DOCKET ENTRIES

FREDERICK E. GREEN

WILMER H. DRIVER — And

MINNIE C. GREEN, his wife, ET AL

NO. 29205-A — VS.

THOMAS N. BIDDISON,	ROBERT GARRETT, President,
EDWIN HARLAN,	J. MARSHALL BOONE,
JOHN J. GHINGHER, JR.	MRS. HOWARD W. FORD,
" "	S. LAWRENCE HAMMERMAN,
" "	BERNARD HARRIS,
" "	R. WILBURT MARSHECK,
" "	WESTON B. SCRIMGER, in their official capacities and comprising and constituting the DEPARTMENT OF RECREATION AND PARKS, Baltimore City, and
" "	
ROBERT D. BARTLETT, J. KEMP BARTLETT, JR., BARTLETT, POE & CLAGGETT	BALTIMORE BASEBALL AND EXHIBITION COMPANY, a Maryland Corporation

---

EBEN J. D. CROSS

CROSS & SHRIVER

INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS,

Party Defendant

---

23 Dec. 1947 - Bill of Complaint for an Injunction and to have an Agreement dated April 2, 1947 declared illegal and void, etc. (1) and Plaintiffs' Exhibits Nos. 1 (2) 2 (3) 3 (4) 4 (5) 5 (6) 6 (7) 7 (8) 8 (9) 9 (10) 10 (11) 11 (12) 12 (13) 13 (14) 14 (15) 15 (16) and 16 (17)

23 Dec. 1947 - Subpoena issued. (18 Summoned as marked)

and Exhibition Company from maintaining its main business office in the Administration Building of the Baltimore Municipal Stadium, except that these facilities may be used in connection with scheduled baseball games played by the Baltimore Orioles, and permanently restraining the Department of Recreation and Parks from permitting use of Administration Building, except as hereinabove provided, and denying relief prayed by Plaintiffs and dismissing Bill of Complaint, Defendants to pay costs (29) fd.

11 May, 1948 - Appeal of Frederick E. Green and Minnie C. Green, his wife, et al to the Court ofAppeals of Maryland from Decree of this Court dated April 12, 1948 (30) fd.

11 May, 1948 - Approved Appeal Bond (31) fd. ($2700.00)(Fid. & Dep. Co.)

6 July 1948 - Designation of Appellant of Transcript of Record on Appeal (32) fd.

6 July 1948 - Testimony taken in Open Court, First & Second Days (33) Third & Fourth Days (34) Fifth & Sixth Days (35) Seventh & Eighth Days (36) Ninth & Tenth Days (37) fd.

RESPONDENT'S EXHIBIT NO; 1

(Schedule of Events)

Filed with Demurrer & Answer of the Baltimore Baseball and Exhibition Co.

(Same as Respondents' Exhibit No. 1, schedule of events)-

Filed with Demurrer & Answer of the Department of Recreation and Parks of Baltimore City

DOCKET 569 FOLIO 745
CASE No. 29205a
FILED 6 July 1948
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NINTH AND TENTH DAYS' PROCEEDINGS

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SEVENTH AND EIGHTH DAYS' PROCEEDINGS

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FIFTH AND SIXTH DAYS' PROCEEDINGS

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FIRST & SECOND DAYS' PROCEEDINGS

* * * * * * * * * * * * *

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FIRST AND SECOND DAYS' PROCEEDINGS

****

No. ....., October Term, 19.....
(LEAVE BLANK)

TRANSCRIPT OF RECORD

FROM THE

CIRCUIT COURT NO. 2 OF BALTIMORE CITY

IN THE CASE OF

FREDERICK E. GREEN, ET AL

Appellant

V S.

ROBERT GARRETT, President, ET AL

Appellee

TO THE

COURT OF APPEALS OF MARYLAND

WILMER H. DRIVER

FOR APPELLANT

THOMAS N. BIDDISON
EDWIN HARLAN
JOHN J. GHINGHER, JR.
ROBERT D. BARTLETT
J. KEMP BARTLETT, JR.
BARTLETT, POE & CLAGGETT
EBEN J. D. CROSS
CROSS & SHRIVER

FOR APPELLEE

Filed .....
(LEAVE BLANK)

COPY

LAW OFFICES
MARBURY, GOSNELL & WILLIAMS
MARYLAND TRUST BUILDING
BALTIMORE 2, MD.

TELEPHONE PLAZA 2587

PX 22

May 1, 1945

5-C

Mr. George W. Reed
c/o National Marine Bank
Gay and Water Streets
Baltimore, Md.

Dear Mr. Reed:

Re: Use of Municipal Stadium
by Baltimore Baseball &
Exhibition Company

Since receipt of your letter of April 10, 1945, I have on several occasions discussed its contents with members of the Stadium Neighborhood Protest Committee.

In view of our several conferences with you, it is, of course, unnecessary for me to repeat the numerous inconveniences and burdensome situations which the residents tolerated at great personal sacrifice during the latter part of last summer.

