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THE HALFWAY HOUSE AS PRIVATE NUISANCE

Arkansas Release Guidance Foundation v. Needler,
— Ark. —, 477 S.W.2d 821 (1972)

Plaintiffs sued to enjoin as a private nuisance in fact defendant's operation of a halfway house for paroled prisoners in a mixed business and residential area. Evidence showed a decrease in surrounding property value, fear on the part of neighbors, conviction of one of the residents of the house for a sex offense, and removal of another resident for activities related to alcohol. The Chancellor granted the injunction and defendant appealed. *Held:* affirmed.[1] The preponderance of evidence established that the operation of the halfway house constituted a private nuisance in fact.

Although incapable of exact definition,[2] a nuisance commonly is defined as an interference with another's interest in the enjoyment and use of real property.[3] A private nuisance interferes with a relatively small area of private land[4] or the use by an individual of his own land.[5] A private nuisance in fact is only a nuisance in certain locations or surroundings[6] and must be both a substantial and an unreasonable

1. — Ark. —, 477 S.W.2d 821 (1972).

2. C. HEPBURN, CASES ON TORTS ch. 5 (3d ed. 1954); W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971); P. WINFIELD, TORTS 442 (5th ed. 1950); Seavey, *Nuisance: Contributory Negligence and other Mysteries,* 65 HARV. L. REV. 984 (1952).

3. *See* Oleck, *Nuisance in a Nutshell,* 5 CLEV.-MAR. L. REV. 148 (1956); Yerke, *The Law of Nuisance in Oregon,* 1 WILLAMETTE L.J. 289 (1960). Nuisance can be defined as either "conduct" or an "interest invaded." The Restatement writers took the position that nuisance refers to the interest invaded. RESTATEMENT OF TORTS ch. 40 (1939). *But see* Seavey, *Nuisance: Contributory Negligence and Other Mysteries,* 65 HARV. L. REV. 984, 985 (1952).

4. Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956); Seavey, *supra* note 2, at 984.

5. Mandell v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175, (1956); Cox v. Ray M. Lee Co., 100 Ga. App. 333, 111 S.E.2d 246 (1959); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957); Adams v. Hamilton Carhartt Overall Co., 293 Ky. 443, 169 S.W.2d 294 (1943); Lederman v. Cunningham, 283 S.W.2d 108, 111 (Tex. Civ. App. 1955).

6. *See* C. MARTZ, RIGHTS INCIDENT TO POSSESSION OF LAND § 28.26 (1954). A nuisance per se or absolute nuisance is a nuisance anywhere and under all circumstances. Echave v. Grand Junction, 118 Colo. 165, 193 P.2d 277 (1948) (unsanitary dwelling not a nuisance per se); Ehrlick v. Commonwealth, 125 Ky. 742, 102 S.W. 289 (1907) (gaming house a nuisance per se); Clifford v. Dam, 81 N.Y. 52, 56 (1880)

interference with the use and enjoyment of another's property.[7] In determining whether the interference is substantial and unreasonable, courts give primary consideration to the circumstances of the particular case.[8] In balancing the utility of the use against the harm of the interference,[9] courts consider various factors, including[10] depreciation of

(hole in street a nuisance per se). *But see* W. PROSSER, LAW OF TORTS § 87 (4th ed. 1971), challenging the validity of the doctrine; and Seavey, *supra* note 2, at 991, defining "absolute nuisance" as the intentional creation of a dangerous condition.

7. Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 166, 169 P. 208, 209 (1917); Borenstein v. Joseph Fein Caterers, Inc., 255 So. 2d 800, 804 (La. App. 1971); RESTATEMENT OF TORTS § 822 (1939); Note, *An Economic Analysis of Land Use Conflicts,* 21 STAN. L. REV. 293 (1963).

8. Wetstone v. Cantor, 144 Conn. 77, 80, 127 A.2d 70, 72 (1956); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 722, 82 N.W.2d 151, 158 (1951); Caldwell v. Knox Concrete Prod., Inc., 54 Tenn. App. 393, 391 S.W.2d 59 (1964); Riblet v. Spokane-Portland Cement Co., 41 Wash. 2d 249, 254, 248 P.2d 380, 382 (1952).

9. Grey v. Mayor of City of Patterson, 60 N.J. Eq. 385, 393, 45 A. 995, 997 (1900); McCann v. Chasm Power Co., 211 N.Y. 301, 305, 105 N.E. 416, 417 (1911); Davis v. Town of Harrisonburg, 116 Va. 864, 869, 83 S.E. 401, 403 (1914); C. MARTZ, RIGHTS INCIDENT TO POSSESSION OF LAND § 28.22 (1954); RESTATEMENT OF TORTS § 829 (1939).

