FLINT v. RUSSELL et al.

Case No. 4,876.

{5 Dill. 151;[1] 8 Cent. Law J. 68; 7 Reporter, 265; 7 Am. Law Rec. 575; 19 Alb. Law J. 226.}

Circuit Court, E. D. Missouri. Jan., 1879.

NUISANCE—LIVERY STABLE IN CITY—INJUNCTION AGAINST THREATENED NUISANCES.

1. A livery stable in the residence portion of a city is not, as a matter of law, necessarily to be considered as a nuisance to the improved property adjoining or near it.

2. Where the facts stated in the bill showing that the erection and use of a livery stable would be a nuisance to the adjoining property were denied by the answer, a preliminary injunction to restrain the erection of a building to be used as a livery stable was refused.

{Cited in Keiser v. Lovett, 85 Ind. 243; Julia Building Ass'n v. Bell Telephone Co., 88 Mo. 262.}

On motion for an injunction. The bill alleges, in substance, that the parties are owners of adjacent premises, in block 1,014, between Ewing and Garrison avenues, on Locust street, in the city of St. Louis—the premises of complainant being occupied solely for residence purposes, and those of the defendants having been acquired by them only recently, for the purpose of the erection thereon of a public livery and sale stable. It is alleged that the property fronting on Locust street, for many blocks east and west of the defendants' property, is occupied and used for residence purposes, and that it has been, to that end, handsomely and expensively improved—there being no erection upon the street within the boundaries indicated which are, or have been, used for business or manufactures. It is alleged that, well knowing the established character of the neighborhood, and its occupation and use for residence purposes, the defendants, having bought the property adjoining that of complainant, have announced their intention to erect thereon a public livery stable; that in such stable will be kept great numbers of horses and vehicles; that there will be stored in it, for purposes of feed, large quantities of hay and other combustible materials; that the presence of so many horses in such a stable will cause great noise, the generation of offensive odors, the congregation of swarms of flies, and will attract numbers of improper and disreputable characters; and that, by reason of the said matters, the value of complainant's premises will be irreparably damaged, they will be rendered unfit for residence purposes, and the dwelling which stands thereon will be rendered untenable by complainant, or any one who might otherwise be desirous to occupy the same. It is alleged that the livery stable of defendants is to be constructed with board floors, and that the stamping of horses thereon, and the rolling of vehicles on the same, by reason of the close proximity of the stable to the dwelling of complainant, will cause any occupant great and interminable annoyance, uneasiness, and disquiet, and render it impossible for any person or family to occupy said dwelling without great physical discomfort and inconvenience,

and that the presence of combustible materials so near the said dwelling will cause every occupant of said dwelling grave fears and anxiety by reason of the increased danger and peril from fire.

It is alleged, also, that the mere beginning of the stable has greatly diminished the value of complainant's property, and that he is advised that the maintenance of such stable will be prejudicial to the health of the residents within its immediate neighborhood. It is alleged, further, that the eastern wall of defendants' stable will be built so as to immediately cover the western wall of complainant's dwelling, and will be extended to the sidewalk on the north, so as to cut off the light and view westward from complainant's

said premises, and that defendants have actually begun the erection of their building, and announce their purpose to complete the same. As a further ground of relief, the bill alleges that the defendants have begun the erection of their building, and will complete the same, for unlawful purposes of extortion and blackmail, and that they have purchased the lot now occupied by them with the expectation that, upon their announcement of their intention to build a livery stable, or upon the completion of the same, the property owners in the immediate neighborhood will be compelled, from motives of self-protection, to unite and buy the defendants' lot at a price to be fixed by defendants, greatly in excess of what they paid and of the real value of said premises. It is alleged, furthermore, that in other neighborhoods devoted to residences the defendants have bought property, and, having announced their intention to build a public livery stable, and having begun the same, have been bought off by the property owners of the neighborhood, at an exorbitant advance over and above the price paid for the property by the defendants; and that, even in the present instance, the defendants have indicated that what they might ultimately do would depend upon the action of the owners of the property in the neighborhood. The bill alleges that the defendants have been notified to desist from the erection thus begun by them, but that they persist in continuing the work already begun. The bill prays an injunction and general relief. In support of the bill, the complainant has filed numerous affidavits.

