[HIGH COURT OF AUSTRALIA.]

VICTORIA PARK RACING AND RECREATION GROUNDS COMPANY LIMITED . . } APPELLANT;
PLAINTIFF,

AND

TAYLOR AND OTHERS . . . . . RESPONDENTS
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 15, 16, 19, 20; *Aug.* 26.

Latham C.J., Rich, Dixon, Evatt and McTiernan JJ.

Tort—Broadcast of races from adjoining land—Whether actionable—Nuisance—Unnatural use of land—Proprietary right in spectacle.

Copyright—Collated information—Notice on racecourse as to starting horses &c.

Descriptions of races taking place on the plaintiff's racecourse were contemporaneously broadcast without the plaintiff's permission through a wireless station by an observer stationed on a platform erected on adjoining land. As a result of such broadcasting, attendances at the racecourse decreased, with consequent loss to the plaintiff. The plaintiff claimed, against the broadcasting company, the observer, and the owner of the adjoining land, an injunction to restrain such broadcasting as amounting to a nuisance, an unnatural use of such adjoining land and an interference with the plaintiff's proprietary right in the spectacle conducted on his land.

Held, by *Latham* C.J., *Dixon* and *McTiernan* JJ. (*Rich* and *Evatt* JJ. dissenting), that the defendants had not infringed any legal right of the plaintiff.

Copyright does not exist in information posted by the proprietors of a racecourse inside the course as to the names and numbers of the starting horses and the scratched horses and the numbers of the winners &c.

So *held* by *Latham* C.J., *Dixon* and *McTiernan* JJ.

Decision of the Supreme Court of New South Wales (*Nicholas* J.): *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*, (1936) 37 S.R. (N.S.W.) 322; 54 W.N. (N.S.W.) 141, affirmed.

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APPEAL from the Supreme Court of New South Wales.

In a suit brought in the equitable jurisdiction of the Supreme Court of New South Wales, the plaintiff, Victoria Park Racing and Recreation Grounds Co. Ltd., claimed injunctions against George Taylor, Cyril Angles and the Commonwealth Broadcasting Corporation Ltd., the three defendants.

The plaintiff was a limited liability company which carried on for profit the business of conducting race meetings at a racecourse owned by it and situate in a suburb of Sydney. The racecourse, on which were conducted about thirteen race meetings per year, was bounded on the east by Dowling Street, on the north by a tramline running from Dowling Street to Joynton Avenue, on the west by Joynton Avenue, and on the south by Epsom Road. The land owned by the plaintiff, and consisting of the racecourse and its appurtenances, was surrounded by a fence of overlapping weatherboard which, for the greater part of the distance, was eleven feet high and for the remainder six feet high. The plaintiff did not permit any description or information concerning the races to be broadcast. About twenty minutes before the start of each race certain officers of the plaintiff determine the starting positions of each competing horse in relation to the inner rail of the racing track and this information, which is of value and interest to spectators of the race and to persons betting thereon, is immediately published by the plaintiff within, and only within, the racecourse to the spectators by means of signals and notice boards. Information is similarly made known of the placings of the horses by the judges at the conclusion of each race.

The defendant Taylor was the owner and occupier of a piece of land, and a cottage thereon, fronting Dowling Street on the opposite side from the racecourse. On the lawn between the front of the cottage and the street alignment there had been erected, with the permission of Taylor, scaffolding about sixteen feet high with an observation platform at the top and ladder-like steps from the ground to the platform. From this platform a person was able to see the whole of the racing tracks, and, amongst other appurtenances, the notice boards on which were shown the names of the competing horses and their positions at the starting barrier; the winning post; the

judge's box; and a semaphore on which the numbers of the placed horses were posted. The appurtenances are on the western side of the racecourse and were distant about 800 yards from the platform on Taylor's land.

The defendant the Commonwealth Broadcasting Corporation Ltd. was a limited liability company licensed in accordance with regulations under the *Wireless Telegraphy Act* 1905-1936, to carry on for profit the business of wireless broadcasting as a " B " class station. For the purpose of its business the company owned and conducted a broadcasting transmission station situate near Sydney and known as station 2 UW. The matters broadcast from station 2 UW consisted of items of public interest and entertainment and advertisements.

From the platform erected on Taylor's land Angles, with the permission of Taylor, as an employee and agent of the defendant company and for the purpose of broadcasting to the public, observed through field glasses the whole of each race held on the plaintiff's racecourse, and signals and notices on the racecourse as to the positions allotted to the horses at the starting line, and their placing by the judge at the finish, and while doing so spoke into a microphone, connected by land wires with station 2 UW, a very full and detailed contemporaneous description of each race and the positions of the horses at the start and at various stages of the race and the result of each race, all of which description and information, mingled with advertisements, was simultaneously broadcast by the defendant company from station 2 UW to the public in Sydney and the surrounding districts. Taylor received from one or other of the other defendants a fee of £1 for each occasion that the platform was used for the purpose mentioned above. Portions of the racecourse were visible from some of the houses in Dowling Street, and the whole of the racecourse, as well as the stands and the winning post, was visible from a sand hill on the further side of Epsom Road.

The plaintiff sought a perpetual injunction (*a*) against Taylor restraining him from allowing his land, or any building or structure thereon, to be used for the purpose of assisting, directly or indirectly, in giving any description of any race meeting held by the plaintiff on its racecourse; (*b*) against Angles restraining him from assisting or taking part in any broadcast of any such race meeting; and (*c*)

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against the defendant company restraining it from broadcasting any description of any such race meeting. The plaintiff alleged that the broadcasting was intended to cause and had caused a large number of people, who would otherwise have attended the race meetings and paid for admission to the racecourse, to listen to the broadcast description of the races, whereby the plaintiff had suffered serious loss and damage. The plaintiff also alleged that the defendants' acts constituted an unreasonable user of Taylor's land, and were an interference with the plaintiff's land and business and of the plaintiff's reasonable and proper use and enjoyment of its land and business.

The plaintiff tendered oral and documentary evidence relating to the racecourse and the manner in which race meetings were there carried on; to the descriptions of race meetings given by Angles; and to other broadcast comments on races and race meetings from station 2 UW. A number of witnesses, called by the plaintiff and representing a variety of occupations and degrees of prosperity, testified that they had abandoned the habit of attending race meetings at Victoria Park because they preferred to listen to simultaneous broadcast descriptions of these races through station 2 UW.

Nicholas J. dismissed the suit: *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1).

From that decision the plaintiff appealed to the High Court.

Gain (with him *McKay* and *Brown*), for the appellant. The acts of the respondents prejudicially affected the appellant (*a*) as promoter of the business which it conducts, and (*b*) as owner of the land on which that business is conducted. The appellant is entitled to relief under two main heads, first, an action on the case, which may be divided into common law nuisance and the rule in *Rylands* v. *Fletcher* (2), for interference with its rights to the use and enjoyment of its land and, second, copyright, that is, statutory copyright and common law copyright. The principles of law which should be applied are set forth in *Halsbury's Laws of England*, 1st ed., vol. 21, pars. 884, 885, 887 and 892, pp. 524, 525-6, 528. The acts of the respondents took away from the appellant the advantages that it had from the

(1) (1936) 37 S.R. (N.S.W.) 322; 54 W.N. (N.S.W.) 141.

(2) (1868) L.R. 3 H.L. 330.

use and enjoyment of its land as improved by it, with the advantages it was entitled to as owner of the land ; they deprived the land of its suitability for the purpose of holding thereon race meetings. Those acts are not justifiable in law and are actionable (*Bamford* v. *Turnley* (1) ; *Andreae* v. *Selfridge & Co. Ltd.* (2)). The power to exclude the public generally from the right to see whatever may be produced on the appellant's land by way of spectacle and the right of having the information collated on the land are valuable proprietary rights. The respondents have infringed the principle of the maxim *sic utere tuo ut alienum non laedas* (*Ball* v. *Ray* (3) ; *Hurdman* v. *North Eastern Railway Co.* (4) ; *Crowhurst* v. *Amersham Burial Board* (5) ; *St. Helen's Smelting Co.* v. *Tipping* (6) ; *Darley Main Colliery Co.* v. *Mitchell* (7) ; *Attorney-General* v. *Cole & Son* (8) ; *West* v. *Bristol Tramways Co.* (9) ; *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (10)). Whether the acts were " reasonable " is a question of fact dependent upon all the circumstances. The test in all cases is : Are the circumstances such that they interfere with the enjoyment of the land ? The principles upon which the court determines whether any particular matter is a nuisance appear in *Vaughan* v. *Menlove* (11) ; see also *National Telephone Co.* v. *Baker* (12). Merely to create an unpleasant sight or aspect is a nuisance (*R.* v. *Grey* (13)). The acts of the respondents seriously interfered with the ordinary enjoyment by the appellant of its land (*J. Lyons & Sons* v. *Wilkins* (14) ; see also *Reners* v. *The King* (15)). There was no right of property involved in *Allen* v. *Flood* (16). An action will lie even though there is not an interference with the use and enjoyment, in the ordinary sense, of a plaintiff's land (*Hepburn* v. *Lordan* (17)). The question for the court, as shown in the " theatre queue " cases, is : Did the respondents by the use of their land

(1) (1862) 3 B. & S. 66, at p. 83 ; 122 E.R. 27, at pp. 32, 33.
(2) (1936) 2 All E.R. 1413, at pp. 1422, 1424.
(3) (1873) 8 Ch. App. 467, at pp. 469, 471.
(4) (1878) 3 C.P.D. 168, at p. 173.
(5) (1878) 4 Ex. D. 5, at p. 9.
(6) (1865) 11 H.L.C. 642 ; 11 E.R. 1483.
(7) (1886) 11 App. Cas. 127, at pp. 148, 151.
(8) (1901) 1 Ch. 205.
(9) (1908) 2 K.B. 14, at pp. 19, 21.
(10) (1921) 2 A.C. 465, at p. 471.
(11) (1837) 3 Bing. N.C. 468 ; 132 E.R. 490.
(12) (1893) 2 Ch. 186.
(13) (1864) 4 F. & F. 73 ; 176 E.R. 472.
(14) (1899) 1 Ch. 255, at p. 267.
(15) (1926) 3 D.L.R. 669, at p. 674.
(16) (1898) A.C. 1.
(17) (1865) 2 Hem. & M. 345 ; 71 E.R. 497.

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cause a detriment to the appellant in the nature of a nuisance? (*Barber* v. *Penley* (1); *Lyons, Sons & Co.* v. *Gulliver* (2)). The court will restrain a defendant from doing acts on his land, or on the land of another person, which injure the business of the plaintiff conducted on the plaintiff's land (*Hollywood Silver Fox Farm Ltd.* v. *Emmett* (3); *Hickman* v. *Maisey* (4)). Anything, whether done to the land or not, which works some hurt, inconvenience or damage to a person in the use and enjoyment of his land is, prima facie, a nuisance. The facts show that the appellant was damaged in the ownership of its land; that the use and enjoyment of its land was lessened (*Townsend* v. *Wathen* (5); *Jefferies* v. *Duncombe* (6); *Deane* v. *Clayton* (7); *Allen* v. *Flood* (8); *Attorney-General* v. *Corke* (9); *Jolly* v. *Kine* (10)). The acts of the respondents rendered the appellant's land less attractive and thereby caused persons to cease to patronize it with consequential loss of income to the appellant. The lessening of the enjoyment of the land is the *injuria*, the fact of the people staying away is the *damnum*. The rights of the appellant and the respondent Taylor as owners of adjoining land are in conflict, but, in the circumstances, the appellant's rights should prevail (*Jordeson* v. *Sutton, Southcoates and Drypool Gas Co.* (11)). The broadcasting from the tower erected on Taylor's land, in the circumstances, was a non-natural user of that land which caused damage to the appellant in the ownership of its land (*Rylands* v. *Fletcher* (12); *Hazelwood* v. *Webber* (13); *Rainham Chemical Works Ltd.* v. *Belvedere Fish Guano Co. Ltd.* (14); *Hurdman* v. *North Eastern Railway Co.* (15); *Crowhurst* v. *Amersham Burial Board* (16); *Ballard* v. *Tomlinson* (17); *National Telephone Co.* v. *Baker* (18)). It is not necessary that the cause of the damage should "escape" from a defendant's land, nor that it should be "dangerous" (*Charing Cross Electricity Supply Co.* v. *Hydraulic*

(1) (1893) 2 Ch. 447.
(2) (1914) 1 Ch. 631.
(3) (1936) 2 K.B. 468.
(4) (1900) 1 Q.B. 752.
(5) (1808) 9 East 277; 103 E.R. 579.
(6) (1809) 11 East 226; 103 E.R. 991.
(7) (1817) 7 Taunt. 489, at p. 500; 129 E.R. 196, at p. 200.
(8) (1898) A.C., at p. 30.
(9) (1933) 1 Ch. 89, at pp. 94, 95.
(10) (1907) A.C. 1.
(11) (1899) 2 Ch. 217, at p. 243.
(12) (1868) L.R. 3 H.L. 330.
(13) (1934) 52 C.L.R. 268, at p. 277.
(14) (1921) 2 A.C. 465.
(15) (1878) 3 C.P.D. 168.
(16) (1878) 4 Ex. D. 5.
(17) (1885) 29 Ch. D. 115.
(18) (1893) 2 Ch. 186.