10. In addition to the factors listed in the text, courts may consider: physical invasion of the property, Lamereaux v. Tula, 312 Mass. 359, 44 N.E.2d 789 (1942) (water flow); Peterson v. King County, 45 Wash. 2d 860, 278 P.2d 774 (1954) (mudslide); Forbus v. Knight, 24 Wash. 2d 297, 163 P.2d 822 (1945) (tree roots); delay in taking action, Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957) (laches); Borsvold v. United Dairies, 347 Mich. 672, 81 N.W.2d 378 (1957) (laches); Grey v. Mayor of City of Patterson, 60 N.J. Eq. 385, 45 A. 995 (1900) (laches); Laurence v. Tucker, 160 Ore. 474, 85 P.2d 374 (1936) (adverse possession); Kinsman v. Utah Gas & Coke Co., 53 Utah 10, 177 P. 418 (1878) (laches); social pressure, Holmen v. Athens Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919) (impossible in city to avoid smoke); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919) (home protected from stone crusher); economic consequences of abatement, *see* Note, *An Economic Analysis of Land Use Conflicts,* 21 STAN. L. REV. 293 (1969); and cases cited notes 24-27 *infra*; sequence of events, Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922) (growth of city around alleged nuisance no defense); Menolascine v. Superior Felt & Belting Co., 313 Ill. App. 557, 40 N.E.2d 813 (1942) (no defense that the nuisance existed before the plaintiff bought the property); Powell v. Superior Portland Cement, Inc., 15 Wash. 2d 14, 129 P.2d 536 (1942) (voluntary purchaser of property in existing industrial district not entitled to recover for dust); Hite v. Cashmere Cemetary Ass'n, 158 Wash. 421, 290 P. 1008 (1930) (purchaser of land near existing cemetary not entitled to complain of depreciation of property value); sanction by public authority, Jones v. Kelley Trust Co., 179 Ark. 857, 18 S.W.2d 356 (1929) (permit to operate quarry no defense); Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922) (license to operate business no defense); Jeffers v. Montana Power Co., 68 Mont. 114, 217 P. 652 (1923) (authorization by legislature sets higher standard of proof in nuisance action); State v. WOR-TV Tower, 39 N.J. Super. 583, 121 A.2d 764 (1956) (authorization by legislature sets higher standard of proof in nui-

property values,[11] harm or fear of harm to the person,[12] discomfort or inconvenience to the plaintiff,[13] duration or recurrence of the interference,[14] character of the harm,[15] opportunities to avoid or reduce the injury,[16] character of the neighborhood,[17] public interest in the use,[18]

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sance action); Lowell v. Pendleton Auto Co., 123 Ore. 383, 261 P. 415 (1927) (parking ordinance no defense in action against stored cars); City of Amarillo v. Ware, 120 Tex. 456, 40 S.W.2d 57 (1931) (city not immune while building sewers).

11. Klassen v. Central Kan. Coop. Creamery Ass'n, 160 Kan. 697, 704, 165 P.2d 601, 607 (1946) (action by tenant); City of Baltimore v. Fairfield Imp. Co., 87 Md. 352, 361, 39 A. 1081, 1084 (1898); Bowden v. Edison Elec. Ill. Co., 29 Misc. 171, 172, 60 N.Y.S. 835, 836 (1899) (action by tenant); City of Amarillo v. Ware, 120 Tex. 456, 468, 40 S.W.2d 57, 61 (1931); Drake v. Smith, 54 Wash. 2d 57, 62, 337 P.2d 1059, 1061 (1959); Morin v. Johnson, 49 Wash. 2d 275, 282, 300 P.2d 569, 573 (1956); Turtle v. Fitchett, 156 Wash. 328, 332, 287 P. 7, 8 (1930).

12. Stotler v. Rochelle, 83 Kan. 86, 109 P. 788 (1910) (fear of cancer hospital); Cumberland Torpedo Co. v. Gaines, 201 Ky. 88, 255 S.W. 1046 (1923) (fear of explosion); City of Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 A. 1081 (1898) (fear of leprosy hospital); Fields v. Stokleey, 99 Pa. 306 (1882) (fear of fire); Everett v. Paschall, 61 Wash. 47, 111 P. 879 (1910) (fear of tuberculosis hospital).