On behalf of the Stadium Neighborhood Protest Committee I have been requested to advise you that this Committee believes that the use of the Stadium by the Baseball Club is unlawful and constitutes a nuisance detrimental to the health and welfare of the residents of the neighborhood, and that the Committee cannot agree to accept your proposals as they will not eliminate these conditions. Consequently, the Committee must reserve all its legal rights against the Baltimore Baseball Club and the Board of Park Commissioners. We trust that you will put into effect all possible measures to alleviate the situation. However, even though you may voluntarily put into effect the proposals contained in your letter of April 10, 1945, and such other measures as you may deem feasible, the Committee must necessarily reserve the right to take such steps as it may deem expedient to protect the rights and interests of the neighborhood at any time when in its judgment such action is necessary.

Very truly yours,

Charles C. G. Evans

cc-J. Kemp Bartlett, Jr., Esq.

PX 23

BALTIMORE BASEBALL & EXHIBITION CO.

BALTIMORE STADIUM
THIRTY-THIRD STREET
BALTIMORE 18, MARYLAND
UNIVERSITY 1600

File
Gross vs Park Bd

May 2, 1945

Mr. Charles C. G. Evans
1000 Maryland Trust Bldg.
Baltimore - 2, Maryland

Dear Mr. Evans:

In re: Use of Municipal Stadium by Baltimore Baseball & Exhibition Company

I have your letter of May 1 in response to my letter of April 10 regarding the concessions made in the playing schedule and other matters with respect to the use of the Stadium by the Baltimore Orioles.

Regardless of the fact that the Committee has refused to accept our proposals, the ball club intends to do exactly as was outlined in my letter of April 10, believing that you will find that that program will work out even better than you suspect.

The only slight amendment to my letter that I find it necessary to make is that in observing the closing time of 11:15 I must advise you that according to baseball rules we cannot stop play in the middle of an inning. Should an inning therefore be in progress at 11:15, it will have to be completed but this will hardly make more than 5 or 10 minutes' difference at the outside. I have already given instructions that no innings are to be started after 11:15 and this has been observed and will continue to be observed for the balance of the season.

I might state, however, that should any legal action be taken against the Club with respect to their playing at the Stadium, we would, of course, feel relieved from carrying out the terms of my letter of April 10 from that time on.

It is my very honest desire that the season be carried through without too much inconvenience to your clients.

Very truly yours,

President

GWR/g

LAW OFFICE OF
WILMER H. DRIVER
819-20 FIDELITY BUILDING
BALTIMORE

PHONE PLAZA 6098

PX 24

September 29, 1947

J. Kemp Bartlett, Esq.
34 U.S.F.& G. Building
Baltimore 2, Maryland

Dear Mr. Bartlett:

The Stadium Neighborhood Committee, through its chairman, Mr. Harry Y. Wright, has consulted me with reference to the objection, by the residents of the area, to the further use and occupancy of the Baltimore Stadium by the Baltimore Baseball and Exhibition Company. I have familiarized myself with the correspondence had between yourself, Mr. Reed and Charles C. G. Evans, Esquire, former counsel for the Committee, and believe that I am acquainted with the problems involved.

It appears that the initial use of the Stadium by the Orioles began at the time Oriole Park was destroyed by fire. Like all citizens of Baltimore a loss of such proportion, occurring in the middle of the playing season, was understood and appreciated, and the members of the organization represented by the Committee were no exception. However, it soon appeared that the use of the Stadium by the baseball club created unforeseen problems which infringed upon the legal rights of the residents of the area surrounding the Stadium, with the result that formal protests were made and some promise of relief was granted. It further appears that the residents were assured that the use and occupancy of the Stadium by the baseball club was only temporary in character and because of a desire to cooperate, the matter has been permitted to be held in abeyance, with a full reservation of all legal rights.

Recently the Committee has received information indicating that the Baltimore Baseball and Exhibition Company has no intentions of rebuilding Oriole Park or locating anywhere other than the Baltimore Stadium. If this is so, it is directly contrary to the assurances given the Committee on prior occasions. I believe that the present agreement between The Board of Park Commissions of Baltimore City and The Baltimore Baseball and Exhibition Company expires December 31, 1947. In order that the matter may be made abundantly clear, I would appreciate for you to let me know whether or not the club intends to seek renewal of an agreement permitting the use and occupancy of the Stadium during the 1948 season.

Very truly yours,

Wilmer H. Driver

WHD/fmw

J. KEMP BARTLETT
EDGAR ALLAN POE
ROBERT DIXON BARTLETT
J. KEMP BARTLETT, JR.
EDGAR ALLAN POE, JR.
FRANCIS A. MICHEL
C. DAMER McKENRICK
RICHARD W. KIEFER
JAMES A. BIDDISON, JR.
L. B. KEENE CLAGGETT
1875 - 1929

LAW OFFICES OF
BARTLETT, POE & CLAGGETT
S.W. COR. CALVERT & REDWOOD STS.
BALTIMORE-2, MD.

