

reducing the volume of noise from the amplifiers and from the competing motor cycles.

Held, (1) that at the time the proceedings were commenced, the noise from the amplifiers and from the competing motor cycles constituted an actionable nuisance, but that the alterations effected had so reduced the noise as to make it no longer an actionable nuisance;

(2) that upon the proprietor of the speedway undertaking to ensure that all competitors in future motor cycle races at the speedway would have a silencer fixed to their machines, an injunction should be refused.

ACTION.

In this action William Frank Field, Albert Reginald White, Robert Edward Thomas, Lionel Leopold Haley, and Elizabeth Fortescue Field sued the South Australian Soccer Football Association (Incorporated) and Alfred Charles Shields, carrying on business under the firm name of Rowley Park Speedway Co., for an injunction to restrain them from carrying on or permitting to be carried on the business or sport of speedway racing on or about the land known as Rowley Park Speedway.

The facts are sufficiently stated in the judgment.

G. C. Harry and R. C. Harry, for the plaintiffs.

K. L. Ward Q.C. and R. G. D. Cresswell, for the defendant Shields.

J. D. O'Sullivan, for the defendant the South Australian Soccer Football Association (Incorporated).

[The following cases were cited:—*St. Helen's Smelting Co. v. Tipping*(1); *Colls v. Home & Colonial Stores Ltd.*(2); *Salvin v. North Brancepeth Coal Co.*(3); *New Imperial and Windsor Hotel Co. Ltd. v. Johnson*(4); *McKenzie v. Powley*(5); *Painter v. Reed*(6); *Spencer v. Silva*(7); *Harkess v. Woodhead*(8); *Don Brass Foundry Pty. Ltd. v. Stead*(9); *Haddon v. Lynch*(10); *Dunstan v. King*(11); *Silservice Pty Ltd. v. Supreme Bread Pty. Ltd.*(12); *Abbott v. Arcus*(13); *Attorney-General v. Cole & Son*(14).]

Cur. adv. vult.

Oct. 3, 1952.

NAPIER C.J.:—This is a claim for an injunction to restrain the defendants from carrying on, or permitting to be carried on, the business or sport of speedway racing on the sports ground, known as Rowley Park, adjoining the Torrens Road in the district of Hindmarsh.

FIELD AND OTHERS v. SOUTH AUSTRALIAN SOCCER ASSOCIATION (INCORPORATED) AND SHIELDS.

Supreme Court: Napier C.J.

Aug. 6, 7, 8, 12, 13; Oct. 3, 30, 1952.

Nuisance—Noise—Use of sports ground as speedway for motor cycle racing—Noise from amplifiers and from racing motor cycles—Claim for injunction by occupants of neighbouring residences—Reduction in noise from amplifiers after action brought—Undertaking by proprietor of speedway to equip motor cycles with silencers—Whether injunction should be granted.

The occupants of a number of houses situated in the vicinity of a sports ground used as a speedway for competitive motor cycle racing claimed an injunction restraining the carrying on of speedway racing at the sports ground, because of the noise, dust and fumes resulting from the use of the speedway, and of the noise made by spectators in arriving at and departing from the ground. After the proceedings had been commenced, the proprietor of the speedway caused alterations to be made to the amplifiers of a broadcasting system used at the ground, and required competitors in motor cycle races to have silencers fitted to their machines. These changes had the effect of considerably

(1) (1865) 11 H.L.C. 642 (11 E.R. 1483).

(2) (1904) A.C. 179.

(3) (1874) L.R. 9 Ch.App. 705.

(4) (1912) 1 Ir. 327.

(5) [1916] S.A.L.R. 1.

(6) [1930] S.A.S.R. 295.

(7) [1942] S.A.S.R. 213.

(8) [1950] S.A.S.R. 54.

(9) (1948) 48 S.R. (N.S.W.) 482; 65 W.N. 218.

(10) (1911) V.L.R. 230.

(11) (1948) V.L.R. 269.

(12) (1949) 50 S.R. (N.S.W.) 127; 67 W.N. 77.

(13) (1948) 50 W.A.L.R. 41.

(14) (1901) 1 Ch. 205.

Rowley Park is an old pughole which has been graded, levelled, and laid out as a football field surrounded by a track, which can be used as a speedway for motor cycles and midget cars.

