11]

The type of neighborhood in which the nuisance controversy arises is relevant in another respect. Certain activities which inherently tend to disturb the occupants of adjacent property cannot well be excluded from all areas. This fact led the court to deny plaintiff relief where he complained of the emission of soot from a carbon plant located in a sparsely settled area near its source of raw materials.[12] In another case, the court considered that the location of an enterprise which necessarily employed noisy machinery was such that the disturbance it created did not amount to a nuisance.[13] Similarly, where a city had virtually approved the location of an industrial plant in a certain neighborhood by closing streets and otherwise facilitating its establishment, the court held that the unavoidable smoke and noise emanating from the plant were inconveniences to which others in the neighborhood must submit.[14]

When the controversy arises in a neighborhood which is losing its residential character as a result of the encroachment of commercial or industrial enterprises, the courts seem reluctant to grant plaintiff relief unless the defendant's industrial or commercial activities create extreme inconveniences. Where a machine and boiler works, for example, was operated in a previously residential area, the court denied plaintiff relief from the resulting disturbances.[15] However, our Supreme Court has observed that "in a populous part of a city greater precaution must be taken to avoid inflicting annoyances, discomfort, and distress

10. Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936).
11. Froelicher v. Oswald Ironworks Ltd., 111 La. 705, 35 So. 821 (1903).
12. O'Neal v. Southern Carbon Co., 216 La. 96, 43 So.2d 230 (1949).
13. Olsen v. Tung, 179 La. 760, 155 So. 16 (1934).
14. Monlezun v. Jahncke Dry-Docks, Inc., 163 La. 400, 111 So. 886 (1927).
15. *Ibid.*

than in the open country."[16] Similarly, one court of appeal has said that the establishment of a boiler safety-valve works in a partially industrialized transition area, even prior to the plaintiff's establishment of a residence there, does not accord defendant the privilege of so conducting his activities as to create a nuisance.[17]

If defendant's activities are prohibited by zoning ordinances or police regulations, the courts will almost invariably consider such activities a nuisance. Thus, where a lawfully located stockyard manufactured fertilizer as an incident to the operation of the stockyard, and the production of fertilizer in that area was prohibited by a police jury ordinance, the court held the production of fertilizer a nuisance.[18] Again, the court granted plaintiff an injunction and damages where the prohibited "firing" of defendant's locomotive within the city limits caused the emission of considerable quantities of smoke, soot, and cinders.[19] Even where a grocery store had been in operation in a neighborhood for many years before the city zoned the area as residential, the court, at the request of a neighboring owner of residential property, ordered the store closed on the basis of the zoning ordinance.[20] In adopting the position that defendant's activities are a nuisance *per se* if prohibited by local ordinance, the courts display their willingness to abide by the conclusion which the legislative arm of government has reached by weighing the same factors that a court would weigh. This acquiescence in legislative decisions is not a complete abdication of judicial power, however; the Louisiana Supreme Court has stated in one case that "no lawful use made by an individual of his own property is a nuisance per se, nor can it be made so by municipal ordinance. . . ."[21]

The Manner in Which the Disturbing Activity Is Conducted

The careful and efficient manner in which defendant conducts the disturbing activities may be a decisive factor in defendant's favor. Thus, plaintiff was refused relief where the noises

16. Tucker v. Vicksburg, S. & P. Ry., 125 La. 689, 698, 51 So. 689, 691 (1910), quoted with approval in Devoke v. Yazoo & M.V.R.R., 211 La. 729, 741, 30 So.2d 816, 820 (1947).

17. Ellis v. Blanchard, 45 So.2d 100 (La. App. 1950).

18. Perrin v. Crescent City Stockyard and Slaughterhouse Co., 119 La. 83, 43 So. 938 (1907).

19. Devoke v. Yazoo & M.V.R.R., 211 La. 729, 30 So.2d 816 (1947).

20. State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929).

21. New Orleans v. Lenfant, 126 La. 455, 462, 52 So. 575, 577 (1910). However, such a definition is questionable in light of the more recent decision of State *ex rel.* Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929).