Power Co. (1)). *Tapling* v. *Jones* (2) is not an authority for the proposition that because a person has a right to look over another man's land an abuse of that right will not amount to a nuisance. The decision in *Browne* v. *Flower* (3) was based upon easement, and the remarks of *Greer* L.J. in *Tolley* v. *J. S. Fry & Sons Ltd.* (4) were directed to the question of personal privacy only ; no right of property was involved. Private rights and public rights in relation to the user of the land were discussed in *Cobb* v. *Saxby* (5). The appellant has copyright in the information, given in literary form on the notice boards and otherwise, relating to the starters, the riders, the post positions and particulars of the winning horses, furnished by it to its patrons. That copyright is not adversely affected by sec. 31 of the schedule to the *Copyright Act* 1912, and has been infringed by the respondents (*Messager* v. *British Broadcasting Co. Ltd.* (6) ; *Chappell & Co. Ltd.* v. *Associated Radio Co. of Australia Ltd.* (7) ; *Performing Right Society Ltd.* v. *Hammond's Bradford Brewery Co. Ltd.* (8)). That information, so given, is proper subject matter for copyright (*Canterbury Park Racecourse Co. Ltd.* v. *Hopkins* (9) ; *Mander* v. *O'Brien* (10) ; *Weatherby & Sons* v. *International Horse Agency and Exchange Ltd.* (11) ; *University of London Press Ltd.* v. *University Tutorial Press Ltd.* (12) ; *Davis* v. *Benjamin* (13) ; *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* (14)). The test of infringement is as stated in *Macmillan & Co. Ltd.* v. *K. & J. Cooper* (15). Although described by the judge of first instance as evanescent, that information is " matter capable of being printed and published " (*Tate* v. *Thomas* (16) ; *Tate* v. *Fullbrook* (17)), and is something which is reduced to literary form, and is both definite and visible. No principles of law were laid down in *Chilton* v. *Progress Printing and Publishing Co.* (18), in which the court merely decided that there cannot be

(1) (1914) 3 K.B. 772, at pp. 779, 780.
(2) (1865) 11 H.L.C. 290 ; 11 E.R. 1344.
(3) (1911) 1 Ch. 219.
(4) (1930) 1 K.B. 467, at p. 478.
(5) (1914) 3 K.B. 822.
(6) (1927) 2 K.B. 543.
(7) (1925) V.L.R. 350 ; 47 A.L.T. 12.
(8) (1934) 1 Ch. 121.
(9) (1932) 49 W.N. (N.S.W.) 27.
(10) (1934) S.A.S.R. 87.
(11) (1910) 2 Ch. 297, at pp. 303, 304.
(12) (1916) 2 Ch. 601.
(13) (1906) 2 Ch. 491.
(14) (1926) 1 Ch. 433.
(15) (1923) 93 L.J. P.C. 113, at p. 117
(16) (1921) 1 Ch. 503, at p. 511.
(17) (1908) 1 K.B. 821.
(18) (1895) 2 Ch. 29.

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copyright in one word only. The decision in *Smith's Newspapers Ltd.* v. *Labor Daily* (1) was based upon an error in reasoning. The information collated by the appellant is of interest and value to the public generally. As such it is property of the appellant and any taking thereof by the respondents without the consent of the appellant is actionable (*Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* (2)). The written matters are capable of being protected at common law quite apart from statute (*Jefferys* v. *Boosey* (3) ; *Prince Albert* v. *Strange* (4)). So also are oral communications made or produced by the author (*Caird* v. *Sime* (5)). The authorities on this aspect of the case were summarized in *In re Dickens* ; *Dickens* v. *Hawksley* (6), where it stated that the earlier authorities do not depend on breach of trust or confidence but on proprietary rights. The decision in *Sports and General Press Agency Ltd.* v. "*Our Dogs*" *Publishing Co. Ltd.* (7) is not applicable ; the remarks of *Horridge* J. (8) are mere *obiter dicta*. The respondents are working in concert ; therefore each is liable for the whole of the damage flowing from the joint acts.

Watt K.C. (with him *Thomas*), for the respondent George Taylor. The erection of the platform for the purpose of broadcasting therefrom was not an unnatural user of Taylor's land. The making available of the land for that purpose was a lawful exercise of proprietorship and mere motive cannot make it unlawful. All persons have the right, apart from contractual obligations, to describe whatever spectacle they may see to as many persons as they like and by any method of dissemination which may be found convenient or most profitable. The onus is upon the appellant of ensuring privacy for itself and for the races and other matters arranged, prepared or made known by it. Not having ensured that privacy no question of breach of trust or confidence can arise. Nor was there any breach of contract on the part of the respondents.

(1) (1925) 25 S.R. (N.S.W.) 593 ; 42 W.N. (N.S.W.) 59.
(2) (1896) 1 Q.B. 147.
(3) (1854) 4 H.L.C. 815, at pp. 866, 893, 962 ; 10 E.R. 681, at pp. 702, 712, 739.
(4) (1849) 1 Mac. & G. 25, at p. 42 ; 41 E.R. 1171, at p. 1178.
(5) (1887) 12 App. Cas. 326, at pp. 337, 343, 344, 351.
(6) (1935) 1 Ch. 267, at pp. 286, 287.
(7) (1916) 2 K.B. 880 ; (1917) 2 K.B. 125.
(8) (1916) 2 K.B., at p. 884.

The respondents, other than Taylor, are creators and disseminators of news and as such are entitled under the common law to gather it and to pass it on to the public. This principle has been long established, although dissemination by broadcasting, being of comparatively recent discovery, may in itself be novel. The appellant has no exclusive right or property in the races it presents, or in any information connected with those races which may be deemed to be of any interest to members of the public, so as to control the respondents' rights to describe what they actually see (*Sports and General Press Agency Ltd.* v. "*Our Dogs*" *Publishing Co. Ltd.* (1); *Tolley* v. *J. S. Fry & Sons Ltd.* (2)). The fact that the information and description are broadcast contemporaneously or simultaneously with the races does not make that broadcasting unlawful. Here there was no trespass by any of the respondents on the land of the appellant, so that the decision in *Hickman* v. *Maisey* (3) has no application to this case other than to show that a plaintiff must show a proprietary right to the land on which the alleged nuisance was committed (See also *Harrison* v. *Duke of Rutland* (4)). Thus it is shown that there is nothing in the nature of common law copyright which may be relied upon by the appellant; there is no right of the appellant which the respondents have infringed; and there has been no actual wrong in gathering up the information which they treat as news and then disseminate, that is, there was no legal wrong in the acts of the respondents in obtaining and passing on by the means they adopted the information which was available to them by looking over the fence surrounding the appellant's land. There was no collated information of the nature under review in *Exchange Telegraph Co.* v. *Gregory & Co.* (5); the purposes for which the information was collated were dissimilar. The appellant has not shown that acts of the respondents have deprived it of or injured it in any rights to which it was entitled (*Hammerton* v. *Dysart* (*Earl*) (6)). Between the acts of the respondents and the matters complained of by the appellant there was the intervention of a deliberate choice by the public concerned. The members of the public have

(1) (1916) 2 K.B. 880; (1917) 2 K.B. 125.
(2) (1930) 1 K.B. 467.
(3) (1900) 1 Q.B. 752.
(4) (1893) 1 Q.B. 142, at p. 147.
(5) (1896) 1 Q.B. 147.
(6) (1916) 1 A.C. 57.

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the right to choose whether they will attend the race meetings or listen in to the broadcast description thereof. If they choose the latter no wrong is committed by the respondents and no damages are occasioned to the appellant by the respondents (*Hopkins* v. *Great Northern Railway Co.* (1)). The decisions in *Andreae* v. *Selfridge & Co. Ltd.* (2), *Ball* v. *Ray* (3) and *Crowhurst* v. *Amersham Burial Board* (4) rest in each case upon an active physical interference by the defendant with the plaintiff's land. The " watching and besetting " cases, such as *J. Lyons & Sons* v. *Wilkins* (5), are also distinguishable. That case was referred to in *Pollock* on *Torts* 13th ed. (1929), p. 240. The court was equally divided in *Deane* v. *Clayton* (6) and no judgment was given. Nothing that the respondents transmit causes trouble in relation to the occupancy of the appellant's land; therefore the principle in *Rylands* v. *Fletcher* (7) does not apply. The unusual or non-natural user of a defendant's land is irrelevant unless it can be shown that such user directly injures or directly interferes with a positive legal right of the plaintiff. The use of the platform for the purpose of overlooking the appellant's land does not constitute an infraction of any legal right of the appellant to privacy (*Chandler* v. *Thompson* (8) ; *Turner* v. *Spooner* (9) ; *Browne* v. *Flower* (10) ; *Johnson* v. *Wyatt* (11) ; *Tapling* v. *Jones* (12)). The right of the appellant, as owner, to exclude the public from its land and from seeing and obtaining information concerning what is being done thereon, extends only so far as the exclusion is made perfect and effective. The respondents have not prevented anyone from going on to the appellant's land. At common law there is no right of property in the spectacle on the appellant's land, nor have the respondents at any time appropriated the spectacle or what has been referred to as the collated information. Even though loss and damage to the appellant resulted therefrom, the user to which the respondent Taylor put his land was within his rights;

(1) (1877) 2 Q.B.D. 224.
(2) (1936) 2 All E.R. 1413.
(3) (1873) 8 Ch. App. 467.
(4) (1878) 4 Ex. D. 5.
(5) (1899) 1 Ch. 255.
(6) (1817) 7 Taunt. 489; 129 E.R. 196.
(7) (1868) L.R. 3 H.L. 330.
(8) (1811) 3 Camp. 80, at p. 82; 170 E.R. 1312, at p. 1313.
(9) (1861) 1 Dr. & Sm. 467; 62 E.R. 457.
(10) (1911) 1 Ch. 219, at pp. 225, 227.
(11) (1863) 2 DeG. J. & S. 18; 46 E.R. 281.
(12) (1865) 11 H.L.C. 290, at p. 305; 11 E.R. 1344, at p. 1350.

the motive for the user is irrelevant (*Mayor &c. of Bradford* v. *Pickles* (1)). The law of copyright does not apply. There is nothing which brings the notice boards within the provisions of the *Copyright Act* (*Greyhound Racing Association Ltd.* v. *Shallis* (2) ; *McCrum* v. *Eisner* (3) ; *Copinger* on *Copyright*, 7th ed. (1936), p. 55 ; *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 520 ; see also *Weil*, *American Copyright Law* (1917), p. 42). The notices are not literary efforts ; they do not constitute or result from an arrangement. The making known of the information relating to the horses, &c., is purely mechanical. The particulars given are merely a notification of the facts in the form of information ; they are not the expression of any intellectual effort (*Smith's Newspapers Ltd.* v. *Labor Daily* (4) ; *Cambridge University Press* v. *University Tutorial Press* (5) ; *Odhams Press Ltd.* v. *London and Provincial Sporting News Agency* (1929) *Ltd.* (6)). Since the enactment of sec. 31 of the schedule to the *Copyright Act* 1912 " copyright or any similar right " does not exist at common law. The court will grant an injunction only in respect of a present copyright and a present right to sue (*Cate* v. *Devon and Exeter Constitutional Newspaper Co.* (7) ; *Moorefield Race Club Ltd.* v. *Longfield* (8)). The claim based on statutory copyright is unsubstantial.