13. Hansen v. Independent School Dist., 61 Idaho 109, 98 P.2d 959 (1940) (excessive light and noise); Menolascino v. Superior Felt & Bedding Co., 313 Ill. App. 557, 40 N.E.2d 813 (1942) (dust); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908) (smoke); Sarraillon v. Stevenson, 153 Neb. 182, 43 N.W.2d 509 (1950) (odor); Hooks v. International Speedway, Inc., 263 N.C. 686, 140 S.E.2d 387 (1965) (loud noise); Gorman v. Sabe, 210 Md. 155, 122 A.2d 475 (1956) (loud noise); Borsvold v. United Dairies, 347 Mich. 672, 81 N.W.2d 378 (1957) (loud noise); Guarnia v. Bogart, 407 Pa. 307, 180 A.2d 557 (1962) (loud noise); Drake v. Smith, 54 Wash. 2d 57, 337 P.2d 1059 (1959) (water pollution).

14. Jones v. Adler, 183 Ala. 435, 62 So. 777 (1913) (occasional smoke); Theil v. Cernin, 224 Ark. 854, 276 S.W.2d 677 (1955) (odor); Flippin v. McCabe, 228 Ark. 495, 308 S.W.2d 824 (1928) (smoke only during damp weather); Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207 (1919) (occasional smoke); State v. WOR-TV Tower, 39 N.J. Super. 583, 121 A.2d 764 (1956) (occasional fall of ice from television tower); Francisco v. Department of Institutions and Agencies, 13 N.J. Misc. 663, 180 A. 843 (1935) (occasional odor); RESTATEMENT OF TORTS § 827, Comment b (1939).

15. Gainey v. Folkamn, 114 F. Supp. 231 (D. Ariz. 1953) (trivial injury); Clark v. Hunt, 192 Ark. 865, 95 S.W.2d 558 (1936) (no anticipatory injunction); Cooper v. Whissen, 95 Ark. 545, 130 S.W. 703 (1910) (no anticipatory injunction); Nicholson v. Connecticut Half-way House, Inc., 153 Conn. 507, 218 A.2d 383 (1958) (no anticipatory injunction); Livingston v. Davis, 243 Iowa 21, 50 N.W.2d 592 (1951) (no anticipatory injunction); City of Richmond v. House, 177 Ky. 814, 198 S.W. 218 (1917) (no anticipatory injunction); Olsen v. City of Baton Rouge, 247 So. 2d 889 (La. App. 1971) (no anticipatory injunction); Cook v. City of Fall River, 239 Mass. 90, 131 N.E. 346 (1927) (no anticipatory injunction); McCann v. Chasm Power Co., 211 N.Y. 301, 105 N.E. 416 (1914) (no injunction for purely technical harm).

16. De Blois v. Bowers, 44 F.2d 621, 623 (D. Mass. 1930); Dauberman v. Grant, 198 Cal. 586, 591, 246 P. 319, 321 (1926); Illinois Central R. Co. v. Grahill, 50 Ill. 241, 245 (1869); Sprague v. Sampson, 120 Me. 353, 114 A. 305 (1921); Jenkins

reasonableness of defendant's use,[19] and the motive[20] or intent[21] of the defendant.

The Arkansas court, in sustaining the injunction, gave primary consideration to three factors: a "significant decrease" in the value of surrounding property, the plaintiff's fear of harm,[22] and the character of the harm. Conviction of one resident for a sex offense and the involvement of another in incidents involving alcohol demonstrated that the harm was not speculative or conjectural. The court gave little weight to evidence that the defendant sought to avoid the harm by excluding from the residence alcoholics and persons convicted of sex offenses, drug offenses or drug habituation; that the association of convicts was a technical violation of Department of Correction rules; and that the neighborhood was mixed residential and business.

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v. Pennsylvania R. Co., 67 N.J.L. 331, 51 A. 704 (1902); Barrlett v. Lopez, 67 N.M. 697, 262 P.2d 981 (1953); Kuhn v. Wood, 36 N.E.2d 1006, 1008 (Ohio App. 1941); Powell v. Superior Portland Cement Inc., 15 Wash. 2d 14, 18, 129 P.2d 536, 538 (1942).