The park is owned by the defendant, the South Australian Soccer Football Association (Incorporated). It is used as a football field in winter, but in summer it is used as a "speedway" by the defendant Shields (trading as Rowley Park Speedway Co.) under lease or licence from the Association.

The plaintiffs are the occupants of houses situated in the vicinity of the Rowley Park ground, and their complaint is that their "rest is seriously disturbed, and the quiet enjoyment of their homes is rendered impossible," by the noise, dust, and noxious fumes resulting from the use of the speedway.

The field and track are about thirty-five feet below the natural surface. The bank on the northern side has been graded to accommodate the spectators. Above that is a terraced roadway for the parking of cars, and behind that the fence, on the southern footpath of the Torrens Road. The houses owned and occupied by the plaintiffs, Miss E. F. Field and Haley, are on the far side of the Torrens Road, and the house owned and occupied by the plaintiff W. F. Field is in McQuillan Avenue immediately behind his sister's house. The other plaintiffs live further from the speedway.

The district is essentially industrial. The Torrens Road carries heavy traffic to and from Port Adelaide, and on the north side (next to Haley's house) there is a brickworks, and, behind that, there is another pughole from which the clay is being taken. Prior to its acquisition by the Soccer Football Association, the old (Rowley Park) pughole was used as a rubbish dump. I think that there can be no doubt that its conversion into a sports ground is an improvement to the appearance of the neighbourhood. I shall have to refer to the evidence with respect to dust; but I may say at once that, so far as the complaint relates to dust and noxious fumes, I find it difficult to believe that the present state of things compares unfavourably—in this respect—with things as they were before the Soccer Football Association acquired the pughole.

Under Shield's "lease" from the Association, he is allowed to conduct a maximum of twenty-six meetings from 1st October to 31st March, and to have twenty-six practice nights. In the course of the last season there were twenty-two meetings and eleven practice nights.

The meetings are held on Friday nights. They start at 8 p.m. and finish at 10.30 to 10.45 p.m. Speaking generally, they attract an attendance of 4,000-5,000, but on a special occasion it has been over 8,000. Many of the patrons come in motor cars or on motor cycles, and the plaintiffs complain of the noise made by the spectators coming and going, and of vehicles being parked in the Torrens Road, outside their houses.

In support of this complaint Mr. Harry relied upon *Silservice Pty. Ltd. v. Supreme Bread Pty. Ltd.*⁽¹⁵⁾, where Roper C.J. in Eq. lays down the proposition that "if it is a necessary ingredient in the successful conduct

of the business of a defendant that he should cause a crowd of people to assemble, as in the theatre and circus cases, he is liable for any nuisance caused by the assembly, or by the process of bringing it together: *Barber v. Penley*⁽¹⁶⁾; *Lyons, Sons & Co. v. Gulliver*⁽¹⁷⁾." I accept that, but it is prefaced by the observation that "every case of nuisance depends on its own facts, and general principles can only be stated broadly." So far as the plaintiff's complaint relates to the use of the street for coming and going, I fail to see how that can be regarded as a nuisance, and, so far as it relates to parking in the street, the evidence is that the local government authority has intervened to arrange for parking in the locality, and I think that there should be no further ground for complaint on that score. I think that much the same complaint might be made in respect of every picture theatre, football ground, or racecourse, in the metropolitan area.

In the case for the plaintiffs, stress was laid upon the pall of dust which was said to arise from the arena, whenever the track was used; but it is clear that the track is watered and well looked after, and that, in the ordinary course of things, there is very little dust from the track. According to the plaintiff's witness, Mr. Goode, the photo which was put in by the plaintiffs is "not representative of what one would get when the track is watered," but the photograph put in by the defence is "typical of a very big night." I have no doubt that, as the summer advances and the mound dries off, a certain amount of dust is raised by the spectators moving about, and by their cars when using the Torrens Road and entering and leaving the parking area, but, having regard to the levels, it seems to me that, save under exceptional circumstances, any dust that invades the houses on the far side of the Torrens Road must come from the traffic using the roadway on its lawful occasions.

That brings me to what I regard as the question in the case, namely, the complaint of noise. In the statement of claim the complaint is of (1) the "loud and offensive noises" emitted by the racing cars and cycles, and (2) the use of the amplifier system. With respect to the amplifier system, I accept the evidence of the defendant that this was very much modified in the course of the 1951-1952 season. There are six speaker points on various parts of the ground, and, when the defendant Shields took over the speedway towards the end of 1951, they were used to broadcast music between the events. Since then they have been used to announce the races, with an occasional broadcast of an interview with one of the competitors. The estimate of the plaintiff, W. F. Field, is that the broadcasting would occupy, in all, about three-quarters of an hour per meeting. The testimony of the plaintiff's witness, Goode, is that the amplifiers do not "blare."