Abrahams K.C. (with him *Street*), for the other respondents. There is no evidence as to how or whence the respondents obtained the information which was broadcast, nor as to the authorship of the information or of the programme. The classification of private nuisances set forth in *Salmond* on *Torts*, 8th ed. (1934), p. 234, covers all decided cases. The words, " the escape of deleterious things into another person's land ", are there used in the broadest sense, the word " land " including the means of ingress to and egress from the land. As shown in the cases referred to on behalf of the appellant, the act causing the nuisance must have some direct physical relationship to the plaintiff's land and must interfere

(1) (1895) A.C. 587, at pp. 595, 599-601.
(2) (1928) MacG. Cop. Cas. (1923-1928) 370.
(3) (1917) 87 L.J. Ch. 99.
(4) (1925) 25 S.R. (N.S.W.) 593 ; 42 W.N. (N.S.W.) 59.
(5) (1928) 45 R.P.C. 335.
(6) (1936) Ch. 357, at pp. 358, 364.
(7) (1889) 40 Ch. D. 500, at p. 507.
(8) (1932) 49 W.N. (N.S.W.) 102.

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directly with something on the land itself, that is, something or some persons on the land, including the means of ingress to and egress from the land. Here nothing done by the respondents affects the appellant. There has been no interference with the beneficial use and enjoyment of the land. The only act causing the damage interfered with people who had no physical relationship with the land. This fact distinguishes this case from the "watching and besetting" cases and the "theatre queue" cases. There was no interference with the business carried on on the land by the appellant. That business is carried on on the land by certain acts done thereon, namely, by running races thereon and admitting people to see those races. There was no interference with any of those acts. If there was an interference it was with the goodwill of the business, that is, with the prospective customers of the business who were off the land. The appellant's whole claim is dependent on a right of property in the spectacle or view on or over its land. The respondents are entitled to the benefit of that spectacle or view, and they are entitled to describe what they see. The respondents' right is subject only to whatever rights of property the appellant has over its own land, to do such things on its own land as would prevent the respondents seeing the spectacle. *Prince Albert* v. *Strange* (1), *Exchange Telegraph Co. Ltd.* v. *Gregory & Co.* (2), *Exchange Telegraph Co. Ltd.* v. *Central News Ltd.* (3) and *Exchange Telegraph Co. Ltd.* v. *Howard* (4) are equally illustrations of the principle that a person, whether a collector of news or otherwise, must not betray a confidential relationship, nor break, nor induce another to break, a contract (*Halsbury's Laws of England*, 2nd ed., vol. 7, pp. 580, 581, pars. 901, 902; *Copinger* on *Copyright*, 7th ed. (1936), pp. 37, 38; *Kerr* on *Injunctions*, 6th ed. (1927), p. 368; *Clerk and Lindsell* on *Torts*, 8th ed. (1929), p. 613). There is no legal ground for making a claim called misappropriation of property, because the parties are not in any relationship in connection with which the law provides that there can be misappropriation. The principle applicable in order to decide whether a document amounts to a literary work was laid down in *Macmillan*

(1) (1849) 1 Mac. & G. 25; 41 E.R. 1171.
(2) (1896) 1 Q.B. 147.
(3) (1897) 2 Ch. 48.
(4) (1906) 22 T.L.R. 375.

& Co. Ltd. v. *Cooper* (1). Here all that was done was that an official wrote down something he could not avoid writing down.

[EVATT J. referred to *British Broadcasting Co.* v. *Wireless League Gazette Publishing Co.* (2).]

It is the skill and exercise of thought that causes a work to be a literary work (*Sweet* v. *Benning* (3)). As to whether the information from time to time written on the notice boards may be regarded as a literary work, see *Tate* v. *Fullbrook* (4). If copyright were granted in respect of matters of this nature great uncertainty would prevail. The temporary nature of the matter must be taken into consideration (*Copinger* on *Copyright*, 7th ed. (1936), p. 61). There is no evidence that the information was prepared by a person under a contract of service with the appellant as required by the statute (*Simmons* v. *Heath Laundry Co.* (5) ; *University of London Press Ltd.* v. *University Tutorial Press Ltd.* (6)), nor has it been established that the appellant is the owner of the copyright.

Gain, in reply. Nuisance does not depend upon direct physical interference with the land or with the comfort of the people on the land used for the purposes of a business (*Hollywood Silver Fox Farm Ltd.* v. *Emmett* (7) ; *Cobb* v. *Saxby* (8) ; *Hepburn* v. *Lordan* (9) ; *J. Lyons & Sons* v. *Wilkins* (10)). The business of the appellant does not consist merely of the races but comprises also the preparation therefor, and matters connected therewith. The suitability of the appellant's land is affected ; that is the *injuria* ; the fact that people stay away from the racecourse merely evidences that interference and is the *damnum* (*Hickman* v. *Maisey* (11)). The collated information is property that does not depend upon breach of trust or confidence. If the court is satisfied that there will be a continuance of the matters complained of, it can apply the *quia timet* principle.

Cur. adv. vult.

(1) (1923) 40 T.L.R. 186, at p. 188.
(2) (1926) Ch. 433.
(3) (1855) 16 C.B. 459, at p. 491 ; 139 E.R. 838, at p. 851.
(4) (1908) 1 K.B., at p. 832.
(5) (1910) 1 K.B. 543, at p. 549.
(6) (1916) 2 Ch., at pp. 610, 612.
(7) (1936) 2 K.B. 468.
(8) (1914) 3 K.B. 822.
(9) (1865) 2 Hem. & M. 345 ; 71 E.R. 497.
(10) (1899) 1 Ch. 255.
(11) (1900) 1 Q.B., at pp. 754 et seq.

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Aug. 26.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment for the defendants given by *Nicholas* J. in an action by the Victoria Park Racing and Recreation Grounds Co. Ltd. against Taylor and others.

The plaintiff company carries on the business of racing upon a racecourse known as Victoria Park. The defendant Taylor is the owner of land near the racecourse. He has placed an elevated platform on his land from which it is possible to see what takes place on the racecourse and to read the information which appears on notice boards on the course as to the starters, scratchings, &c., and the winners of the races. The defendant Angles stands on the platform and through a telephone comments upon and describes the races in a particularly vivid manner and announces the names of the winning horses. The defendant the Commonwealth Broadcasting Corporation holds a broadcasting licence under the regulations made under the *Wireless Telegraphy Act* 1905-1936 and carries on the business of broadcasting from station 2 UW. This station broadcasts the commentaries and descriptions given by Angles. The plaintiff wants to have the broadcasting stopped because it prevents people from going to the races and paying for admission. The evidence shows that some people prefer hearing about the races as seen by Angles to seeing the races for themselves. The plaintiff contends that the damage which it thus suffers gives, in all the circumstances, a cause of action.

The plaintiff's case is put as an action upon the case for nuisance affecting the use and enjoyment of the plaintiff's land. It is also contended that there is an unnatural user of Taylor's land by Angles to which the Broadcasting Co. is a party and of which it takes advantage. The unnatural user is, I understand, alleged to consist in the erection of the wooden structure on Taylor's land which Angles uses and the use of the land for broadcasting purposes. It is contended that, there being this unnatural user of the land, the defendant is liable for all the damage which may happen to any person, including the plaintiff, as a result of such user.

The first contention is that the plaintiff's land has been made suitable for a racecourse, that by reason of the action of the defendants it has been deprived of at least some measure of that suitability,

and that therefore this is a case of nuisance—an unlawful interference with the use and enjoyment of land. No analogous case has been cited to the court. I agree that the category of nuisance is not closed and that if some new method of interfering with the comfort of persons in the use of land emerges the law may provide a remedy. For example, the increasing use of electricity, with the possibility of the escape of electricity into an adjoining property, has provided a new possible source of interference with the use of land and the law provides a remedy in such a case.

In this case, however, in my opinion, the defendants have not interfered in any way with the use and enjoyment of the plaintiff's land. The effect of their actions is to make the business carried on by the plaintiff less profitable, and they do so by providing a competitive entertainment. It is unnecessary to cite authorities for the proposition that mere competition (certainly if without any motive of injuring the plaintiff) is not a cause of action. The facts are that the racecourse is as suitable as ever it was for use as a racecourse. What the defendants do does not interfere with the races, nor does it interfere with the comfort or enjoyment of any person who is on the racecourse. The alleged nuisance cannot be detected by any person upon the land as operating or producing any effect upon the plaintiff's land. It is consistent with the evidence that none of the persons on that land may, at any given moment, be aware of the fact that a broadcast is being made. The only alleged effect of the broadcast is an effect in relation to people who are not upon the land, that is, the people who listen in or have the opportunity of listening in and who therefore stay away from the land. In my opinion the defendants have not in any way interfered with the plaintiff's land or the enjoyment thereof.

It has been contended that if damage is caused to any person by the act of any other person an action will lie unless the second person is able to justify his action. Many cases show that there is no such principle in the law (See *Hammerton* v. *Dysart* (1); *Grant* v. *Australian Knitting Mills Ltd.* (2)).

The plaintiff relied upon the maxim *sic utere tuo ut alienum non laedas*. The argument founded upon this maxim is met by

(1) (1916) 1 A.C., at p. 84.
(2) (1936) A.C. 85, at p. 103; 54 C.L.R. 49, at p. 64.

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Bonomi v. *Backhouse* (1), which is referred to by the learned trial judge. I think it is desirable to reproduce the passage which the learned judge quotes in his judgment :—" As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated, and no wrong has been done. The maxim *sic utere tuo ut alienum non laedas* is mere verbiage. A party may damage the property of another where the law permits ; and he may not where the law prohibits : so that the maxim can never be applied till the law is ascertained ; and, when it is, the maxim is superfluous " (2).

I am unable to see that any right of the plaintiff has been violated or any wrong done to him. Any person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land. If the plaintiff desires to prevent this, the plaintiff can erect a higher fence. Further, if the plaintiff desires to prevent its notice boards being seen by people from outside the enclosure, it can place them in such a position that they are not visible to such people. At sports grounds and other places of entertainment it is the lawful, natural and common practice to put up fences and other structures to prevent people who are not prepared to pay for admission from getting the benefit of the entertainment. In my opinion, the law cannot by an injunction in effect erect fences which the plaintiff is not prepared to provide. The defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground. The court has not been referred to any principle of law which prevents any man from describing anything which he sees anywhere if he does not make defamatory statements, infringe the law as to offensive language, &c., break a contract, or wrongfully reveal confidential information. The defendants did not infringe the law in any of these respects.

The plaintiff further contended that there was an unnatural user of land by the defendant Taylor and that all the defendants were liable for resulting damage to the plaintiff's land or to the plaintiff's

(1) (1858) E. B. & E. 622 ; 120 E.R. 643.
(2) (1936) 37 S.R. (N.S.W.) at p. 338.

business. In my opinion, this contention cannot be supported. "Prima facie, it is lawful to erect what one pleases on one's own land" (*Rogers* v. *Rajendro Dutt* (1)). It is not suggested that Taylor has broken any building regulation. If he had done so the remedy would be found under the relevant building regulations, and not in an action of the present kind. In truth, the plaintiff's complaint would be the same in all material particulars if Taylor had a two-storey house from the upper storey of which Angles made his broadcast. In my opinion it would be impossible to contend that there was an unnatural user of the land and house because they were used for that purpose. If Taylor complies with any relevant provision under the Federal *Post and Telegraph Act* or the *Wireless Telegraphy Act*, he is entitled to have a telephone and to use his premises as an originating point for broadcasting. So also the Commonwealth Broadcasting Co. is entitled to broadcast under the licence granted in pursuance of the Federal regulations. I am not prepared to assent to what I regard as the surprising argument that the use of land for broadcasting is an unnatural user of land within the principle of *Rylands* v. *Fletcher* (2). Broadcasting of races could doubtless be prevented, either altogether or without the consent of the persons who undertake the trouble and expense of organizing race meetings, by a regulation dealing with the conditions of broadcasting licences; but no such regulation has yet been made.