TELEPHONE
LEXINGTON 5610

PX 25

September 30, 1947

Wilmer H. Driver, Esq.,
819 Fidelity Building,
Baltimore - 1, Maryland.

Dear Mr. Driver:

I have received your letter of September 29th and in answer to the question which you ask I desire to state that the Baltimore Baseball and Exhibition Company does intend to seek a renewal of its license to use the Baltimore Stadium for the coming 1948 baseball season.

Although you do not say so in your letter, I assume that the Stadium Neighborhood Committee has employed you to bring some proceeding in reference to this matter, and I shall be very glad to confer with you at any time that suits your convenience. I am leaving Baltimore tomorrow for a short vacation, but will return on October 14th. If the matter of your clients is pressing I suggest that you confer with Mr. George W. Reed, President of the Baltimore Baseball and Exhibition Company.

Very truly yours,

J. Kemp Bartlett, Jr.

JKB, Jr:ALR.

J. KEMP BARTLETT
EDGAR ALLAN POE
ROBERT DIXON BARTLETT
J. KEMP BARTLETT, JR
EDGAR ALLAN POE, JR
FRANCIS A. MICHEL
C. DAMER McKENRICK
RICHARD W. KIEFER
JAMES A. BIDDISON, JR
L. B. KEENE CLAGGETT
1875 - 1929

LAW OFFICES OF
BARTLETT, POE & CLAGGETT
S.W. COR. CALVERT & REDWOOD STS.
BALTIMORE-2, MD.

TELEPHONE
LEXINGTON 5610

PX 27

October 16, 1947

Wilmer H. Driver, Esq.,
819 Fidelity Building,
Baltimore - 1, Maryland.

Dear Mr. Driver:

I have received your letter of October 7th.

You only asked me to let you know whether or not the Club intends to seek a renewal of an agreement permitting the use and occupancy of the Stadium during the 1948 season, and so accordingly I answered only that question.

With respect to the attitude of the Club for the future, you will of course understand that it is difficult for me to make a definite statement about this. There is no doubt in my mind that after the fire at Oriole Park we moved into the Stadium with no intention of remaining there permanently, but with the distinct intention of rebuilding, either on the 29th Street property or on some other suitable site that we might acquire. The war was on, materials were not obtainable and we looked at many sites which, for one reason or another, were not suitable or not obtainable.

In my opinion, and I believe this is shared by others, Baltimore is an American City large enough and important enough to have a suitable, convenient and comfortable ball park. No team in a minor league that I know of owns the kind of a park that Baltimore should have, and where a suitable park exists in minor league cities, as far as I have been able to ascertain, they were constructed by the municipality and leased to the ball club. As you know, there is now a movement in Baltimore for the erection of a Stadium on Thirty-third Street or some other place. If such a Stadium is erected we hope and expect to be given an opportunity to negotiate an agreement for the playing of our games there.

As far as I can definitely tell you, that is the attitude of the Club for the future.

Very truly yours,

J. Kemp Bartlett, Jr.

JKB, Jr:ALR.

PX 26

October 7, 1947

J. Kemp Bartlett, Jr., Esquire
Bartlett, Poe and Claggett
S.W. Cor. Calvert & Redwood Sts.
Baltimore 2, Maryland

Dear Mr. Bartlett:

Thank you for your letter of September 30, 1947. While I appreciate your frankness in disclosing the present intention of the Baltimore Baseball and Exhibition Company to seek a renewal of its agreement with the Department of Recreation and Parks for the year 1948, I had hoped that your reply would not necessarily have been limited to the coming season, but would have disclosed the attitude of the company for the future. As stated in my letter of September 29, 1947, the Stadium Neighborhood Committee has received information indicating that the Company intends to make the Baltimore Stadium its permanent home, provided the application is met with favor by the City authorities. This information is very disturbing to the people I represent for the reason that they have relied upon official assurances from representatives of the Company and the City that the use of the Stadium was temporary and would continue only for such limited time as might be reasonably necessary to allow the construction of a new baseball park elsewhere. Therefore, I would appreciate it for you to advise me with respect to this aspect of the matter.

While this is urgent, I feel that there is no necessity for me to see Mr. Reed, but will await your return to the city.

Very truly yours,

Wilmer H. Driver

WHD/fmw

PX 21

BALTIMORE BASEBALL & EXHIBITION CO.

BALTIMORE STADIUM
THIRTY-THIRD STREET
BALTIMORE 18, MARYLAND
UNIVERSITY 1600

April 10, 1945.

Charles C. G. Evans, Esq.,
1000 Maryland Trust Building,
Baltimore - 2, Maryland.

Re: Use of Municipal Stadium by
Baltimore Baseball Club.

Dear Mr. Evans:

We are writing this letter to supplement the conference which you, Mr. J. Kemp Bartlett, Jr., and I had on Monday, April 2d, at which time you asked us to put in writing those things which we felt could be done by the Baseball Club to meet the demands of your clients. You and your clients are to understand, of course, that we do not admit that the use of the Stadium by the Baseball Club under its license from the Board of Park Commissioners is in any way unlawful or improper, nor do we admit that the Baseball Club's use of this property in any way constitutes or gives rise to any nuisance for which your clients can maintain a cause of action against the Baseball Club.