The evidence with respect to the noise from the racing cars and cycles is conflicting. I do not think that the evidence as to the sounds being heard at a distance is of any great importance. Mr. Goode was cross-examined about the broadcast from the Wayville Show Grounds, and said that there were occasions when he could hear it at Unley Park,

(16) (1893) 2 Ch. 447.

(17) (1914) 1 Ch. 631.

(15) (1949) 50 S.R. (N.S.W.) 127, at p. 130; 67 W.N. 77, at p. 79.

two miles away. I have no doubt that under suitable conditions the sound of a tram or a train can be heard at that distance.

I am not disposed to question the good faith of the evidence given by the plaintiffs, but I think that there was a tendency to exaggerate the grievance, and to complain of things that could hardly be regarded as a nuisance in that locality. For example, the plaintiff W. F. Field says: "The traffic leaving the area is intermittent—a large volume leaves soon after the races, but cars are leaving up to half an hour after completion of races, followed by a low rumbling sound of a truck being driven round the track, grading and watering the track at completion of racing"; and again: "During racing season it is summer—there has been no attention to car parking in our street and cars park on roads and foot-paths opposite our house and make a dust." It is a minor matter, but I notice that this witness complains of the broadcasting of talks with interstate riders. He says "that happens at least once a night," but the witness Goode, who describes himself as "a regular attendant" at the Speedway, said that he had not heard the amplifiers when celebrities were being interviewed.

I think that I must accept Goode's account of the racing:—

"The volume of noise when a race is in progress is very loud, depending on number and type of vehicles running. The noise is the exhaust noise of the engines . . . On occasions the vehicles backfire. That creates a very sharp crack. Generally a motor car or motor 'bike' is being tuned up in the pits." [These are on the far side of the speedway.] "That creates a certain amount of noise. Motor bikes also race there—individual motor cycles, and cycles with a side car attachment . . . I don't think the noise of the cycles is quite as great as that of the cars, but it is an exhaust noise and quite loud. In addition there are 'two-stroke races,' where silencers are fitted, and that does not involve an undue amount of noise. They make more of a buzzing noise than a popping noise like the larger vehicles."

It is obvious that what is one man's meat may be poison to another. Apart from the fact that thousands of people pay to go and see these races, the defendants have called a number of the occupants of the cottage homes, which may be said to overhang the speedway on the east. One after another these elderly ladies, Mrs. Huxley (72), Mrs. Chapman (80), Mrs. Harris (77), Mrs. Errington (67), and Mrs. Moore (72), have come to speak to the state of the pughole as it was, and as it is, and to say that they enjoy the speedway meetings. I think that Mrs. Huxley was voicing the general attitude when she said: "It is the only bit of pleasure we have there." I found it difficult to take her literally when she said, in cross-examination, "we can just hear the noise, it is not as bad as the cars on the front road," but she was followed by other witnesses who said very much the same. Mrs. Errington said:—"The noise doesn't annoy us, it doesn't worry me. We get more noise, really, from the motor bikes going up the street. We get that almost every day. They make more noise than the speedway. The street is not so wide." And Mrs. Heitman (who lives in a house backing onto the speedway) said:—"There are as many as eight cars or motor bikes in a race at times.

I haven't noticed very much difference in the noise from that than from the average traffic in my street—it is about the same."

With respect to the volume of the noise, as it is heard on the Torrens Road, I think that I must accept the evidence of the defendant Shields and the witnesses Turnbull and Johnson. Shields says:—"To test the position, I stood in front of Haley's place on two occasions on one night . . . normal conversation was carried on during the progress of a side-car race and then a speed car race. I did not have to raise my voice at all."

Mr. Turnbull is the Mayor of Hindmarsh, and his evidence is:—"In the early part of this year—in January or February—some members of the council and the town clerk, and Sergeant Scott of Hindmarsh Police Station and I, met on Torrens Road just opposite the speedway—to inspect the street lighting . . . There was a speedway meeting in progress that night. We remained there for approximately an hour and a half . . . We were discussing matters when we were there, it was really an official council visit. We didn't have to raise our voices—it was just ordinary conversation. That was so while races were in progress. We didn't particularly notice the races. Personally I found no difficulty in concentrating my thoughts on the matter under discussion."