The defendants answer, under oath, in which they admit the ownership, as alleged, of lots in block 1,014, on Locust street; that the defendants are erecting a brick building thereon, adjoining the plaintiff's property, to be used as a livery and boarding, but not, as alleged, a sale stable; deny that the complainant is in actual possession of the adjoining building, but only in possession by his tenant; deny that the neighborhood is fixed in its character as a residence neighborhood, and set forth various trades that are carried on in said block 1,014—among them, on Olive street, a large livery stable, two meat shops, and other shops; deny that the building they are constructing will be a nuisance, or that the business to be carried on therein will in any way constitute a nuisance, and they put in issue every averment to that effect in the bill. They aver that they have purchased and paid for the land occupied by them in good faith; that they have employed an architect, who stands well in his profession, to design the building in such a manner that defendants shall reside in the second story, and so as to suppress all noises and be free from all nuisances averred in the bill. They aver, further, that Thomas P. Russell, for thirty years previous to March, 1878, carried on the business continuously in the same building on Franklin avenue, in a residence portion of the city. Their change from that place was occasioned by the expiration of his lease; that his son was admitted as a partner some years previous to 1878. They aver that they bought and paid for the ground now owned by them with the intention of pursuing their trade in a lawful and proper manner, and that

they propose only to enjoy the lawful use and control of their own land, and in no manner to interfere with the rights of others; that the said livery stable, when constructed, will not be a nuisance, nor carried on in any way so as to interfere with the complainant, and they will carry it on in a proper and lawful manner; that their business, when so conducted, is a useful and necessary calling, and they deny all the imputations in the bill against their good faith. Numerous affidavits were filed in support of the answer.

J. M. & C. H. Krum, for complainant.

Broadhead, Slayback & Haeussler, for defendants.

DILLON, Circuit Judge. The prayer of the bill is "that the defendants be perpetually enjoined by the decree of the court from further proceeding with the erection of said livery stable upon the said lot, and from the use and occupation of said premises for the purposes of a public livery stable, and for general relief." The present application is for a special preliminary injunction restraining the defendants from making such erection, and from so using the said premises.

The questions which may finally be involved in the merits of the case are of very great importance, as they arise out of the point where two plain principles of law meet. The one is that every owner of private property may make any lawful use of it which he sees proper. The other is that private property must be so used as not to injure the property of his neighbor, or invade the just rights of the public. St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642.

The essential groundwork of the bill in this case is, that the proposed erection of a livery stable on the lot in question, and its use for this purpose when erected, will constitute a nuisance to the plaintiff's adjoining property. The bill can have no other foundation. On a street, and in a locality such as this portion of Locust street is, many erections can readily be imagined that would be extremely objectionable to the owners of residences, such as a meat market, a greengrocer's establishment, or, indeed, a store building or a business house of any kind. But the general law of the land does not limit the rights of ownership by the tastes and wishes of one's neighbors. Possibly, under the charter provisions, the municipal authorities might be invested with more power, in the nature of police regulations,

over the uses to which private property may be put, than can be exercised by the courts under the general law; but it is conceded that the city authorities have not undertaken to regulate the erection or use of livery stables. It is, therefore, clear that this application must rest upon the proposition that the livery stable proposed to be erected and used by the defendants is, and will be, in the legal sense of the term, a "nuisance." To be a nuisance it must be something which unreasonably and sensibly interferes with the comfort and enjoyment of life or property—which may be by noises, noxious and offensive smells, injurious gases, the collection of flies and insects, and the like. The books abound in cases where nuisances of this kind are held actionable at law, and where, when the fact is ascertained, either by a verdict or by admission in the pleadings, or from the essential and unavoidable character of the trade or occupation, that the thing or matter complained of is a nuisance, courts of equity have interfered by injunction.

Counsel have referred to a number of adjudications in which the legal rights of the proprietors of livery stables and those of the adjoining or near proprietors have been considered by the courts. The principal cases are the following: Aldrich v. Howard. 7 R. I. 87, 8 R. I. 246; Burditt v. Swenson, 17 Tex. 489; Dargan v. Waddill, 9 Ired. 244; Kirkman v. Handy, 11 Humph. 406; Coker v. Birge, 10 Ga. 336; Harrison v. Brooks, 20 Ga. 537; Morris v. Brower, 1 Anth. N. P. 368. The judgments in these cases concur in establishing this doctrine, viz., that a livery stable in a town or city is not per se—that is, necessarily and unavoidably—a nuisance, but it may be or become a nuisance, and this depends upon its location, as respects the property near by, and the manner in which it is built, kept, and used. The foregoing observations are well illustrated by Aldrich v. Howard, 8 R. I. 246, where it was decided that a livery stable may be a nuisance, notwithstanding it was properly built, properly kept, and was in a location as fit as any in that part of the city. The court say: "It has been held, in other cases, that a stable in a town is not necessarily and per se a nuisance; yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance that it is well kept, carefully built, and as favorably located as the town will admit."