As stated to you by us, this letter is written purely for the purpose of endeavoring to reach a mutually agreeable compromise of the matters which we have discussed, and is without prejudice.

1. The Baseball Club is willing to definitely commit itself to you in writing to the effect that it has no intention to occupy the Municipal Stadium for playing its International Baseball games for a period longer than that occasioned by the present war and war conditions.

2. The Baseball Club will definitely agree that it will in no event play night games on more than three consecutive nights, and in order to accomplish this it will play the game on the fourth day at six o'clock P.M. Night games will be started promptly at 8:30, and in no event will continue longer than 11:15. As explained to you, most games, in accorance with our experience, are terminated in two hours, and very few games last as long as 2½ hours. We will request the League President to instruct the umpires to expedite these games as much as possible.

April 10, 1945.

Charles C. G. Evans, Esq.

3. The Baseball Club will do all in its power to reduce the volume of sound from the loud speakers. We will place the loud speakers in a way to minimize the sound and will limit their use as much as possible.

4. The Baseball Club will do everything reasonably possible within its power to have the Police Department of Baltimore City furnish more police protection in the vicinity of the Stadium.

5. The Baseball Club will do everything reasonably possible within its power to petition the Board of Park Commissioners to take appropriate steps to control the dust from the parking lots which is complained of. In this connection we have been discussing this matter with the Board of Park Commissioners. At present that Board has no sprinkler, but they have learned of a sprinkler which they hope to be able to purchase and repair, so that it can be used by them each day to sprinkle this parking lot.

We are very desirous that our temporary use of the Municipal Stadium shall be at as small inconvenience as possible to those persons who live in its vicinity, and believe that the commitments above set forth, particularly the one with respect to our temporary use of the Stadium, should go a long way toward relieving the fears of your clients.

Very truly yours,

BALTIMORE BASEBALL & EXHIBITION CO.

By _____
President.

JKB,Jr:ALR.

PX 28

October 7, 1947

Mr. R. Brooke Maxwell
Department of Recreation and Parks
Druid Hill Park
Baltimore 17, Maryland

Dear Sir:

The Stadium Neighborhood Committee, through its chairman, Mr. Harry Y. Wright, has consulted me with reference to the objection, by the residents of the area, to the further use and occupancy of the Baltimore Stadium by the Baltimore Baseball and Exhibition Company.

While the use of the Stadium was made available to the baseball club as a temporary measure by the proper officials of the City, it now appears that the club intends to make it their permanent headquarters. Information to this effect has come to the attention of the Committee, and because it is contrary to formal assurances given my client by officials of the City and of the Baltimore Baseball and Exhibition Company, I wrote to J. Kemp Bartlett, Jr., Esq., attorney for the company, on September 29, 1947, requesting that he advise me of his client's intentions. On September 30, 1947 Mr. Bartlett replied to my letter stating that his client intends to seek renewal of the present agreement for the 1948 season. Because of the assurances given and the reliance thereon, we are quite concerned with this recently expressed attitude. I, therefore, will appreciate it for you to advise me whether such an application by the Baltimore Baseball and Exhibition Company will be looked upon with favor by the Department of Recreation and Parks.

You may be sure that your prompt reply will be greatly appreciated.

Very truly yours,

Wilmer H. Driver

WHD/fmw

FREDERICK E. GREEN, et al)

(IN THE CIRCUIT COURT
No.2
v. of
) BALTIMORE CITY

ROBERT GARRETT, et al (

)()()()()()()()()()()()()()()()()()()(

MEMORANDUM BRIEF
SUBMITTED ON BEHALF OF THE
BALTIMORE BASEBALL & EXHIBITION COMPANY

The playing of baseball is not a nuisance per se.

" The playing of the game of baseball is not a nuisance per se against which persons living in the vicinity where the game is played may necessarily be entitled to equitable relief. "

Alexander v. Tebeau, 24 Ky. L.Rep. 1305;
71 S.W., 427.

" Spiker v. Eikenberry, 110 N.W., 451;
11 L.R.A.(N.S.),463.

" The playing of baseball on a park, or keeping a baseball park, is not a nuisance per se."

New Orleans Baseball & Amusement Company
v. New Orleans, 42 So., 784;
7 L.R.A.(N.S.),1014-1016.

" The playing of ordinary games of baseball, or the operation of a park for such games, in a lawful, decent and orderly manner, and accompanied only by the usual cheers and noise of spectators, where those contests are harmlessly played and enjoyed, is not a nuisance per se."

Warren Company v. Dickson, 195 S.E., 568-570.

" In all cases of nuisance the question is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant."

Dittman v. Repp, 50 Md., 516-522;

Singer v. James, 130 Md., 382-386.