In reality there is no particular connection between the use of the defendant Taylor's land as land and the wrong which the plaintiff alleges that it suffers. The position in all material particulars would be exactly the same if the broadcasting were done from a motor car on a road from which the racecourse could be seen or by a man standing on high land of which he was not the owner or the occupier. Reference to Taylor's land in the argument is introduced only for the purpose of relying upon an alleged unnatural user of that land. As I have already said, in my opinion, there is no such user.

The claim under the head of nuisance has also been supported by an argument that the law recognizes a right of privacy which has

(1) (1860) 13 Moo. P.C.C. 209, at p. 237; 15 E.R. 78, at p. 89.
(2) (1868) L.R. 3 H.L. 330.

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been infringed by the defendant. However desirable some limitation upon invasions of privacy might be, no authority was cited which shows that any general right of privacy exists. The contention is answered, in my opinion, by the case of *Chandler* v. *Thompson* (1); see also *Turner* v. *Spooner* (2): "With regard to the question of privacy, no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard, but neither this court nor a court of law will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering, perhaps, with his comfort"; see also *Tapling* v. *Jones* (3).

It has been argued that by the expenditure of money the plaintiff has created a spectacle and that it therefore has what is described as a quasi-property in the spectacle which the law will protect. The vagueness of this proposition is apparent upon its face. What it really means is that there is some principle (apart from contract or confidential relationship) which prevents people in some circumstances from opening their eyes and seeing something and then describing what they see. The court has not been referred to any authority in English law which supports the general contention that if a person chooses to organize an entertainment or to do anything else which other persons are able to see he has a right to obtain from a court an order that they shall not describe to anybody what they see. If the claim depends upon interference with a proprietary right it is difficult to see how it can be material to consider whether the interference is large or small—whether the description is communicated to many persons by broadcasting or by a newspaper report, or only to a few persons in conversation or correspondence. Further, as I have already said, the mere fact that damage results to a plaintiff from such a description cannot be relied upon as a cause of action.

I find difficulty in attaching any precise meaning to the phrase "property in a spectacle." A "spectacle" cannot be "owned" in any ordinary sense of that word. Even if there were any legal

(1) (1811) 3 Camp. 80: 170 E.R. 1312. (2) (1861) 30 L.J. Ch. 801, at p. 803.
(3) (1865) 11 H.L.C., at pp. 305, 311; 11 E.R., at pp. 1350, 1352, 1353.

principle which prevented one person from gaining an advantage for himself or causing damage to another by describing a spectacle produced by that other person, the rights of the latter person could be described as property only in a metaphorical sense. Any appropriateness in the metaphor would depend upon the existence of the legal principle. The principle cannot itself be based upon such a metaphor.

Even if, on the other hand, a spectacle could be said to exist as a subject matter of property, it would still be necessary, in order to provide the plaintiff in this case with a remedy, to show that the description of such property is wrongful or that such description is wrongful when it is widely disseminated. No authority has been cited to support such a proposition.

The plaintiff also argued, though it did not plead, that the defendants were guilty of some infringement of copyright. This argument lacked precision in every respect. If an attempt had been made to plead this claim I think that the difficulties in the way of establishing it would at once have become apparent. It has not been proved that the plaintiff has copyright in anything. There may possibly be copyright in a race book, but it is not shown that the plaintiff has such copyright in this case, or, if the plaintiff has copyright, that the defendant has infringed it. Even if the defendant Angles used the race book for the purpose of obtaining information, he did no more than state facts which were recorded in the race book. The contention that the names or numbers of the starting horses and of the scratched horses and the numbers of the winners, &c., placed upon boards in the racecourse, constituted original literary works so as to be possible subjects of copyright does not appear to me to require any detailed answer. A race result is ordinarily announced by reference to the numbers of horses in some such form as the following :—

3

12

4.

Copyright, where it exists, exists for fifty years from the death of the author (*Copyright Act* 1912-1935, sched., sec. 3). Much more argument than has been produced in this case would be required to

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convince me that because the plaintiff caused those numbers to be exhibited for a few minutes upon a notice board, everybody in Australia was thereafter for a term of fifty years from somebody's death precluded from reproducing them in any material form (*Copyright Act*, sched., secs. 1 (2) and 2 (1)). The law of copyright does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race prevent other people from stating those facts. The *Copyright Act* 1912-1935 gives protection only to " original literary dramatic musical and artistic work " (See sched., sec. 1). What the law of copyright protects is some originality in the expression of thought (*Halsbury's Laws of England*, 2nd ed., vol. 7, p. 521). The plaintiff has no rights by virtue of the statute, and common law rights to copyright are abrogated by sec. 31 of the schedule to the Act. In my opinion, the claim based upon copyright fails.

I agree with the judgment of *Nicholas* J. and with the reasons which he gave for it. In my opinion the appeal should be dismissed.

RICH J. The plaintiff company is the owner and occupier of certain land near Sydney which is laid out and equipped as a racecourse. The locality is eminently suited for such purpose—there are two or three similar courses in the vicinity—and the land is being put to its best use and that use is natural and legitimate. The plaintiff company at frequent intervals holds meetings on this course. Its privacy or exclusiveness is guarded by suitable fences and gates. The result is that no one, unless entrance is permitted, can under ordinary conditions view the races or obtain the information, which is only published on the course. That information is shown on boards and semaphores and consists in the scratchings of horses, the position at the barrier of the horses running, the names of the jockeys, the protest flag and the result of the races. The defendants, on the other hand, are using their premises in a non-natural way which curtails or impairs the use and enjoyment of the plaintiff company's land and detracts from its value. The defendant Taylor owns and occupies a cottage and land opposite the racecourse. On the land at the side of this cottage he has erected a tower and

platform. An observer standing on the platform is enabled to view the whole of the racing tracks and obtain the collated information to which I have referred. The relation of the defendant corporation and of the defendant Angles to the defendant Taylor is stated by the learned primary judge as follows :—" The defendant, the Commonwealth Broadcasting Corporation Limited, referred to in the evidence . . . as 2 UW, is a limited company licensed in accordance with regulations under the *Wireless Telegraphy Act* 1905-1936 of the Commonwealth of Australia, to carry on the business of broadcasting as a " B " class station. 2 UW derives the greater part of its revenue from advertisements, which are broadcast to listeners together with items of news or of entertainment. The defendant Cyril Angles, with the permission of the defendant Taylor, observes each of the race meetings held by the plaintiff company from the platform erected on Taylor's land, and describes each race by speaking through a microphone and communicating a description of the race, together with other information relating to the competitors, by means of a land line to the studio of 2 UW, whence the descriptions and information mingled with advertisements are broadcast to listeners in Sydney and the surrounding districts. The defendant Angles is an employee of 2 UW and the defendant Taylor receives from one or other of these defendants a fee of £1 for each time that the platform is used for the purpose mentioned above. . . . I was satisfied," his Honour said, " from a view which I had of the course that the most favourable point for observation was the platform on the defendant Taylor's land. From that position an observer could keep the whole of the tracks under observation and could follow the horses racing down the straight to the winning post, could observe the protest and weight flags and could decipher the numbers of the placed horses as well as the post positions and scratchings displayed on the boards " (1).

Evidence was led as to the falling off of attendance at the course. The impression that this evidence left on his Honour's mind was " that there were numbers of persons who would have attended Victoria Park had it not been possible for them to listen to simultaneous broadcast descriptions of the races either in their own homes

(1) (1936) 37 S.R. (N.S.W.), at pp. 331-333.

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or in the homes of their friends or at a public house, and I so hold. These appeared to be persons who took very little interest in horses and derived little enjoyment from the spectacle of a race but were addicted to betting and who found excitement and suspense in following broadcast descriptions. Possibly no other broadcast would have lured away so many racegoers as those for which the defendant Angles was responsible. For the purposes for which he is employed, Angles appears to be unusually gifted. Besides giving exceptionally vivid descriptions of the races in progress, he is a critic of form and his advice on the prospects of the competing horses is highly valued by his listeners. Some of the witnesses found Angles' descriptions more instructive than a visit to the course, for from his platform on Taylor's land, and with his experience, he is better able to follow the different horses throughout the race than would be possible to a spectator on one of the stands " (1).

In these circumstances the learned judge held that the case was one of *damnum sine injuria*. The question to be solved is, " How far can one person restrain another from invading the privacy of land which he occupies, when such invasion does not involve actual entry on the land ? " (Professor *Winfield*, *Law Quarterly Review*, vol. 47, p. 24). The defendants contended that the law provides no remedy as their action did not fall within any classification of torts and that the plaintiff's remedy lay either in self-defence, e.g., raising the height of the fences round the course, or in an application to the legislature. It does not follow that because no precedent can be found a principle does not exist to support the plaintiff's right. Nuisance covers so wide a field that no general definition of nuisance has been attempted but only a classification of the various kinds of nuisance. Courts have always refrained from fettering themselves by definitions. " Courts of equity constantly decline to lay down any rule, which shall limit their power and discretion as to the particular cases in which such injunctions shall be granted or withheld. And there is wisdom in this course ; for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights, or redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly

(1) (1936) 37 S.R. (N.S.W.), at p. 334.

indispensable for the purposes of social justice in a great variety of cases, and therefore should be fostered and upheld by a steady confidence" (*Story's Equity Jurisprudence*, 1st Eng. ed. (1884), sec. 959 (*b*), p. 625). "The common law has not proved powerless to attach new liabilities and create new duties when experience has proved that it is desirable. That this was so in the older days was due to the wide scope of the action upon the case. The action upon the case was elastic enough to provide a remedy for any injurious action causing damage . . . When relationships come before the courts which have not previously been the subject of judicial decision the court is unfettered in its power to grant or refuse a remedy for negligence. The action on the case for negligence has no limits set upon its territory, save by previous decisions upon such specific relationships as have come before the courts." (*Salmond* on *Torts*, 9th ed. (1936) (*Stallybrass*), pp. 18, 19 ; cf. *Pollock*, *Torts*, 13th ed. (1929), p. 22). An action on the case in the nature of nuisance was one of the flexible remedies capable of adaptation to new circumstances falling within recognized principles. This case presents the peculiar features that by means of broadcasting—a thing novel both in fact and law—the knowledge obtained by overlooking the plaintiff's racecourse from the defendants' tower is turned to account in a manner which impairs the value of the plaintiff's occupation of the land and diverts a legitimate source of profit from its business into the pockets of the defendants. It appears to me that the true issue is whether a non-natural use of a neighbour's land made by him for the purpose of obtaining the means of appropriating in this way part of the profitable enjoyment of the plaintiff's land to his own commercial ends—a thing made possible only by radio—falls within the reason of the principles which give rise to the action on the case in the nature of nuisance. There is no absolute standard as to what constitutes a nuisance in law. But all the surrounding circumstances must be taken into consideration in each case. As regards neighbouring properties their interdependence is important in arriving at a decision in a given case. An improper or non-natural use or a use in excess of a man's right which curtails or impairs his neighbour's legitimate enjoyment of his property is "tortious and hurtful" and constitutes a nuisance. A man has no absolute right