Mr. Johnson is an alderman of the Hindmarsh Corporation. He was present on the occasion mentioned by the previous witness, and says that he "found no difficulty in conversing" while they were in the vicinity of the speedway, and that that was so when races were in progress. He speaks of another occasion when he was asked by the plaintiff Field to go to Miss Field's house. He says:—"We conversed there that night during the progress of the speedway meeting—it seemed to me that when the bikes took part in a race and came to the Torrens Road side of the course, there was—for a second or two—more noise than at other times, but it was not then loud enough to disturb our conversation or the trend of my thoughts . . . I would say that the noise was for a second or two like motor bikes starting up, when they came on that side of the ground. At that point the noise would be louder than the normal traffic along Torrens Road."

When this testimony is compared with the evidence of the plaintiffs, it seems to me that the conflict is not so much with respect to the volume of the noise as with respect to its effect upon the individual. For example, Miss Field says:—"I have conversed with people in my home while races are in progress. That cannot be done in a normal voice in front of our house—it requires a little raising of the voice."

Mr. Bartlett speaks of a visit to Haley's home on 9th November, 1951 while races were in progress. He says:—"I noticed a tremendous noise coming from the speedway while I was at the house . . . To me the noise was distressing . . . I could talk to them in an ordinary tone of voice, but the objectionable element was there just the same."

I think that this relates to the time when the amplifiers were in full blast. The witness says:—"I have noticed the loud speakers on my visit, and when I have been driving past. That seemed to me to be part and parcel of the whole noise that was being made."

The plaintiff Haley says:—"We can talk inside if we are in the same room, but to speak to a person in another room it would be hard to hear. You can hear the wireless, but there is the disconcerting effect of noises coming in all the time—then it would go quiet and then come in as loud as before. You can't concentrate and read." The plaintiff W. F. Field says:—"Conversation can be carried on during the races, but the trend of thought is disturbed by the noises. The wireless has to be run at a louder volume than normal to get a continuity of programme, and the noise disturbs one's train of thought." His wife says:—"I should think that you could talk outside the house when there is a race on, without lifting your voice. I agree that you could."

The claim is for nuisance. There is no allegation of malice, or that the defendants are doing anything that is prohibited by law or in contravention of any proprietary or contractual right, and, in these circumstances, the basic principle is that the Courts will not restrict the defendants' use of their own land, unless the plaintiffs can show a substantial interference with their use and occupation of their homes. I think that I must dismiss the claim so far as it relates to dust and noxious fumes, or to obstruction of the highway, and so far, also, as it relates to any of the houses, other than the three occupied by Haley, Miss Field and W. F. Field. The allegation that requires further consideration is that the comfortable occupation of these three homes is disturbed by the noise arising from the use of the speedway.

For this purpose the leading case is *Gaunt v. Fynney*⁽¹⁸⁾, where Lord Selborne L.C. says:—

"There may of course be such a thing as a legal nuisance from noise in a manufacturing or other populous town, of which the case of *Soltau v. De Held*⁽¹⁹⁾ is an example. But a nuisance of this kind is much more difficult to prove than when the injury complained of is the demonstrable effect of a visible or tangible cause . . . A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party-wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction. Such things, to offend against the law, must be done in a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable"⁽²⁰⁾.

The question of fact is "whether the annoyance is such as materially to interfere with the ordinary comfort of human existence" (*Crump v. Lambert*⁽²¹⁾), having regard to all the circumstances of the locality, and, in particular to the nature of the trades usually carried on in the locality, and "the noises and disturbances existing prior to the commencement of

the defendants' operations" (per Warrington J. in *Rushmer v. Polsue & Alfieri, Ltd.*⁽²²⁾).

In reading some of the cases to which I have been referred, I think that it is necessary to bear in mind that "times change, and we with them." Whether we like it or not, we—in this day and generation—have to put up with many things that would have seemed quite intolerable prior to 1896, when the *Locomotives on Highways Act* (Imp.) became law. That was the Act that classed a motor car as a "light locomotive," and exempted it from the necessity of having an attendant to precede it, on foot, at a distance of not less than twenty yards. The speed limit fixed by that Act was fourteen miles per hour.