17. Howard v. Etchieson, 228 Ark. 809, 811, 310 S.W.2d 473, 474 (1958); Benton v. Pittard, 197 Ga. 843, 845-47, 31 S.E.2d 6, 7-8 (1944); Phelps v. Winch, 309 Ill. 158, 159-60, 140 N.E. 847, 848-49 (1923); Hofstetter v. Myers, 170 Kan. 564, 568, 228 P.2d 522, 526 (1951); Irby v. Panama Ice Co., 184 La. 1082, 1090-91, 168 So. 306, 309 (1936); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914); Robinson v. Westman, 224 Minn. 105, 111, 29 N.W.2d 1, 6 (1947); Tureman v. Ketterlin, 304 Mo. 221, 224-25, 263 S.W. 202, 204 (1924); Sou Koup v. Republic Steel Corp., 78 Ohio App. 87, 99, 66 N.E.2d 334, 340 (1946); George v. Goodovich, 288 Pa. 48, 52, 135 A. 719, 721 (1927); Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 168, 126 A. 345, 347 (1924); Dahl v. Utah Refining Co., 71 Utah 1, 12, 262 P. 269, 273 (1927); Jones v. Rumford, 64 Wash. 2d 559, 392 P.2d 808 (1964).

18. Dixie Ice Cream Co. v. Blackwell, 217 Ala. 330, 332, 116 So. 348, 349 (1929); Clinic & Hosp., Inc. v. McConnell, 236 S.W.2d 384, 391 (Mo. App. 1951); Johns Shingle Co. v. City of Portland, 195 Ore. 505, 524, 246 P.2d 554, 562 (1952); Booth-Kelly Lumber Co. v. City of Eugene, 67 Ore. 381, 384, 136 P. 29, 30 (1913); Hannum v. Gruber, 346 Pa. 417, 423-24, 31 A.2d 99, 102 (1943); Steele v. Queen City Broadcasting Co., 54 Wash. 2d 402, 408, 341 P.2d 499, 504-05 (1959); Powell v. Superior Portland Cement Inc., 15 Wash. 2d 14, 20, 129 P.2d 536, 539 (1942).

19. *See* RESTATEMENT OF TORTS § 822, Comment j (1939); Smith, *Reasonable Use as Justification for Damage to a Neighbor,* 17 COLUM. L. REV. 383 (1917).

20. Larkin v. Tsavaris, 85 So. 2d 731, 733 (Fla. 1956); White v. Bernhart, 41 Idaho 665, 669, 241 P. 367, 368 (1925); Flaharty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Medford v. Levy, 31 W. Va. 649, 657, 8 S.E. 302, 306 (1888).

21. Smith v. Staso Milling Co., 18 F.2d 736, 738 (2d Cir. 1927); Barr v. Adam Eidemiller, Inc., 386 Pa. 416, 421, 126 A.2d 403, 406 (1956); Jost v. Dairyland Power Cooperative, 45 Wis. 2d 164, 173, 172 N.W.2d 647, 652 (1969).

22. The court found the fear substantiated by law enforcement officials' testimony that a congregating of convicts usually creates problems. Arkansas Release Guidance Foundation v. Needler, — Ark. —, 477 S.W.2d 821, 822 (1972).

Though the factors considered by the court show economic and mental harm to the plaintiffs' use and enjoyment of their property, the court failed to mention several important factors. One factor is the public interest in the use to which the defendant was putting its land. Halfway houses, as an intermediate step between prison and full return to society, attempt to reduce crime and rehabilitate criminals by helping the convict readjust to life in society. If halfway houses are effective,[23] the court should balance the public interest in the reduction of crime with the interference with plaintiffs' use of their land. Most courts will consider the public interests in deciding whether an injunction should be issued for a nuisance. Although the benefit may be more difficult to prove in the case of a halfway house than in cases of public schools,[24] public utilities,[25] sanitation services,[26] factories,[27] cement plants,[28] or airports,[29] it is not so minimal as to be unworthy of

23. Little hard evidence exists of the effectiveness of halfway houses because of the short period in which such programs have been in operation and because of the shortage of funds for program evaluation. The informally reported experience of the Federal Bureau of Prisons, however, offers encouragement for the idea that community-based programs can lead to a reduction in recidivism among a substantial proportion of the participants. Moeller, *The Continuum of Corrections,* 381 ANNALS OF AMER. ACADEMY OF POL. & SOC. SCI. 85-86 (1969).

24. Johnson v. Independent School Dist. 1, 239 Mo. App. 749, 199 S.W.2d 421 (1947).

25. Northern Public Serv. Co. v. Vesey, 210 Ind. 338, 200 N.E. 620 (1936) (gas plant); Ferguson v. Village of Hamburg, 272 N.Y. 234, 5 N.E.2d 801 (1936) (railroad); Pappenheim v. Metropolitan El. Ry. Co., 128 N.Y. 436, 28 N.E. 518 (1891) (railroad).