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"within the ambit of his own land" to act as he pleases. His right is qualified and such of his acts as invade his neighbour's property are lawful only in so far as they are reasonable having regard to his own circumstances and those of his neighbour (*Law Quarterly Review*, vol. 52, p. 460; vol. 53, p. 3). The plaintiff's case must, I am prepared to concede, rest on what is called nuisance. But it must not be overlooked that this means no more than that he must complain of some impairment of the rights flowing from occupation and ownership of land. One of the prime purposes of occupation of land is the pursuit of profitable enterprises for which the exclusion of others is necessary either totally or except upon conditions which may include payment. In the present case in virtue of its occupation and ownership the plaintiff carries on the business of admitting to the land for payment patrons of racing. There it entertains them by a spectacle, by a competition in the comparative merits of racehorses, and it attempts by all reasonable means to give to those whom it admits the exclusive right of witnessing the spectacle, the competition and of using the collated information in betting while that is possible on its various events. This use of its rights as occupier is usual, reasonable and profitable. So much no one can dispute. If it be true that an adjacent owner has an unqualified and absolute right to overlook an occupier whatever may be the enterprise he is carrying on and to make any profitable use to which what he sees can be put, whether in his capacity of adjacent owner or otherwise, then to that extent the right of the occupier carrying on the enterprise must be modified and treated in law as less extensive and ample than perhaps is usually understood. But can the adjacent owner by virtue of his occupation and ownership use his land in such an unusual way as the erection of a platform involves, bring mechanical appliances into connection with that use, i.e., the microphone and land line to the studio, and then by combining regularity of observation with dissemination for gain of the information so obtained give the potential patrons a mental picture of the spectacle, an account of the competition between the horses and of the collated information needed for betting, for all of which they would otherwise have recourse to the racecourse and pay? To admit that the adjacent owner may overlook does not answer this

question affirmatively. The *Silver Fox Case* (1) shows that an adjoining owner may not fire a gun in the breeding season so as to interfere with his neighbour's usual or normal use of his land. The besetting cases indicate that at common law the concert of others is a material factor. Eavesdropping suggests that at common law calculated overhearing differs from the casual sort. The steward of a court leet in charging the jury was wont to charge them: "You shall inquire of and present . . . (among other evil members and persons of ill behaviour) . . . the evesdropper, i.e., he that doth hearken under windows and the like, to heare and then tell newes to breed debate between neighbours . . . all these may be amerced, and be bound to the good behaviour by a justice of peace" (*The Court-Keepers' Guide, William Sheppard* (1649), pp. 47-49; see also *Blackstone, Commentaries*, 4th ed., Bk. 4, c. 13, p. 169).

There can be no right to extend the normal use of his land by the adjoining owner indefinitely. He may within limits make fires, create smoke and use vibratory machinery. He may consume all the water he finds on his land, but he has no absolute right to dirty it. Defendants' rights are related to plaintiff's rights and each owner's rights may be limited by the rights of the other. *Sic utere tuo* is not the premise in a syllogism but does indicate the fact that *damnum* may spring from *injuria* even though the defendant can say: "I am an owner." All the nuisance cases, including in that category *Rylands* v. *Fletcher* (2), are mere illustrations of a very general principle "that law grows and . . .though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion" (*R.* v. *Ramsay and Foote* (3)). I adapt Lord *Macmillan's* words and say: "The categories of 'nuisance' are not closed" (*Donoghue* v. *Stevenson* (4)). Nuisance is not trespass on the case and physical or material interference is not necessary. The "vibration" cases and the "besetting and eavesdropping" cases are certainly against such a contention.

(1) (1936) 2 K.B. 468.
(2) (1868) L.R. 3 H.L. 330.
(3) (1883) 48 L.T. N.S. 733, at p. 735.
(4) (1932) A.C. 562, at p. 619.

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What appears to me to be the real point in this case is that the right of view or observation from adjacent land has never been held to be an absolute and complete right of property incident to the occupation of that land and exercisable at all hazards notwithstanding its destructive effect upon the enjoyment of the land overlooked. In the absence of any authority to the contrary I hold that there is a limit to this right of overlooking and that the limit must be found in an attempt to reconcile the right of free prospect from one piece of land with the right of profitable enjoyment of another. The unreported case of the Balham dentist mentioned by Professor *Kenny* in his *Cases on the Law of Tort*, 4th ed. (1926), p. 367, would, if correctly decided, be discreditable to English law. This is what Professor *Winfield*, in an article on *Privacy*, *Law Quarterly Review*, vol. 47, at p. 27, says : " A curious invasion of privacy, recorded by the late Professor *Kenny*, was a case of 1904 in which a family in Balham, by placing in their garden an arrangement of large mirrors, were enabled to observe all that passed in the study and operating room of a neighbouring dentist, who sought in vain for legal protection against ' the annoyance and indignity ' to which he was thus subjected. This is all that is given of the case, and, as there is no further reference, it is worthless as an authority. Why should it not have been actionable as a nuisance ? It was something very like watching and besetting the dentist's house so as to compel him to do or not to do something which he was lawfully entitled not to do or to do ; and this was held to be a common law nuisance in *Lyons & Sons* v. *Wilkins* (1). Subsequent trade union legislation may have affected the decision in that case, but not the principle underlying it, which is that such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset. Indeed, the Balham family behaved worse than the defendants in *Lyons' Case* (1), for there was some economic excuse for the acts of the trade union officials there, while none whatever existed in the Balham case." In 1904 the unneighbourly neighbours of Balham were forced to adopt an elaborate system of mirrors to vent their ill feeling. But it is easy to believe that half a century later they would be able to do all they desired

(1) (1899) 1 Ch. 255.

by means of television. Indeed the prospects of television make our present decision a very important one, and I venture to think that the advance of that art may force the courts to recognize that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life. For these reasons I am of opinion that the plaintiff's grievance, although of an unprecedented character, falls within the settled principles upon which the action for nuisance depends. Holding this opinion it is unnecessary for me to discuss the question of copyright raised in the case.

I think that the appeal should be allowed.

DIXON J. The foundation of the plaintiff company's case is no doubt the fact that persons who otherwise would attend race meetings stay away because they listen to the broadcast made by the defendant Angles from the tower overlooking the course. Beginning with the damage thus suffered and with the repetition that may be expected, the plaintiff company says that, unless a justification for causing it exists, the defendants or some of them must be liable, inasmuch as it is their unauthorized acts that inflict the loss. It is said that to look for a definite category or form of action into which to fit the plaintiff's complaint is to reverse the proper order of thought in the present stage of the law's development. In such a case it is for the defendants to point to the ground upon which the law allows them so to interfere with the normal course of the plaintiff's business as to cause damage.

There is, in my opinion, little to be gained by inquiring whether in English law the foundation of a delictual liability is unjustifiable damage or breach of specific duty. The law of tort has fallen into great confusion, but, in the main, what acts and omissions result in responsibility and what do not are matters defined by long-established rules of law from which judges ought not wittingly to depart and no light is shed upon a given case by large generalizations about them. We know that, if upon such facts as the present the plaintiff could recover at common law, his cause of action must have its source in an action upon the case and that in such an action, speaking generally, damage was the gist of the action. There is, perhaps, nothing wrong

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either historically or analytically in regarding an action for damage suffered by words, by deceit or by negligence as founded upon the damage and treating the unjustifiable conduct of the defendant who caused it as matter of inducement. But, whether his conduct be so described or be called more simply a wrongful act or omission, it remains true that it must answer a known description, or, in other words, respond to the tests or criteria laid down by established principle.

The plaintiff's counsel relied in the first instance upon an action on the case in the nature of nuisance. The premises of the plaintiff are occupied by it for the purpose of a racecourse. They have the natural advantage of not being overlooked by any surrounding heights or raised ground. They have been furnished with all the equipment of a racecourse and so enclosed as to prevent any unauthorized ingress or, unless by some such exceptional devices as the defendants have adopted, any unauthorized view of the spectacle. The plaintiff can thus exclude the public who do not pay and can exclude them not only from presence at, but also from knowledge of, the proceedings upon the course. It is upon the ability to do this that the profitable character of the enterprise ultimately depends. The position of and the improvements to the land thus fit it for a racecourse and give its occupation a particular value. The defendants then proceed by an unusual use of their premises to deprive the plaintiff's land of this value, to strip it of its exclusiveness. By the tower placed where the race will be fully visible and equipped with microphone and line, they enable Angles to see the spectacle and convey its substance by broadcast. The effect is, the plaintiff says just as if they supplied the plaintiff's customers with elevated vantage points round the course from which they could witness all that otherwise would attract them and induce them to pay the price of admission to the course. The feature in which the plaintiff finds the wrong of nuisance is the impairment or deprivation of the advantages possessed by the plaintiff's land as a racecourse by means of a non-natural and unusual use of the defendants' land.

This treatment of the case will not, I think, hold water. It may be conceded that interferences of a physical nature, as by fumes, smell and noise, are not the only means of committing a private

nuisance. But the essence of the wrong is the detraction from the occupier's enjoyment of the natural rights belonging to, or in the case of easements, of the acquired rights annexed to, the occupation of land. The law fixes those rights. Diversion of custom from a business carried on upon the land may be brought about by noise, fumes, obstruction of the frontage or any other interference with the enjoyment of recognized rights arising from the occupation of property and, if so, it forms a legitimate head of damage recoverable for the wrong ; but it is not the wrong itself. The existence or the use of a microphone upon neighbouring land is, of course, no nuisance. If one, who could not see the spectacle, took upon himself to broadcast a fictitious account of the races he might conceivably render himself liable in a form of action in which his falsehood played a part, but he would commit no nuisance. It is the obtaining a view of the premises which is the foundation of the allegation. But English law is, rightly or wrongly, clear that the natural rights of an occupier do not include freedom from the view and inspection of neighbouring occupiers or of other persons who enable themselves to overlook the premises. An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt. But while it is no wrongful act on his part to block the prospect from adjacent land, it is no wrongful act on the part of any person on such land to avail himself of what prospect exists or can be obtained. Not only is it lawful on the part of those occupying premises in the vicinity to overlook the land from any natural vantage point, but artificial erections may be made which destroy the privacy existing under natural conditions. In *Chandler* v. *Thompson* (1) *Le Blanc* J. said that, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained, and when he was in the common pleas he had heard it laid down by *Eyre* L.C.J. that such an action did not lie and that the only remedy was to build on the adjoining land opposite to the offensive window. After that date there is, I think, no trace in the authorities of any doctrine to the contrary. In *Johnson* v. *Wyatt* (2) *Turner* L.J. said :

(1) (1811) 3 Camp., at p. 82 ; 170 E.R., at p. 1313.

(2) (1863) 2 DeG. J. & S., at p. 27 ; 46 E.R., at p. 284.

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"That the windows of the house may be overlooked, and its comparative privacy destroyed, and its value thus diminished by the proposed erection . . . are matters with which, as I apprehend, we have nothing to do," that is, they afforded no ground for an injunction. In *In re Penny and the South Eastern Railway Co.* (1) the Court of Queen's Bench set aside an award of compensation to a landowner for injurious affection by the construction of a railway because in the compensation awarded there was included the depreciation of the land owing to its now being overlooked. *Erle* J. said: "The comfort and value of the property may have been diminished but no action would have lain for the injury before the statutory authority was conferred on the company" (2). This principle formed one of the subsidiary reasons upon which the decision of the House of Lords was based in *Tapling* v. *Jones* (3). Lord *Chelmsford* said:—"the owner of a house has a right at all times . . . to open as many windows in his own house as he pleases. By the exercise of the right he may materially interfere with the comfort and enjoyment of his neighbour; but of this species of injury the law takes no cognizance. It leaves everyone to his self-defence against an annoyance of this description; and the only remedy in the power of the adjoining owner is to build on his own ground, and so to shut out the offensive windows" (4).

