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Real Property-Nuisances-Building Restrictions-Garages

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thereof". This would seem to be broad enough to cover any possible interpretation the courts may ultimately place upon the new section 1212.

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REAL PROPERTY—NUISANCES—BUILDING RESTRICTIONS—GARAGES. Three recent cases by the same parties[1] disclose an interesting litigation on the subject of the erection of garages as nuisances or as violations of building restrictions. The first *Ladner v. Siegel* case[2] has definitely established the rule that a public garage in an exclusively residential neighborhood constitutes a nuisance *per se*. The defendants planned to construct a garage with space for the handling of over 400 automobiles in a neighborhood in West Philadelphia that was exclusively residential. Notice was given to the defendants that an injunction would be sought to prevent its erection. Nevertheless the building was started and a preliminary injunction was granted against the use of any building on the premises as a public garage. The building was completed and the lower court made the injunction permanent.

On appeal to the Supreme Court it was said that a nuisance *per se* was any such business as is "generally known to be injurious to health and to cause legal damage to property in certain localities and surroundings, regardless of how it may be carried on, for the common experience of mankind, of which the courts will take judicial notice, proves this to be the result, and such pursuits in certain areas are to be prohibited."[3] The court held that a public garage when conducted in a residential district is such a business and a nuisance *per se*.[4]

The importance of holding a given pursuit a nuisance *per se* is the resulting ease in the matter of proof. If a pursuit has been held such a nuisance all that need be averred and proved is the character of the neighborhood and the actual or proposed conduct of the given business and an injunction will be granted. If not a nuisance *per se*, these averments must be followed by an averment and

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[1]Ladner v. Siegel, 293 Pa. 306; 294 Pa. 360; 294 Pa. 368 (1928).

[2]293 Pa. 306 (1928).

[3]Pa. Co. v. Sun Oil Co., 290 Pa. 404, 410 (1927).

[4]Mitchell v. Guaranty Corp., 283 Pa. 361 (1925); Unger v. Edgewood Garage, 287 Pa. 14 (1926).

proof of injurious consequences flowing from the business in question.[5] This latter is frequently attended with no little difficulty.

In several previous cases it had been shown that public garages were nuisances in fact due to the injurious consequences flowing from their operation and their use as such had been restrained.[6] Other cases had held that public garages were nuisances in residential neighborhoods and apparently had based their holdings on the conclusion that such were nuisances *per se*.[7] Since *Ladner v. Siegel*[8] there can be no doubt that such is the law.

Hohl v. Modell[9] and *George v. Goodovitch*[10] were cases where a number of joined individual garages, owned by one person but rented to various car owners, were found to be nuisances in fact in residential neighborhoods and their operation enjoined. The court in the first-mentioned case called such garages semi-public garages.

A sales and service station was held to be practically a public garage and a nuisance in fact in *Slinguff v. Tyson*.[11] A service station has been declared to be a nuisance *per se*.[12]

In *Carney v. Penn Oil Co.*[13] a filling station where no accessories were sold or cars repaired was held not to be a nuisance *per se* but where operated in a residential neighborhood and shown to produce injurious consequences to adjacent property owners, as was shown in the instant case, will be enjoined. It is to be noted that the station was built within a very few feet of the adjoining residence.

Apparently there has been but one case holding that a purely private garage may be enjoined when shown to be a nuisance in fact.[14]

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[5]Supra, note 3.

[6]Prendergast v. Walls, 257 Pa. 547 (1917); Hohl v. Modell, 264 Pa. 516 (1919); Phillips v. Donaldson, 269 Pa. 244 (1920); Phillips v. Dunseith, 269 Pa. 251 (1920); Tyson v. Coder, 83 Pa. Super. Ct. 116 (1924).

[7]Hunter v. Wood, 277 Pa. 150 (1923); Mitchell v. Guaranty Corp., supra; Unger v. Edgewood Garage, supra.

[8]Supra, note 2.

[9]Supra, note 6.

[10]288 Pa. 48 (1927).

[11]280 Pa. 206 (1924).

[12]Mitchell v. Guaranty Corp., supra.

[13]291 Pa. 371 (1928). But see Braun v. Refining Co., 27 Dist. Rpts. 451 (1917).

[14]La Rossa v. Forte, 92 Pa. Super. Ct. 450 (1928).