This principle, that a livery stable is or is not a nuisance according to circumstances, is decisive of the present application for a preliminary injunction. The stable is not yet erected—its erection has just been commenced. The complainant seeks relief by injunction against an apprehended mischief and nuisance. The principles upon which the courts of equity proceed in such cases are well settled, and are thus clearly stated by Lord Chancellor Brougham in the case of Earl of Ripon v. Hobart, 3 Mylne & K. 169, 179: "If the thing sought to be prohibited is in itself a nuisance, the court will interfere to stay irreparable mischief, without waiting for the result of a trial; and will, according to the circumstances, direct an issue, or allow an action, and, if need be, expedite the proceed-

ings, the injunction being in the meantime continued. But where the thing sought to be restrained is not unavoidably and in itself noxious, but only something which may, according to circumstances, prove so, the court will refuse to interfere until the matter has been tried at law, generally by an action, though in particular cases an issue may be directed for the satisfaction of the court where an action could not be framed so as to meet the question." I consider the principles thus laid down as to the time or stage at which equity will interfere as founded on the soundest of reasons; and they have been approved by the supreme court of Tennessee in Kirkman v. Handy, supra, which refused to prevent the erection of a livery stable upon a lot adjoining the plaintiff's, "on Cherry street, in one of the best neighborhoods in the city of Nashville." In Coker v. Birge, 9 Ga. 425, an injunction against the erection was granted, but it was for the reason that, no answer having been filed, the allegations of the bill that the stable would be a nuisance were admitted; but when this was denied, the same court, in the subsequent case of Harrison v. Brooks, refused such an injunction. In Burditt v. Swenson, supra, the livery stable having been found to be a nuisance by the verdict of a jury, the court awarded a perpetual injunction.

No case has been referred to in which the erection of a livery stable has been enjoined where the fact that it would be a nuisance was denied, and where it had not been ascertained to be such by an appropriate judicial inquiry, before the injunction was awarded. And, so far as my researches have gone, Lord Brougham is entirely correct in his statement in the Earl of Ripon's Case, supra, "that no instance can be produced of the interposition by injunction in the case of an eventual or contingent nuisance." Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201; Duncan v. Hayes, 22 N. J. Eq. 25; Rhodes v. Dunbar, 57 Pa. St. 274; Wood, Nuis. § 789. The difficulty in thus interfering is greatly increased, if not insurmountable, when it is the use to which the structure is to be put, and not the intrinsic nature of the structure itself, which forms the basis of anticipated grievance. Duncan v. Hayes, 22 N. J. Eq. 25.

That the parties may not be misled, it may be well to add that we deny the injunction on the ground that the answer having denied the fact that the building, when erected

and used as proposed, will be a nuisance to the property in the neighborhood, and the case being one in which the question of nuisance or no nuisance depends upon circumstances hereafter to be ascertained, it is, therefore, not one in which it is proper to issue the writ asked at this stage of the controversy. The filing of the bill may not, however, prove to be eventually useless, since "it is generally good policy," says Mr. Wood (Law of Nuisance, § 790), where there are strong reasons to believe that the thing will be a nuisance, to institute proceedings to stay its progress, particularly if its erection involves large expenditures, as in such cases the party cannot be charged with laches, nor can acquiescence in any measure be imputed to him, and the diligence used by instituting the proceedings, operating as a notice and protest against the use of the property in the manner contemplated, strengthens the plaintiff's equities when he asks for an injunction after the use of the property actually proves injurious." The defendants now proceed at their peril, and if it shall be hereafter found by a jury, or otherwise judicially ascertained, that the stable in this place, as used by them, does interfere with the comfortable enjoyment of the neighboring property, they cannot complain if they are then perpetually enjoined from the further use of it for the purpose for which it was designed. Injunction denied.

[1] {Reported by Hon. John F. Dillon, Circuit Judge, and here reprinted by permission.}