produced by an ice plant were unavoidable,[22] where spark arresters on a tramway were of the most modern type,[23] where a laundry used some of the best equipment available,[24] and where a carbon plant was equipped with the most modern machinery obtainable.[25] On the other hand, the negligent or otherwise improper conduct of defendant's activities may be a decisive factor in plaintiff's favor.[26] In such cases, the court may order the defendant in general terms to abate the nuisance,[27] or order him to correct that specific phase of his operations which is improperly conducted.[28] If, by the time of the trial, defendant has so changed his methods of operation as to relieve plaintiff of the disturbance complained of, an injunction ordering defendant to correct his method of operation will, of course, not be issued. However, in such cases, plaintiff may recover damages for the injuries caused prior to the change in operating methods.[29]

Plaintiff's Failure to Protest the Establishment of Defendant's Plant

The court has frequently assigned considerable weight to plaintiff's acquiescence in the establishment of the enterprise creating the disturbances of which he complains. The effect of such acquiescence is greater where plaintiff seeks the removal or complete abatement of an operation than where his complaint is confined to some specific phase of defendant's operations. Thus, where the plaintiff had not objected to the establishment of an ice plant, the court refused to grant him either damages or an injunction when he later complained of the noise and vibration created by the operation of the plant.[30] Similarly, in refusing to order the abatement of one phase of defendant's dry-dock and ship-repair works, the court reminded the plaintiff home-owner that he had initially approved of the location of defendant's enterprise in the neighborhood.[31] Such decisions leave occupants of land in a quandary. On the one hand, lawfully

22. Irby v. Panama Ice Co., 184 La. 1082, 168 So. 306 (1936).
23. Morris v. Putsman, 166 La. 14, 116 So. 577 (1928).
24. Olsen v. Tung, 179 La. 760, 155 So. 16 (1934).
25. O'Neal v. Southern Carbon Co., 216 La. 96, 43 So.2d 230 (1949).
26. Devoke v. Yazoo & M.V.R.R., 211 La. 729, 30 So.2d 816 (1947); McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So.2d 21 (1944).
27. McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So.2d 21 (1944).
28. *Cf.* Devoke v. Yazoo & M.V.R.R., 211 La. 729, 30 So.2d 816 (1947).
29. Dodd v. Glen Rose Gasoline Co., 194 La. 1, 193 So. 349 (1939).
30. LeBlanc v. Orleans Ice Mfg. Co., 121 La. 249, 46 So. 226 (1908).
31. Monlezun v. Jahncke Dry-Docks, Inc., 163 La. 400, 111 So. 886 (1927).

located enterprises are never nuisances *per se*[32] and the commencement of their operations cannot be prevented for fear that they will become nuisances.[33] On the other hand, if the occupant of neighboring land fails to protest the establishment of an enterprise, this failure to protest may be used against him in subsequent litigation.

Conclusion

None of the foregoing factors can be described as ordinarily conclusive. The weight of each in the balancing process in any given nuisance case varies with the presence or absence of the others. In no other area of the law do the implications of the decisions seem more difficult to trace.

Billy H. Hines

Separation of the Jury in Criminal Trials

The common law system of criminal procedure, which was adopted in the Territory of Orleans by the Crimes Act of 1805,[1] requires that there be no separation of the jury during a criminal trial.[2] This rule was adopted by the Louisiana Supreme Court for the first time in 1844 in the case of *State v. Hornsby*,[3] and, with little change, is now included in Article 394 of the Louisiana Code of Criminal Procedure of 1928:

> "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge."

The object of this comment is to present an analysis of the

32. Canone v. Pailet, 160 La. 159, 106 So. 730 (1926); New Orleans v. Lenfant, 126 La. 455, 52 So. 575 (1910); *cf.* Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 62 So.2d 100 (1952); Graver v. Lepine, 161 La. 97, 108 So. 138 (1926); Hill v. Battalion Washington Artillery of City of New Orleans, 143 La. 533, 78 So. 844 (1918).

33. Frederick v. Brown Funeral Homes, Inc., 222 La. 57, 62 So.2d 100 (1952); Bell v. A. Riggs & Bro., 38 La. Ann. 555 (1886).

1. La. Acts 1805, c. 50, § 33, p. 440.

2. 1 CHITTY, CRIMINAL LAW 632 *et seq.* (1819).

3. 8 Rob. 554 (La. 1844).