26. Harrisonville v. Dickey Clay Mfg. Co., 289 U.S. 334 (1933); Webb v. Town of Rye, 108 N.H. 147, 230 A.2d 223 (1967); Johns Shingle Co. v. City of Portland, 195 Ore. 505, 246 P.2d 554 (1952).

27. Clifton Iron Co. v. Dye, 87 Ala. 468, 471, 6 So. 192, 193 (1888) (smelter); Koseris v. J.R. Simplot Co., 82 Idaho 263, 269, 352 P.2d 235, 237-38 (1960) (phosphate plant); Louisville Refining Co. v. Mudd, 339 S.W.2d 181, 187 (Ky. 1960) (refinery); Roy v. Chevrolet Motor Car Co., 262 Mich. 663, 667-68, 247 N.W. 774, 776 (1933) (factory); Monroe Carp Pond Co. v. River Raisin Paper Co., 240 Mich. 279, 285, 215 N.W. 325, 328 (1927) (paper mill); York v. Stalings, 217 Ore. 13, 21-23, 341 P.2d 529, 533-34 (1959) (saw mill); Hannun v. Gruber, 346 Pa. 417, 422-23, 31 A.2d 99, 102 (1943) (dye works); Madison v. Ducktown Sulpher, Copper & Iron Co., 113 Tenn. 331, 336, 83 S.W. 658, 666 (1904) (smelter); Oliver v. Forney Cotton Oil and Grinding Co., 226 S.W. 1094, 1097-98 (Tex. Civ. App. 1921) (cotton gin); Rose v. Socony-Vacuum Corp., 54 R.I. 411, 421, 173 A. 627, 631 (1934) (oil refinery).

28. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 257 N.E.2d 870 (1970), apparently overruling Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1913); McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907); Strobel v. Kerr Salt Co., 164 N.Y. 303, 58 N.E. 142 (1900). *See* Note, *Torts—Com-*

consideration. Closely tied with this consideration and with the character of the neighborhood is the reasonableness of defendant's use. Since the neighborhood was mixed residential and business, plaintiffs obviously could not expect to be surrounded only by private residences. Moreover, defendant's selection of such a neighborhood appears reasonable since its use, if a nuisance at all, would be a more substantial and unreasonable interference in a purely residential neighborhood. Placement of the house in a purely commercial or industrial setting or in an unpopulated district would provide little opportunity for the integration of the convicts into society and, thus, defeat the purpose of the house.[30] The rationale of the Arkansas court eliminates halfway houses altogether or reduces their effectiveness to the point of little consequence by forcing the houses to locate in industrial, commercial or unpopulated locations.

In granting the injunction, the *Needler* court ignored a fundamental conflict between the purpose of a nuisance action, to prevent or halt interference with a landowner's use and enjoyment of his land, and the purpose of a halfway house, to rehabilitate criminals. Rehabilitation of criminals, in theory, reduces the interference (crime) a landowner, and the rest of society, suffers in the use and enjoyment of property. By enjoining the rehabilitative effort, the court eliminated short-term detriments to some people in the name of the same benefit the halfway house is attempting to secure on a long-term basis. The court could have reduced or eliminated this conflict by balancing the purposes of both the nuisance action and the halfway house. It is not suggested that halfway houses should never be enjoined as nuisances, but only that the Arkansas Supreme Court failed to consider several factors important to the analysis.

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parative Injury Doctrine of Nuisance, 49 N.C.L. REV. 402 (1971); Note, *No Injunctive Relief in New York Against a Private Nuisance When Defendant's Comparative Financial Hardship Outweighs the Injury to Complainant,* 21 SYRACUSE L. REV. 1243 (1970). California has reached the opposite result. Hulbert v. California Portland Cement Co., 161 Cal. 239, 118 P. 928 (1911). *See also* Riblet v. Spokane Portland Cement Co., 41 Wash. 2d 249, 255, 248 P.2d 380, 383 (1952); Powell v. Superior Portland Cement, 15 Wash. 2d 14, 19-20, 129 P.2d 536, 539 (1942).

29. Antonik v. Chamberlain, 81 Ohio App. 465, 475, 78 N.E.2d 752, 759 (1947); Atkinson v. Bernard, Inc., 223 Ore. 624, 632, 355 P.2d 229, 232 (1960). *See* United States v. Causby, 328 U.S. 256 (1946) (compensation must be paid landowners).

30. *See* PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS 7, 40-41 (1967); Moeller, *The Continuum of Corrections,* 381 ANNALS OF AMER. ACADEMY OF POL. & SOC. SCI. 81, 84 (1969).