It is an inescapable circumstance of this case that the Baltimore Stadium is a municipal stadium built for the recreation of the people of Baltimore, on land that was at the time of the

construction of the Stadium unused, unimproved, and which was then surrounded by unimproved land. All of the residences of the complainants were built after the Stadium was erected and had been dedicated to the purpose of supplying a place for the gathering of large numbers of persons to witness athletic contests. In this case we have an edifice that was built for the purpose for which it is being used. It has been in operation for 26 years.

In order to give it more extensive use lights were installed in 1939, nine years ago, and five years before this respondent played its baseball games there.

> " A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country."
>
> Lohmuller v. S. Kirk & Son, 133 Md., 78.

> " Every one taking up his abode in the City, must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."
>
> Dittman v. Repp, 50 Md., 516.

The complainants, in taking up their abode in the vicinity of the Stadium, must have expected to encounter the inconveniences and annoyances incident to its use as a place of assembly for large gatherings of citizens for recreational purposes and for witnessing athletic contests. To a certainextent they must be taken to have consented to endure such annoyances when they built or purchased houses in the vicinity of the Stadium.

Not all of the annoyances complained of by these complainants are produced or occasioned by this respondent, nor are these annoyances peculiar to the use of the Stadium by this respondent. Traffic conditions, noise, dust, busses, crowds in the streets, vendors, etc., are present there during other uses of the Stadium and the complainants do not, in their Bill of Complaint, although they do in their testimony, complain of such

things at times when the use of the Stadium is by persons other than by this respondent.

" The proximity of dwellings to disagreeable or objectionable structures is an inevitable incident of life in cities and towns."

Gallagher v. Flury, 99 Md., 182.

This respondent has no control over, and of right ought to have no control over traffic, the parking of cars of the public on streets and in alleys, or the conduct of the public while using the public streets. Such things in their very nature are, and should be exclusively within the control of the Police Department. The City Charterhas conferred upon the Mayor and City Council power to regulate the use of streets and highways by foot passengers and vehicles.

State of Maryland v. Stewart,
152 Md., 419.

It has been definitely proved that this respondent is not given any control or jurisdiction over the parking lots adjoining the Stadium to the east and the west, and it has been also definitely proved that dust from these parking lots existed prior to the time when this respondent played its baseball games in the Stadium, and exists when those other than this respondent use the Stadium. In fact, it has been proved that when the wind blows dust arises from these parking lots when no use is being made of them.

This respondent operates the lights at the Stadium when it plays night games there. There are two sets of lights -- those on the east and the west parapets of the Stadium, which were installed in 1939 and which were used for five years before this respondent used them; and those on the two steel poles erected on the north end of the playing field in 1944 by this respondent. No complaint is made specifically about the lights on these last-mentioned two poles, and, indeed, none could be,

as these lights are focused down on the field and throw no light outside of the Stadium. Complaint is made by these complainants who live to the west and the east of the Stadium about the spill of light which comes from the lights erected in 1939 upon the parapets. The complainants apparently could tolerate these lights for at least five years of use, and even now make no complaint about their use twenty times or more each year when they are used for events other than professional baseball. With respect to these lights there is a great conflict of opinion and many close neighbors say that they bother them not at all. The homes of the complainants are so far removed from these lights that although they can be seen from their homes, the light that reaches them is hardly more than bright moonlight. The construction of these lights is such that they cannot be focused upon the playing field more than they are.

The evidence adduced by this respondent is that there were complaints about the loud-speaker in the early part of the 1947 season and that at that time a careful inspection was made, the result of which was that rigid steps were taken to correct not only the volume, but also the direction of the horns. The noise emanating from these horns is not continuous, but is intermittent, and there has been no testimony that it has any injurious effect upon the complainants.

> " The real question in all such cases, as stated by the authorities, is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as in view of the circumstances of the case is unreasonable and in derogation of the rights of the party."
>
> Hamilton Corporation v. Julian, 130 Md.,597.

Respectfully submitted,

Solicitors for BALTIMORE BASEBALL AND EXHIBITION COMPANY.

GREEN, ET AL V GARRETT, ET AL

Complainants' Exhibits

NOS. 1 to 16 inclusive (photostats of deeds of property owners)
Filed in Volume 1 of original court papers.

No. 17 Large colored plat showing zoning of Baltimore City

18 Official City plat, identical with one filed as Ex. 1 with Bill of Complaint showing certain added property

19 Agreement 1947 between Club and Park Board covering occupancy of Stadium which is substantially the proposed 1948 agreement.

20 Agreement showing set-up of scheduled games for 1948, substantially the same as 1947

21 Letter of April 10th, 1945 from Ball Club to Charles C. G. Evans indicating certain concessions to be made by Club, without prejudice

22 Reply to above letter under date of May 1, 1945 from C. G. Evans to George W. Reed reserving Stadium residents' legal rights.