In *Rushmer v. Polsue & Alfieri, Ltd.*⁽²³⁾ it was argued that a person living in a district specially devoted to a particular trade cannot complain of any nuisance by noise caused by the carrying on of any branch of that trade without carelessness and in a reasonable manner. That argument was rejected as follows:—

"Whatever the standard of comfort in a particular district may be . . . the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in a manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked. In short, if a substantial addition is found in any particular case, it is no answer to say that the neighbourhood is noisy, and that the defendant's machinery is of first-class character"⁽²⁴⁾.

As I read this it means that the defendant cannot "confess" that his operations seriously interfere with the plaintiff's comfort, and "avoid" the conclusion of a legal nuisance, by showing that his operations are reasonable or necessary incidents of his trade. But this does not touch the question whether there is a nuisance which gives a right of action. That is a question of fact and of degree (see *Polsue & Alfieri, Ltd. v. Rushmer*⁽²⁵⁾). And, for this purpose, a very material question may be whether the defendant has done everything that a reasonable man might be expected to do, in order to avoid interfering with the comfort of his neighbours.

In the present case, it seems to me, that the defendant Shields is providing a large number of people with a form of entertainment that appeals to them, and, in the course of his operations, the defendants are utilising and improving a tract of waste land, in a way that adds to the amenities of the neighbourhood. And it may be said in Shields' favour that he has shown a very definite disposition to act reasonably towards

(18) (1872) L.R. 8 Ch.App. 8.
 (19) (1851) 2 Sim. (N.S.) 133 (61 E.R. 291).
 (20) (1872) L.R. 8 Ch.App., at pp. 11-12.
 (21) (1867) L.R. 3 Eq. 409, at p. 413.

(22) (1906) 1 Ch. 234, at pp. 236-237; on appeal (1906) 1 Ch. 249; (1907) A.C. 121.
 (23) (1906) 1 Ch. 234.
 (24) (1906) 1 Ch., at pp. 250-251.
 (25) (1907) A.C. 121, at p. 123.

the plaintiffs. But I think that it is difficult to resist the conclusion that, as the meetings were conducted when the writ was issued, there was some substantial interference with the peace and comfort of the three houses that I have mentioned.

I think that the changes made in the use of the amplifiers, by discontinuing the broadcast of music between the races, and by directing them along the bank has effected a very substantial reduction in this interference, and I hesitate to say that what remains is "exceptive and unreasonable" in that locality. My doubt relates to the noise attending the midget car racing. I have accepted the evidence that the noise made by these cars is perceptibly greater than that of the cycle and "two-stroke" races, and there seems to be some doubt whether all the cars are fitted with silencers. If the noise can be reduced in that way then, in my opinion, it should be done.

In these circumstances I feel grave doubt as to the order that should be made. As at present advised, I think that I must declare that, as the meetings were conducted at the time of action brought, the noise of the amplifiers, added to the noise of the racing, constituted an actionable nuisance. I think that the defendant Shields might give an undertaking, in suitable terms, to ensure that the cars and cycles are silenced as effectively as may be. If such an undertaking is forthcoming I am not disposed to grant an injunction. With respect to the costs, I think that at least half of the costs of trial were incurred in respect of issues that have been found in favour of the defendants. But upon that, and upon the form of the judgment generally, I shall be glad to have the assistance of counsel.

[Upon the defendant Shields subsequently giving such an undertaking, on 30th October, 1952 an order was made as set out hereunder.]

Declare that at the time of action brought the noise of amplifiers used by the defendant Shields, added to the noise of the racing of cars and motor cycles at meetings conducted by the defendant Shields under licence from the defendant the South Australian Soccer Football Association (Incorporated) constituted an actionable nuisance, but make no such declaration as to the conduct of such meetings since the time of action brought.

Defendant Shields by his counsel undertaking to ensure that all competitors in any races conducted by him at the Rowley Park Speedway shall have affixed to their vehicles a silencer of a type described in the affidavit of the defendant Shields filed herein on the 10th day of October 1952 and the exhibits thereto, or some more effective type, injunction refused.

Defendants to pay plaintiffs their costs of action to be taxed up to the time of setting down the action, and otherwise each party to pay his or its own costs.

Solicitors for Plaintiff: Romilly Harry & Co.

Solicitors for defendant Shields: R. G. D. Cresswell.

Solicitors for defendant the South Australian Soccer Football Association (Incorporated): Moran, O'Sullivan & Devaney.