When this principle is applied to the plaintiff's case it means, I think, that the essential element upon which it depends is lacking. So far as freedom from view or inspection is a natural or acquired physical characteristic of the site, giving it value for the purpose of the business or pursuit which the plaintiff conducts, it is a characteristic which is not a legally protected interest. It is not a natural right for breach of which a legal remedy is given, either by an action in the nature of nuisance or otherwise. The fact is that the substance of the plaintiff's complaint goes to interference, not with its enjoyment of the land, but with the profitable conduct of its business. If English law had followed the course of development that has recently taken place in the United States, the "broadcasting rights"

(1) (1857) 7 E. & B. 660; 119 E.R. 1390.
(2) (1857) 7 E. & B., at pp. 670, 671; 119 E.R., at p. 1394.
(3) (1865) 11 H.L.C. 290; 11 E.R. 1344.
(4) (1865) 11 H.L.C., at p. 317; 11 E.R., at p. 1355.

in respect of the races might have been protected as part of the quasi-property created by the enterprise, organization and labour of the plaintiff in establishing and equipping a racecourse and doing all that is necessary to conduct race meetings. But courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the law of copyright and by the fact that the exclusive right to invention, trade marks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization.

In dissenting from a judgment of the Supreme Court of the United States by which the organized collection of news by a news service was held to give it in equity a quasi-property protected against appropriation by rival news agencies, *Brandeis* J. gave reasons which substantially represent the English view and he supported his opinion by a citation of much English authority (*International News Service* v. *Associated Press* (1)). His judgment appears to me to contain an adequate answer both upon principle and authority to the suggestion that the defendants are misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value. Briefly, the answer is that it is not because the individual has by his efforts put himself in a position to obtain value for what he can give that his right to give it becomes protected by law and so assumes the exclusiveness of property, but because the intangible or incorporeal right he claims falls within a recognized category to which legal or equitable protection attaches. *Brandeis* J. cites with approval *Sports and General Press Agency Ltd.* v. "*Our Dogs*" *Publishing Co. Ltd.* (2), a decision of *Horridge* J. (affirmed by the Court of Appeal (3)), which he describes as follows :—"The plaintiff, the assignee of the right to photograph the exhibits at a dog show, was refused an injunction against the

(1) (1918) 248 U.S. 215; 63 Law. Ed. 211.

(2) (1916) 2 K.B. 880.

(3) (1917) 2 K.B. 125.

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defendant, who had also taken pictures of the show and was publishing them. The court said that, except in so far as the possession of the land occupied by the show enabled the proprietors to exclude people or permit them on condition that they agree not to take photographs (which condition was not imposed in that case), the proprietors had no exclusive right to photograph the show and could therefore grant no such right. And, it was further stated that, at any rate, no matter what conditions might be imposed upon those entering the grounds, if the defendant had been on top of a house or in some position where he could photograph the show without interfering with the physical property of the plaintiff, the plaintiff would have no right to stop him " (1).

In my opinion, the right to exclude the defendants from broadcasting a description of the occurrences they can see upon the plaintiff's land is not given by law. It is not an interest falling within any category which is protected at law or in equity. I have had the advantage of reading the judgment of *Rich* J., but I am unable to regard the considerations which are there set out as justifying what I consider amounts not simply to a new application of settled principle but to the introduction into the law of new doctrine.

Apart from the matters with which I have dealt, the plaintiff claimed that the defendants or some of them had been guilty of infringement of copyright. Copyright in two forms of production was set up. One was the board affording information of the scratchings and places at the barrier. The other was the race book. It may at once be conceded that copyright subsisted in the latter. Perhaps from the facts a presumption arises that the plaintiff company is the owner of the copyright but, as corporations must enlist human agencies to compose literary, dramatic, musical and artistic works, it cannot found its title on authorship. No proof was offered that the author or authors was or were in the employment of the company under a contract of service and that the book was compiled or written in the course of such employment (See sec. 5 (2) of the British *Copyright Act* 1911, scheduled to the Commonwealth Act of 1912). Perhaps these facts are to be presumed. But the reason for the absence of proof of ownership is that the book

(1) (1918) 248 U.S., at p. 255 : 63 Law. Ed., at p. 227.

was not relied upon at the hearing of the suit in support of the claim for infringement of copyright. In my opinion, the plaintiff was right in not relying upon it. For to establish infringement it would be necessary to show that the broadcast included such a use of the contents of the book as to amount to a " performance " of a substantial part of the " work " which it constitutes. No doubt the defendant Angles made much use of the information contained in the race book to enable him to give an account of the proceedings upon the course. But it is not information that is protected in the case of literary works but the manner in which ideas and information are expressed or used. " Performance " is defined to mean any acoustic representation of a work and any visual representation of any dramatic work, including such a representation made by means of any mechanical instrument. I do not think that any " acoustic representation " of a substantial part of the race book was given through the microphone.

The board contained a list of positions at the barrier which was, in effect, repeated, but I should not have thought that, if the list was the subject of copyright, to repeat the order of positions actually assigned to the horses amounted to an infringement. I am, however, quite unable to suppose that, when the names of the starters, their positions, jockeys and so on are exhibited before a race, doing so amounts to publishing a literary work which becomes the subject of copyright. No doubt the expression " literary work " includes compilation. The definition section says so (sec. 35 (1)). But some original result must be produced. This does not mean that new or inventive ideas must be contributed. The work need show no literary or other skill or judgment. But it must originate with the author and be more than a copy of other material. The material for the board consists in the actual allotment of places and other arrangements made by the plaintiff company's officers in respect of the horses. To fit in on the notice board the names and figures which will display this information for a short time does not appear to me to make an original literary work.

In my opinion the judgment of *Nicholas* J. is right and the appeal should be dismissed.

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EVATT J. The appellant, who is the plaintiff in the suit, is the owner and occupier of a well-known Sydney racecourse, duly licensed as such under the law of New South Wales. It there carries on the business of conducting race meetings. The land has been specially laid out and improved as a racecourse, and the fence which surrounds the course is sufficiently high to ensure privacy for all practical purposes, although it is possible to obtain some sort of view of the course and the races from certain vantage points outside. The respondents, who are defendants to the suit, are three in number, viz.: (*a*) the owner and occupier of a residence situated outside the plaintiff's course, (*b*) a company which carries on the business of broadcasting for profit, and (*c*) one of its announcers who broadcasts to the public descriptions of the plaintiff's races as and when each race is being run. As the land and residence of the first defendant did not include any position which afforded a sufficiently advantageous view over the plaintiff's fence, a special observation tower was erected by the broadcasting company on the land, and, from a platform on this tower, the simultaneous broadcast description of all races is given.

As a result of the conjoint actions of the three defendants, it is established that persons who would otherwise attend the races, paying for admission, are induced to listen in to the broadcasts either at public houses or other places supplied with radio receiving sets; the reason for the abstention of such persons is plain—they obtain all the practical advantages of viewing the plaintiff's races without having to pay to enter, and they make their bets "off the course."

The law of New South Wales prohibits the business of betting at all places except licensed courses, but systematic broadcasting of races such as that conducted by the defendant makes it almost impossible to police such gaming legislation. While it is plain that either the Commonwealth Parliament by its control of broadcasting, or the State Parliament by virtue of its general legislative powers, could end or minimize illegal "off the course" betting by prohibiting simultaneous broadcasting of races, it is, of course, erroneous to infer that, in the absence of such legislation, such broadcasting is necessarily lawful.

The defendants' broadcast descriptions are invariably followed by an announcement of the starting prices of the winning horses. This information, although essential for the payment over of winning bets at hotels or other places where there is listening in, can only be obtained from persons who have been admitted to the racecourse ; so that an important, if brief, part of the information broadcasted by the defendants either involves, or could be made to involve, a series of breaches of the contract of admission entered into between the plaintiff and those attending the course. Further, it is obvious from the defendants' broadcast descriptions that the announcer makes frequent use of the plaintiff's official programmes as well as of the results posted on the board at the course. As a result of this use of the material brought into existence by the plaintiff, it was faintly suggested that there had been an infringement of copyright by the defendants. I need not elaborate further on these very minor aspects of the case for I have reached the conclusion that, on the main part of the case, the plaintiff is entitled to succeed.

It is quite unnecessary to cite or discuss authorities which repeat or illustrate the well-known principle that the plaintiff must affirmatively establish that the defendants have been guilty of a tort, and that the damage which they have caused to be inflicted upon the plaintiff may be *damnum absque injuria*. At the same time, it is practically conceded that, if a legal wrong has been committed, the case is one for the application of the remedy of injunction.

The defendants have argued that the damage and loss of the plaintiff have been sustained by it rather in its character as racing entrepreneur than as occupier of land. But the plaintiff's profitable conduct of its business cannot be dissociated from its occupation of the land, and damage to the plaintiff's business is necessarily reflected by some diminution in the value of the land of the plaintiff. It has been said with accuracy that

> " nuisance does not convey the idea of injury to the realty itself. It means rather an interference with some right incident to the ownership or possession of realty. The law of nuisance is an extension of the idea of trespass into the field that fringes property. It is associated with those rights of enjoyment which are, or may become, attached to realty. Ownership or rightful possession necessarily involves the right to the full and free enjoyment of the property occupied " (*Street, Foundations of Legal Liability* (Tort), vol. 1, p. 211).

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The defendants have not been content with a mere denial that a tort has been committed. They have ventured upon general reasoning in defence of their conduct, and Mr. *Watt* in his able argument said that the broadcasting company was a competitor of the plaintiff in the business of entertainment and was equally " entitled to be protected in the legitimate exercise of their trade." This phrase is taken from the well-known judgment of *Bowen* L.J. in *Mogul Steamship Co. Ltd.* v. *McGregor, Gow, & Co.* (1), a case which has occupied some prominence in the judgment of *Nicholas* J. In the *Mogul Case* shipowners, in order to force a rival shipowner out of business, combined for that purpose, but employed no unlawful means. But, in the present case, what the broadcasting company does is, by means of broadcasting, to incorporate in its own entertainment, simultaneously with the plaintiff's entertainment, precisely so much of the latter as an expert verbal representation can give, the plaintiff having to expend capital and labour in providing *its* entertainment, and the company contributing nothing and taking everything. I cannot imagine a case which is further removed from the facts of the *Mogul Case* or other cases where individuals or groups, being in the same field of commercial enterprise, choose to engage in fierce competition for custom by making special offers or concessions in return for promises to give exclusive custom. The implied basis of all such competition is that each competitor is providing goods or services to the customer which are entirely the result of its own efforts, and that there is no " appropriation " or " borrowing " of the goods or services of the other. In the *Mogul Case Bowen* L.J. gave some illustrations of the type of conduct which is not permissible as between trade rivals. It is a profound mistake to suppose that the list was intended to be exhaustive. The classical example of the setting up of a new school the competition of which causes loss and damage to an old school in the neighbourhood only illustrates the principle that mere trade competition does not give rise to liability for tort. The facts of the present case might be analogous to the illustration of the rival schools if it were shown that, by means of broadcasting, television and the like, those conducting the new school listened in to the lessons

(1) (1889) 23 Q.B.D. 598, at p. 611.

or lectures delivered at the old school, and, by reproducing them as near as may be, caused damage to those conducting the old school. The attempt of the defendants to justify their conduct by reference to the cases on trade competition breaks down.

It is not enough for the plaintiff to destroy the argument that the defendants are only engaged in normal trade competition with the plaintiff. The plaintiff must establish his cause of action. But in analysing the validity of the plaintiff's attempt to establish his cause of action, we must recognize certain fundamental principles recently summarized by the House of Lords in *Donoghue* v. *Stevenson* (1). There, Lord *Atkin* said :—

> " I venture to say that in the branch of the law which deals with civil wrongs, dependent in England at any rate entirely upon the application by judges of general principles also formulated by judges, it is of particular importance to guard against the danger of stating propositions of law in wider terms than is necessary, lest essential factors be omitted in the wider survey and the inherent adaptability of English law be unduly restricted. For this reason it is very necessary in considering reported cases in the law of torts that the actual decision alone should carry authority, proper weight, of course, being given to the dicta of the judges " (2).

In the same case, Lord *Macmillan* said in particular reference to the tort of negligence :—" The grounds of action may be as various and manifold as human errancy ; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards. The criterion of judgment must adjust and adapt itself to the changing circumstances of life. The categories of negligence are never closed " (3).