23 Letter from Ball Club to Evans under date of May 2nd, 1945 reaffirming their voluntary concessions but indicating that any legal action on part of Residents would relieve them of the terms contained in April 10th letter (Ex 21)

24 Letter from Driver, September 29th, 1947 to Bartlett, asking Ball Club's future intentions with regard to use of Stadium

25 Letter from Bartlett, September 30th, 1947, to Driver stating their intentions regarding 1948 Season

26 Letter from Driver, Oct. 7th, 1947 to Bartlett, stating their concern over Club's plans for future seasons, etc.

27 Letter from Bartlett, Oct. 16th, 1947, to Driver, explaining their status but making no commitments as to future.

28 Letter from Driver, Oct. 7th, 1947 to Maxwell, Supt. Dept. of Recreation and Parks, as to what action Dept. of Recreation and Parks will take on renewal application of Ball Club for 1948 season

29 Letter from King, Secretary of Park Board, Oct. 20, 1947 to Driver stating their willingness to renew application of Ball Club provided terms are agreeable.

30 Park System map of 1928 (George Armour's testimony)

31 Map of City Plan Committee showing contemplated enlargement of park areas by 1950

32 Photo of dog on outside Stadium property

33 Same

LAW OFFICE OF
WILMER H. DRIVER
819-20 FIDELITY BUILDING
BALTIMORE

PHONE PLAZA 6098

March 31, 1948

Judge E. Paul Mason
Court House
Baltimore 2, Maryland

Re: Frederick E. Green et al vs Robert Garrett et al

Dear Judge Mason:

Having read the memorandum brief submitted on behalf of the City, several thoughts have occurred to me which I would like to convey to the Court by way of reply memorandum.

Point 1 of the memorandum submitted by the City of Baltimore proceeds upon the predicate that under the Baltimore City Charter (1946 Ed.) the Department of Recreation and Parks has the power to lease the Stadium for professional baseball. This power is derived from Section 96(g) of the Charter which is said to be broader than the powers heretofore enjoyed by the predecessors of the Department under previous charters. On this basis the Hanlon case is distinguished. But this argument overlooks one important feature of the Hanlon case, i.e., that the Department is an agency of the City and has no greater power to lease than the municipality. A comparison of the provisions of the 1927 Charter and the 1946 Charter reveals that the City's power to lease was and still is restricted to property no longer needed for public use. See Sections 159, 160, 161 and 169 of the 1946 Charter.

Point 2 goes upon the theory that the diversion of public property to private use is illegal only if the conveyance by which the property was originally acquired by the municipality can be construed to restrict the use to be made thereof. This argument ignores the indisputable fact that the Charter is the organic grant of power to the municipality, and the restrictions contained therein are applicable to land held by the municipality and its agencies. These restrictions limit the use of all land of the municipality to public use.

Point 3 of the memorandum is to the effect that if the use of the Stadium for professional baseball is a private use, nevertheless it does not interfere with public use of the Stadium except when games are played. An analysis of the Agreement and schedule of events reveals that with few exceptions, the public use permitted is seeming rather than real. By similar agreements with other professional sports organizations, public use may be kept at a minimum while private use predominates. This would be inconsistent with the restrictive Charter provisions.

Re: Frederick E. Green et al vs Robert Garrett et al

Point 4 of the memorandum assumes that the use of the Stadium for professional baseball does not constitute it an "amusement park" nor is such use a "business" use. Therefore, there is no zoning violation. If there is a zoning violation, a City agency should not be enjoined from making it possible because by mandamus against another City official the violation may be stopped. An injunction is the only adequate remedy under the circumstances of this case.

The argument, presented by the memorandum, upon the nuisance aspect of the case is as follows:

1. There is no nuisance:

(a) Value of neighboring property has not decreased.
(b) The noise is spasmodic - infrequent
(c) The lights would not bother a normal man, because he does not go to sleep before 11 p.m.
(d) The dust is not thick enough.
(e) If the dirt is carried on the streets, the Bureau of Sanitation will remove it.
(f) The Defendants have no control over the crowds attracted to the games while they are going and coming to the games.

2. If there is a nuisance, someone else should be asked to control it. The Court should not enjoin it because:

(a) Complainants should have expected it.
(b) The Defendants make money from it.
(c) The City wants a "new" Stadium.
(d) The Defendants should first be allowed to correct the nuisance.

As stated to the Court on the occasion of oral argument at the conclusion of the testimony, it is my opinion that the question of nuisance is a factual one, to be determined by consideration of all the evidence covering the various points raised; and because I feel that the Court has a complete understanding of this factual information, I see no purpose in submitting an extended reply memorandum on the evidence of the case. It is the earnest contention of counsel for the Complainants that the nuisances complained of are of such a character as to interfere with the normal and reasonable use of the homes of the Complainants.

In conjunction with Point 1 of the memorandum submitted by the City of Baltimore, I would like to call the Court's attention to a statement contained on Page 3 of the City's brief under Paragraph 1, as follows:

Re: Frederick E. Green et al vs Robert Garrett et al

"1. THE AGREEMENT BETWEEN THE BOARD AND THE BASEBALL CLUB IS IN CONFORMITY WITH THE POWER GRANTED THE BOARD UNDER THE AMENDED CHARTER."