Frequently public garages have been held to constitute violations of building restrictions, imposed upon property in residential neighborhoods, against offensive or obnoxious trades or businesses.[15] The operation of a filling station will be permitted where the building restriction permits a "store" on the premises.[16]

The second of the *Ladner v. Siegel* cases[17] was decided on the question whether the operation of the garage would constitute a violation of a building restriction that there should be but private dwellings and garages erected on the property and that it should not be used for commercial purposes. The court found that the garage was erected on land that had originally been retained by the common grantor and that it was not subject to the building restriction.

The third of these cases[18] was an application under the Act of June 18, 1923, P. L. 840 for a declaratory judgment defining the use that might be made of the garage without violating the injunction that had been granted or without having the operation enjoined as a nuisance in fact although being used as a private garage merely. A declaratory judgment was entered by the lower court. The Supreme Court held that the case was a moot one merely, that it really sought an advisory opinion and that such could not properly be granted under the Act. Nor may a decree of the court be construed under the guise of a declaratory judgment. The judgment was accordingly reversed.

In other jurisdictions the cases are almost unanimous in holding that garages and filling stations are not nuisances *per se* but must be shown to be nuisances in fact by reason of injuries flowing from their operation.[19]

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[15]Hibberd v. Edwards, 235 Pa. 454 (1912); Hohl v. Modell, supra; Phillips v. Donaldson, supra; Hunter v. Wood, supra.

[16]Gunther v. Atlantic Refining Co., 277 Pa. 289 (1923).

[17]294 Pa. 360 (1928).

[18]294 Pa. 368 (1928).

[19]O'Hara v. Nelson, 63 Atl. 836 (N. J. 1906); Diocese of Trenton v. Toman, 70 Atl. 606 (N. J. 1908); Sherman v. Livingston, 128 N. Y. S. 581 (1910); Electra v. Cross, 225 S. W. 795 (Tex. 1920); Marshall v. Dallas, 253 S. W. 887 (Tex. 1923); Julian v. Oil Co., 212 Pac. 884 (Kan. 1923); Brown v. Easterday, 194 N. W. 798 (Neb. 1923); Haines v. Cadillac Co., 97 S. E. 162 (N. C. 1918).

The cases are numerous in which garages have been held to be violations of various building restrictions.[20] A few cases, however, disclose a liberal attitude in freeing garages from the withering blight of restrictions placed on premises before automobiles were as numerous as they are today or before they were in existence.[21]

A recent case in Oklahoma decided that a municipal ordinance forbidding a filling station within certain distances of churches and schools was a valid one, the court taking judicial notice that such a station in a residential neighborhood would constitute a nuisance.[22]

In *Blaustein v. Pincus*[23] leased premises were used as a lodging house. The landlord leased the adjoining premises to a tenant to use as a garage. The subsequent use of this land as a garage was held to constitute an eviction of the adjoining tenant so as to relieve from liability for rent.

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UNCONSTITUTIONAL AMENDMENTS—The bald statement that this or that amendment to a constitution is unconstitutional, is more or less startling to those who have given serious thought to the construction and interpretation of constitutions, and their functions in the business of governing a people. Such statements are, however, quite commonly made, seemingly without consciousness of the apparent incongruity involved. In fact, the very frequency with which they are encountered, both within and without the ranks of the legal profession, provokes inquiry as to possible foundations for the statement among the recognized canons of constitutional interpretation.

The ordinary and accepted meaning of 'unconstitutionality', as it is most frequently applied to statutes, is

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[20]Ringgold v. Denhardt, 110 Atl. 321 (Md. 1920); Evans v. Foss, 80 N. E. 587 (Mass. 1907); Riverbank Co. v. Bancroft, 95 N. E. 216 (Mass. 1911); Williams v. Carr, 248 S. W. 625 (Mo. 1923); Hepburn v. Long, 131 N. Y. S. 154 (1911); Perpall v. Gload, 190 N. Y. S. 417 (1921); Wilmot v. Gandy, 203 N. Y. S. 535 (1923).

[21]Beckwith v. Pirung, 119 N. Y. S. 444 (1909); Hammond v. Constant, 168 N. Y. S. 384 (1917); Riverbank Co. v. Bancroft, 95 N. E. 216 (Mass. 1911); Ronan v. Barr, 89 Atl. 282 (N. J. 1913).

[22]**Magnolia Petroleum Co. v. Wright, (Okl. 1926).**

[23]**131 Pac. 1064 (Mont. 1913).**