Here the plaintiff contends that the defendants are guilty of the tort of nuisance. It cannot point at once to a decisive precedent in its favour, but the statements of general principle in *Donoghue* v. *Stevenson* (1) are equally applicable to the tort of nuisance. A definition of the tort of nuisance was attempted by Sir *Frederick Pollock*, who said :—

> " Private nuisance is the using or authorizing the use of one's property, or of anything under one's control, so as to injuriously affect an owner or occupier of property—(*a*) by diminishing the value of that property ; (*b*) by continuously interfering with his power of control or enjoyment of that property ; (*c*) by causing material disturbance or annoyance to him in his use or occupation of that property. What amounts to material disturbance or annoyance is

(1) (1932) A.C. 562.
(2) (1932) A.C., at pp. 583, 584.
(3) (1932) A.C., at p. 619.

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a question of fact to be decided with regard to the character of the neighbourhood, the ordinary habits of life and reasonable expectations of persons there dwelling, and other relevant circumstances " (*Indian Civil Wrongs Bill*, c. VII., sec. 55).

At an earlier date, *Pollock* C.B. had indicated the danger of too rigid a definition of nuisance. He said :—" I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances—the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent " (*Bamford* v. *Turnley* (1)).

In the present case, the plaintiff relies upon all the surrounding circumstances. Its use and occupation of land is interfered with, its business profits are lessened, and the value of the land is diminished or jeopardized by the conduct of the defendants. The defendants' operations are conducted to the plaintiff's detriment, not casually but systematically, not temporarily but indefinitely ; they use a suburban bungalow in an unreasonable and grotesque manner, and do so in the course of a gainful pursuit which strikes at the plaintiff's profitable use of its land, precisely at the point where the profit must be earned, viz., the entrance gates. Many analogies to the defendants' operations have been suggested, but few of them are applicable. The newspaper which is published a considerable time after a race has been run competes only with other newspapers, and can have little or no effect upon the profitable employment of the plaintiff's land. A photographer overlooking the course and subsequently publishing a photograph in a newspaper or elsewhere does not injure the plaintiff. Individuals who observe the racing from their own homes or those of their friends could not interfere with the plaintiff's beneficial use of its course. On the other hand, the defendants' operations are fairly comparable with those who, by the employment of moving picture films, television and broadcasting would convey to the public generally (i) from a point of vantage specially constructed ; (ii) simultaneously with the actual running of the races, (iii) visual, verbal or audible representations of each and every portion of the races. If such a plan of campaign were

(1) (1862) 3 B. & S., at p. 79 ; 122 E.R., at p. 31.

pursued, it would result in what has been proved here, viz., actual pecuniary loss to the occupier of the racecourse and a depreciation in the value of his land, at least so long as the conduct is continued. In principle, such a plan may be regarded as equivalent to the erection by a landowner of a special stand outside a cricket ground for the sole purpose of enabling the public to witness the cricket match at an admission price which is lower than that charged to the public bodies who own the ground, and, at great expense, organize the game.

In concluding that, in such cases, no actionable nuisance would be created, the defendants insist that the law of England does not recognize any general right of privacy. That is true, but it carries the defendants no further, because it is not merely an interference with privacy which is here relied upon, and it is not the law that every interference with privacy must be lawful. The defendants also say that the law of England does not forbid one person to overlook the property of another. That also is true in the sense that the fact that one individual possesses the means of watching, and sometimes watches what goes on on his neighbour's land, does not make the former's action unlawful. But it is equally erroneous to assume that under no circumstances can systematic watching amount to a civil wrong, for an analysis of the cases of *J. Lyons & Sons* v. *Wilkins* (1) and *Ward Locke & Co. (Ltd.)* v. *Operative Printers' Assistants' Society* (2) indicates that, under some circumstances, the common law regards "watching and besetting" as a private nuisance, although no trespass to land has been committed.

The defendants relied strongly upon the decision in *Sports and General Press Agency Ltd.* v. "*Our Dogs*" *Publishing Co. Ltd.* (3). That case decides that, if an exhibition of animals is conducted at a sports ground, the occupier cannot, by purporting to confer upon A the exclusive right of taking photographs, prevent B, who is also a spectator lawfully in attendance, from taking photographs. The court considered that the occupier should have protected himself by regulating the terms of the contract of admission and so preventing the use of photographs by unauthorized persons. In one judgment

(1) (1899) 1 Ch. 255. (2) (1906) 22 T.L.R. 327.
(3) (1916) 2 K.B. 880.

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there was an *obiter dictum* as to the right of taking a photograph from outside the ground. But the case does not anywhere suggest that there exists an absolute and unqualified right to photograph from outside a ground the spectacle which is being conducted inside.

In the United States, in the case of *International News Service* v. *Associated Press* (1), *Brandeis* J. regarded the "*Our Dogs*" *Case* (2) as illustrating a principle that "news" is not property in the strict sense, and that a person who creates an event or spectacle does not thereby entitle himself to the exclusive right of first publishing the "news" or photograph of the event or spectacle (3). But it is an extreme application of the English cases to say that because *some* overlooking is permissible, all overlooking is necessarily lawful. In my opinion, the decision in the *International News Service Case* (1) evidences an appreciation of the function of law under modern conditions, and I believe that the judgments of the majority and of *Holmes* J. commend themselves as expositions of principles which are *not* alien to English law.

If I may borrow some phrases from the majority decision, I would say that in the present case it is indisputable that the defendant broadcasting company has "endeavoured to reap where it has not sown," and that it has enabled all its listeners to appropriate to themselves "the harvest of those who have sown." Here, too, the interference with the plaintiff's profitable use of its land takes place "precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not" (4). For here, not only does the broadcasting company make its own business profits from its broadcasts of the plaintiff's races; it does so, in part at least, by conveying to its patrons and listeners the benefit of being present at the racecourse without payment. Indeed, its expert announcer seems to be incapable of remembering the fact that he is not on the plaintiff's course nor broadcasting with its permission, for, over and over again, he suggests that his broadcast is coming from within the

(1) (1918) 248 U.S. 215; 63 Law. Ed. 211.
(2) (1916) 2 K.B. 880.
(3) (1918) 248 U.S., at p. 255; 63 Law. Ed., at p. 227.
(4) (1918) 248 U.S., at p. 240; 63 Law. Ed., at p. 220.

course. The fact that here, as in the *International News Service Case* (1), the conduct of the defendants cannot be regarded as honest should not be overlooked if the statement of Lord *Esher* is still true that " any proposition the result of which would be to show that the common law of England is wholly unreasonable and unjust, cannot be part of the common law of England " (quoted in *Donoghue* v. *Stevenson* (2)).

The fact that there is no previous English decision which is comparable to the present does not tell against the plaintiff because not only is simultaneous broadcasting or television quite new, but, so far as I know, no one has, as yet, constructed high grandstands outside recognized sports grounds for the purpose of viewing the sports and of enriching themselves at the expense of the occupier.

In the United States, no such practice has ever been commenced. The only case which can be regarded as comparable is *Detroit Baseball Club* v. *Deppert* (3), decided by the Supreme Court of Michigan. There, the defendant resided upon his own land, which was situated near the recreation ground of the plaintiff company, which conducted baseball games for profit as a member of the National Baseball League. A high fence enclosed the ground, but the defendant, who had a barn on his land, erected a stand on the roof of his barn solely for the accommodation of persons who wished to view the games played on the plaintiff's ground. The defendant charged less for the accommodation provided by him than was ordinarily charged for admission to the recreation ground.

Apparently the plaintiff failed to establish the fact that persons who visited the defendant's stand would otherwise have paid the admission fee to the plaintiff's ground. The court refused an injunction, but upon the ground that the plaintiff's remedy at law was " entirely adequate." *Campbell* C.J. dissented, stating that " the law has never defined nuisance in such a way as to be exhaustive, for the plain reason that perverse ingenuity can readily devise new means of harm " (4).

(1) (1918) 248 U.S. 215; 63 Law. Ed. 211.
(2) (1932) A.C., at pp. 608, 609.
(3) (1886) 61 Mich. 63; 1 Am. St. Rep. 566.
(4) (1886) 61 Mich., at p. 69.

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He added :—

> " All the rules of law made to redress offensive invasions of private property and rights, short of trespass, go upon the theory that conduct tending to great provocation, unless checked by civil remedies, may lead to disturbance. The present case does not differ in principle from any other where exhibitions are profitable and the profits are secured to the owners. This nuisance is one which is chiefly obnoxious from its repetition and continuance, and I think should be restrained by injunction " (1).

So far as it goes, the decision supports the claim of the present plaintiff, for the reasoning of the majority of the court was that the plaintiff possessed an adequate remedy at law for the private nuisance of which he complained. In the present case, damage to the plaintiff has been established and found. I can see no difference in principle between the present defendants' broadcasting of the races observed from their specially erected observation tower and the special erection outside the plaintiff's racecourse of a grandstand solely for the purpose of charging the public for the right to overlook the plaintiff's entertainment. In each case, the price charged, or the absence of any charge, may be shown to have caused or induced persons who would otherwise attend the ground to stay away, but at the same time enabled them to observe or listen to a running description of the race.

It should be appreciated that the plaintiff does not question the general principle that it is a legitimate use of property to erect and extend homes for the purpose of obtaining or improving favourable prospects or " views." A number of cases bearing upon such question have been collected and discussed by Professor *Winfield* in a learned article on " Privacy," published in the *Law Quarterly Review*, vol. 47, p. 23. The Balham case there discussed illustrates not only what *Paley* called the " competition of opposite analogies," but also, in my opinion, how the competition might fairly be resolved. It appeared that, by an arrangement of large mirrors, " neighbours " succeeded in observing all that went on in the surgery of a near-by dentist. Professor *Winfield* rightly asks : " Why should it not have been actionable as a nuisance ? " In my opinion, such conduct certainly amounted to a private nuisance and should have been restrained by injunction, although the sole object of the " peeping

(1) (1886) 61 Mich., at p. 69.

Toms " of Balham was to satisfy their own degraded curiosity and not to interfere with the dentist's liberty of action. In truth, no normally sensitive human being could have pursued his profession or business under so intolerable an espionage, and the result would have been to render the business premises practically uninhabitable.

The motive of the wrongdoers at Balham was to satisfy their curiously perverted instincts. But let us suppose that, by such devices as broadcasting and television, the operating theatre of a private hospital was made inspectable, so that a room outside the hospital could be hired in order that the public might view the operations on payment of a fee. It would not be any the less a nuisance because in such a case the interference with the normal rights of using and enjoying property was accentuated and aggravated by the wrongdoers making a profit out of their exhibition. Let it be also supposed that medical students, who would otherwise pay a fee to the hospital in order to witness the operations, stayed away because they were able to see them performed elsewhere but simultaneously for a smaller fee, the result being that damage is sustained by the hospital.

My opinion is that an action would lie, not only in the Balham case but in the instances I have suggested and that a court of equity would grant the additional remedy of an injunction. If this conclusion is right, the following propositions may be suggested :—(*a*) Although there is no general right of privacy recognized by the common law, neither is there an absolute and unrestricted right to spy on or to overlook the property of another person. (*b*) A person who creates or uses devices for the purpose of enabling the public generally to overlook or spy upon the premises of another person will generally become liable to an action of nuisance, providing appreciable damage, discomfort or annoyance is caused. (*c*) As in all cases of private nuisance, all the surrounding circumstances will require examination. (*d*) The fact that in such cases the defendant's conduct is openly pursued, or that his motive is merely that of profit making, or that he makes no direct charge for the privilege of overlooking or spying will provide no answer to an action.