"While this question is not specifically raised in the Bill of Complaint, it is felt that it must be faced in view of the apparent ruling to the contrary found in the case of Hanlon v. Levin, 168 Md. 674."

It is, of course the contention of the Complainants that the question is specifically raised in Bill of Complaint, and in that regard the Court's attention is invited to Paragraphs 7, 12, 13, 14, 15, 18, 19 and 21 and to the first paragraph of the Prayer for Relief contained in the Bill of Complaint.

Very truly yours,

Wilmer H. Driver

Wilmer H. Driver

WHD/fmw

cc - Thomas N. Biddison, Esq., City Solicitor
cc - J. Kemp Bartlett, Esq.
cc - Eben J. D. Cross, Esq.

DEPARTMENT OF RECREATION AND PARKS
BUREAU OF PARKS
MADISON AVE. ENTRANCE
DRUID HILL PARK
BALTIMORE 17, MARYLAND
LA. 4288

PX29

October 20, 1947

Mr. Wilmer H. Driver
819 Fidelity Building
Baltimore-1, Maryland

Dear Mr. Driver:-

On the question relative to the use of the Baltimore Stadium by the "Orioles" for the 1948 baseball season, the Board of Recreation and Parks at its meeting held on October 17, 1947 made the following decisions.

The Board of Recreation and Parks agrees to allow the Baltimore Baseball and Exhibition Company the use of the Baltimore Stadium for the 1948 baseball season, provided the Company enters into a written agreement that is acceptable and agreeable to the Board of Recreation and Parks.

Very truly yours,

Joseph J. King
Secretary

JJK-L

Copy to - Mr. Robert Garrett
Mr. R. Brooke Maxwell
Mr. C. A. Hook

FREDERICK E. GREEN, et al, Complainants,	:	In the
vs.	:	CIRCUIT COURT NO. 2
ROBERT GARRETT, et al, Respondents.	:	OF BALTIMORE CITY

* * * * * *

- MEMORANDUM TO THE COURT -

Submitted by

OFFICE OF CITY SOLICITOR

in behalf of the defendant,

BOARD OF RECREATION AND PARKS OF BALTIMORE CITY

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ROBERT GARRETT, et al, Respondents.	:	OF BALTIMORE CITY

* * * * * *

- MEMORANDUM BRIEF -

* * * * * *

The Bill of Complaint in this case bears a double aspect, in that the use of the Municipal Stadium for night baseball is attacked, first, from the standpoint of "ultra vires" act of the Board of Recreation and Parks and, second, from the point of view of nuisance.

The first aspect of the Bill goes only to the relief prayed by the complainants under their first and second prayers:

> "1. That the Respondents and each of them, their officers, agents, servants and employees may be enjoined, by a permanent injunction issuing out of this Honorable Court, from executing or attempting to execute or otherwise enter into any agreement directly or indirectly permitting the use and occupancy of the Baltimore Stadium by the Baltimore Baseball and Exhibition Company or its successors or assigns.
>
> "2. That the agreement dated April 2, 1947, filed herewith as Exhibition No. 16, be declared illegal and void and that all acts, measures and things done or to be done thereunder or in consequence thereof, be restrained and enjoined."

However, it will be noted that the second prayer for relief has no sep-

arate significance, for the reason that it is directed to the contract between the two defendants for the year 1947, which has now expired, and the granting of the injunction as to such contract would be superfluous and ineffectual.

The third prayer for relief goes to the nuisance aspect of the Bill mentioned above, and is as follows:

> "3. That the Respondents and each of them, their officers, agents, servants and employees may be restrained and enjoined, by a permanent injunction issuing out of the Honorable Court, from causing or permitting to exist the operation of the loud speaker system at the Baltimore Stadium to the extent that said loud speaker system may be heard in the homes of your Complainants; from permitting or causing to be permitted the parking of automobiles in such a manner as to prevent your Complainants from the normal and reasonable access to and from their respective homes, and further from permitting the parking of said automobiles in such a manner as to create clouds of dust and dirt being stirred up and subsequently carried into the homes of your Complainants; and from causing or permitting to exist the flood lights now in operation at the Baltimore Stadium from casting light into the homes of your Complainants and other residents similarly situated."

This Memorandum will first discuss the legal merit of the Bill of Complaint in its first aspect, and will treat later the allegations of the Bill of Complaint relating to nuisance.

- A -

POWER OF THE DEPARTMENT OF RECREATION AND PARKS TO PERMIT USE OF STADIUM FOR PROFESSIONAL BASEBALL.

Equity will only enjoin the ultra vires act of a public official or correct a public wrong where the complainant suffers damage

different in character from that sustained by the public generally.[1] It is the position of the defendant, Board of Recreation and Parks, that their action in permitting the use of the Stadium for professional baseball was and is not ultra vires or illegal on any ground, this being the primary basis for its demurrer to the Bill; and in considering the legal issues raised by the Bill in this connection it is submitted that -

1. THE AGREEMENT BETWEEN THE BOARD AND THE BASEBALL CLUB IS IN CONFORMITY WITH THE POWER GRANTED THE BOARD UNDER THE AMENDED CHARTER.