The above-suggested statement of principle may require either extension or qualification, but in essence I think that it is in accordance with the principles of the common law of England, the

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"inherent adaptability" of which is as essential to-day as ever it was, having regard to our "altering social conditions and standards." These phrases of Lord *Atkin* and Lord *Macmillan* (1), though applied to another branch of the common law, are equally applicable to the problem which has arisen in this case. I can see nothing in the statement of principle to which reasonable objection would be taken in practice. Indeed, no one who recognizes the existence of any duties towards his neighbour could ever think of acting in contravention of the principles. Only an insufficiently disciplined desire for business profit and an almost reckless disregard, not so much of the legal rights as of the ordinary decencies and conventions which must be observed as between neighbours, could have induced the broadcasting company to cause the loss to the plaintiff which has been proved in this case. The argument that the plaintiff might have protected itself from intrusion and loss by increasing the height of its boundary fence comes with ill grace from the defendants, whose reply would probably have been to disfigure further the Taylor bungalow by increasing the height of the broadcasting tower. In such a way, reprisals might go on indefinitely. However, in the circumstances proved, I am of opinion that the plaintiff should not be remitted either to self-help or to legislative aid, but that he is entitled to redress from the law by the application of the principles which I have suggested are embodied in the common law. Thus the plaintiff is entitled to maintain an action for damages for private nuisance, and, if so, it is indisputable that he is also entitled to an injunction against all three defendants.

In my opinion the appeal should be allowed.

McTIERNAN J. In my opinion the appeal should be dismissed. The facts upon which the plaintiff grounds its claim to restrain the broadcasting of descriptions of the races on its racecourse from the platform on the land of the defendant Taylor commence with the steps which it took, namely, fencing and the imposition of conditions on the right to enter the racecourse, to make the enjoyment of the races exclusive to persons whom it admitted to the racecourse. The platform on Taylor's land was erected high enough to enable a person

(1) (1932) A.C. 562.

standing on it to see the races and the information posted by the plaintiff on its notice boards on the course for the benefit of its patrons. The platform was equipped with a telephone communicating with the broadcasting apparatus of the defendant company. Even if, upon a comparison with other buildings in the locality, the structure holding this platform with its broadcasting equipment might be regarded as peculiar or unusual, Taylor had a right to have it erected and it was not actionable for Taylor or his licensee to invade the privacy of the racecourse by looking at the races from this vantage ground (*Tapling* v. *Jones* (1)). So much, indeed, appears to have been conceded by the plaintiff, for it does not claim a mandatory injunction for the removal of the platform from Taylor's land or for removing the broadcasting equipment from it. The relief which the plaintiff claims is in effect limited to an injunction restraining the broadcasting of any description of the races.

The only consequence detrimental to the plaintiff which the broadcasting of which it complains was proved to bring about was that a number of persons who would have paid for admission to the race meetings preferred to remain away from the racecourse while the race meetings were being held, and to listen to the vivid descriptions of them given by the defendant Angles from the raised platform on Taylor's land as they were being broadcast by the defendant company. The fact that so many people prefer radio entertainment producing the excitement of the spectacle to seeing the spectacle at first hand has, it is true, resulted in the plaintiff losing profits which it would otherwise have made from conducting the race meetings. And if the drop in the number of persons who are willing to pay for admission has been reflected in a fall in the value of the land, this must be because the broadcasting affects the goodwill of the racecourse and not because it damages the land. It is not shown that the broadcasting interferes with the use and enjoyment of the land or the conduct of the race meetings or the comfort or enjoyment of any of the plaintiff's patrons. Indeed, it appears quite impossible that any such result would be caused by the action of Angles in standing on this platform aloof from the racecourse, observing the races and talking into a microphone or telephone. The principle

(1) (1865) 11 H.L.C. 290; 11 E.R. 1344.

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upon which liability for acts in the nature of nuisance is founded is not to be restrained by the instances in which that liability has been found to exist. The list of acts which may give rise to an action on the case in the nature of nuisance is not closed against broadcasting. But to broadcast a lawful description of what is happening on premises cannot be an actionable nuisance at least unless it causes substantial interference with the use and enjoyment of the premises. It is conceivable that broadcasting may be made an adjunct to conduct constituting the actionable nuisance of watching and besetting premises, the nature of which is discussed in *J. Lyons & Sons* v. *Wilkins* (1). But no facts are proved to bring the broadcasting of which the plaintiff complains within the scope of the principle which was applied in that case.

"It is essential to an action in tort that the act complained of should under the circumstances, be legally wrongful as regards the party complaining: that is, it must prejudicially affect him in some legal right; merely that it will, however directly, do him harm in his interests is not enough" (*Rogers* v. *Rajendro Dutt* (2)). To allege simply that the defendants broadcast a description of a spectacle undertaken by the plaintiff on land in the sole possession of the plaintiff and that the plaintiff thereby lost profits which it would otherwise have made from the undertaking and that the value of the land was diminished, does not state a cause of action in tort. There is no averment of a wrongful act any more than if the plaintiff were to allege that the defendants saw the spectacle and described it to a gathering of bystanders. It is essential to an action on the case in the nature of nuisance to prove that the acts complained of infringe a legal right of the plaintiff. The loss of profits and the diminution in the value of the land are set up here by the plaintiff both as the *injuria* and the *damnum*. In *Soltau* v. *De Held* (3) *Kindersley* V.C. made these observations: "Then it is said that part of what is alleged by the plaintiff as the mischief arising to him is the diminution in value of his house; and it is said, and with perfect truth, by the defendant's counsel, that diminution in value does not constitute nuisance, and is no ground for the court's interfering." To the like effect was the statement of *Bacon* V.C. in *Harrison* v. *Good* (4):—"I would not have it supposed that I am not perfectly sensible of the great disadvantage which will happen

(1) (1896) 1 Ch. 811.
(2) (1860) 13 Moo. P.C.C., at p. 241; 15 E.R., at p. 90.
(3) (1851) 2 Sim. (N.S.) 133, at p. 158; 61 E.R. 291, at p. 301.
(4) (1871) L.R. 11 Eq. 338, at p. 353.

to the plaintiff, Mr. *Dangerfield*, if this school should be established in the place where it is proposed. I have no doubt that the value of his property will be depreciated. But the case which was referred to, and very properly referred to, is by no means an authority for the proposition that, because a depreciation in value would take place, the owners of adjoining property suffering depreciation have therefore a right to call that a 'nuisance' which they fail to prove otherwise to be a nuisance." In *Hammerton* v. *Dysart* (1) Lord *Parker* said: "Nuisance, then, involves damage, but damage alone is not sufficient to give rise to a right of action." It was not a legal right of the plaintiff always to be able to carry on its undertaking without loss of profits or not suffer any diminution in the value of its land. The plaintiff took steps to secure that the entertainment to be got from following the fate of the horses running on its racecourse should be restricted to persons whom it admitted. In the circumstances existing before the parasitical substitute of which it complains was transmitted from the platform on Taylor's land, the racecourse had apparently enjoyed a measure of exclusiveness such as was conducive to the profitable conduct of the business. But the plaintiff took the risk of a change in those circumstances (Cf. *Hopkins* v. *Great Northern Railway Co.* (2)).

The plaintiff laid great stress on the maxim *sic utere tuo ut alienum non laedas*. The principle underlying the action on the case in the nature of nuisance is the same as that embodied in this maxim (*Hammerton* v. *Dysart* (3)). It is essential for the application of this maxim that a wrongful act is committed and damage is sustained. "'*Alienum*' must be taken to mean 'the rights of the neighbouring owner'" (*Gale* on *Easements*, 8th ed. (1908), at pp. 416, 417). "If a man sustains damage by the wrongful act of another, he is entitled to a remedy; but to give him that title these two things must concur, damage to himself, and a wrong committed by the other. That he has sustained damage is not of itself sufficient" (*R.* v. *Commissioners of Sewers for the Levels of Pagham* (4)). Referring to the maxim *sic utere tuo ut alienum non laedas* in *West Cumberland Iron and Steel Co.* v. *Kenyon* (5), *Brett* L.J. said:—"The cases have decided that where that maxim is applied to landed property, it is subject to a certain modification, it being necessary for the plaintiff to show

(1) (1916) 1 A.C., at p. 84.
(2) (1877) 2 Q.B.D. 224, at p. 234.
(3) (1916) 1 A.C., at p. 84.
(4) (1828) 8 B. & C. 355, at p. 362; 108 E.R. 1075, at p. 1077.
(5) (1879) 11 Ch. D. 782, at pp. 787, 788.

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not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the natural user of his own land. If the plaintiff only shows that his own land is damaged by the defendant's using his land in the natural manner, he cannot succeed. So he must fail if he only proves that the defendant has used his land otherwise than in the natural way, but does not prove damage to himself." The use which Taylor and his licensee are making of Taylor's land may be quite impudent. But it was in the course of the natural user of his land for Taylor to have the platform erected on his land from which Angles speaks. And I cannot think that Taylor is going beyond the natural user of the land in allowing his licensee Angles to talk into the telephone or microphone on the platform and give a description of the races and the information exhibited on the racecourse to the members of the public who wish to listen (Cf. *Chasemore* v. *Richards* (1)). Upon the facts proved none of the defendants is liable to be sued in an action on the case for nuisance. The plaintiff has failed to establish its claim to an injunction on the ground of an alleged nuisance or a breach of the legal relation of neighbourliness expressed by the maxim *sic utere tuo ut alienum non laedas*. In *Soltau* v. *De Held* (2) *Kindersley* V.C. said : " Now it is true that equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law : there is no such thing as an equitable nuisance."

Passing from the question of nuisance the plaintiff would, of course, be entitled to redress if the broadcasting violated any right residing in it. In *Hannam* v. *Mockett* (3) *Bayley* J. said :—" To maintain an action, the plaintiff must have had a right and the defendant must have done a wrong. A man's rights are the rights of personal security, personal liberty, and private property. Private property is either property in possession, property in action or property that an individual has a special right to acquire. . . . A man in trade has a right in his fair chances of profit, and he gives up time and capital to obtain it. It is for the good of the public that he should." But the element of exclusiveness is missing from the plaintiff's right in the knowledge which the defendants participate in broadcasting. It was competent for the plaintiff to impose a condition on the right

(1) (1859) 7 H.L.C. 349; 11 E.R. 140.
(2) (1851) 2 Sim. (N.S.), at p. 151; 61 E.R., at p. 298.
(3) (1824) 2 B. & C. 934, at p. 937; 107 E.R. 629, at p. 630.

it granted to any patron to enter the racecourse that he would not communicate to anyone outside the racecourse the knowledge about the racing which he got inside. It would be actionable for a patron to break this condition or for any person to induce him to break his contract by disclosing the knowledge with a view to it being broadcast (*Exchange Telegraph Co. Ltd.* v. *Central News Ltd.* (1)). But where the communication is not in breach of contract and there is no proof that what is communicated comes " from a source which could not honestly be made use of " its dissemination is not a matter in respect of which the court can give any relief. Angles got the information first hand from a position of vantage outside the racecourse. The law does not reserve to the plaintiff the exclusive right to broadcast or otherwise disseminate that which formed the subject matter of the broadcasting complained of. The case of *Sports and General Press Agency Ltd.* v. " *Our Dogs* " *Publishing Co. Ltd.* (2), approved on appeal (3), illustrates the limits of the plaintiff's rights in the present case. " It is quite true that, as they were in possession of the spot where it would probably be convenient to place the camera for the purpose of photographing, they had the advantage, so far as the land in their possession was concerned, of being the only persons who could conveniently take photographs, but that is a very different thing from saying that they had the sole right to photograph anything inside the show. If any person were to be in a position, for example from the top of a house, to photograph the show from outside it, the association would have no right to stop him " (4).

There is no substance in the contention that what is done by any of the defendants is an infringement of copyright.

In my opinion there are no legal principles which the court can apply to protect the plaintiff against the acts of the defendants of which it complains.

The judgment of *Nicholas* J. should, I think, be affirmed.

Appeal dismissed.

Solicitor for the appellant, *F. P. Donohoe.*

Solicitors for the respondent, George Taylor, *C. Don Service & Co.*

Solicitors for the other respondents, *Baldick, Asprey & Co.*

J. B.

(1) (1897) 2 Ch. 48.
(2) (1916) 2 K.B. 880.
(3) (1917) 2 K.B. 125.
(4) (1916) 2 K.B., at p. 884.