While this question is not specifically raised in the Bill of Complaint, it is felt that it must be faced in view of the apparent ruling to the contrary found in the case of Hanlon v. Levin, 168 Md. 674. There the Court, at the instance of a taxpayer, enjoined the Park Board from leasing a small piece of ground located in Druid Hill Park to a radio station, holding that under the provisions of the City Charter (prior to its amendment) the Board only had power to lease property "which it may acquire on behalf of the City,"[2] and that since Druid Hill Park had been dedicated for park purposes it had no power under the Charter to make the lease in question.

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1. Smart v. Graham, 179 Md. 476; Williams v. Baltimore, 128 Md. 140; St. Mary's Industrial School v. Brown, 45 Md. 310; Ruark v. Baltimore, 157 Md. 576; Smith v. Shiebeck, 180 Md. 412; Riden v. Phila. B. & W. R. R. Co., 182 Md. 336; Kelly, Piet & Co. v. Baltimore, 53 Md. 134.

2. Baltimore City Charter (1938 Ed.), Sec. 118.

The Baltimore City Charter has since been amended, and now provides, under Paragraph 96(g) that the Board of Recreation and Parks shall have power:

> "to charge and collect fees for admission, services and the use of facilities, and rentals for the use of properties controlled by it; . . . "

and it will be noted that there is now no limitation confining the exercise of the power to property acquired on behalf of the City. However, it must be admitted that the language leaves something to be desired as it contains no direct grant of power to license or lease; but it can surely be considered as an implied grant of such power when read in conjunction with Section 96(a) of the amended Charter, which empowers the Department of Recreation and Parks:

> "to establish, maintain, operate and control parks, zoos, squares, athletic and recreational facilities and activities for the people of Baltimore City, and to have charge and control of all such property and activities belonging to, or conducted by, the City;"

It can hardly be argued that the Board was given control of park property and the right to charge fees and rentals for the use thereof, without the attendant right to rent such property, or to license its use, and it was so held in the case of Hagerman v. South Park Commissioners, 278 Ill. App. 33, granting the use for a period of five years of certain small buildings located throughout the public parks to be used for concession purposes. It was contended that the Board had exceeded its authority, as it was merely empowered by law "to manage, control, maintain and

regulate the parks for the benefit, health and recreation of the public" without any specific authority whatsoever to sell or lease park property. The Court unequivocably held that the general power quoted above was sufficient to permit the contract despite the absence of a definite grant of power to sell or lease.

But the decision in Hanlon v. Levin also indicated that even had the Board's power in that case not been specifically limited to property "which it may acquire on behalf of the City" under the old Charter, it still would have lacked power under that Charter to grant the lease there in question, as "such grants must be in compliance with all requirements of the Charter, and the terms and conditions thereof must first have been authorized and set forth in an ordinance passed by the City." Undr Sections 159, 160 and 161 of the amended City Charter substantially the same provisions are made with respect to franchises as existed under the old Charter. It is believed that the procedure outlined therein in regard to the passage of an ordinance may well apply to the Stadium contract, as indicated by the Hanlon case, and that the Board of Recreation and Parks should use such procedure in arranging for the use of the Municipal Stadium by the Baseball Club.

However, as it is understood that no contract has yet been executed for the current year between the Department and the Baseball Club, this procedural objection cannot be raised by the complainants; but should a contract be entered into prior to or during the trial of the case no reason is seen why this point might not be raised as an objection to the legality of such contract.

2. THE USE OF THE STADIUM FOR PROFESSIONAL BASEBALL IS NOT AN UNLAWFUL DIVERSION OF PUBLIC PROPERTY TO A PRIVATE USE.

This principle is only applicable where the terms or conditions of the conveyance by which the property was originally acquired by the municipality can be construed as a restriction on the use to be made thereof. McQuillin on "Municipal Corporations," states the rule in this form:

> "To constitute misuse or diversion, the use made of the dedicated property must be inconsistent with the purpose of the dedication."[3]

Reference to the deeds by which the City obtained title to the Stadium site discloses that mention is made in some instances that the land thereby conveyed was acquired "as a part of the public park system of Baltimore City," but in no deed was there any specific restriction placed on its use as such. Thus, at first blush, the question in this case seems to be simply whether the use of the property for professional baseball can be said to be repugnant to the above purpose. On this point the recent case of Board of Park Commissioners v. Shanklin, reported in 304 Ky. 43, 199 S. W. (2) 721, indicates that the consistency of the use should be liberally construed under certain circumstances:

> "The uses to which park property may be devoted depend to some extent on the manner of its acquisition, that is, whether it was granted and dedicated by individuals for the purpose, or purchased in fee by the

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3. Revised Edition, Vol. 4, p. 833.

> municipality. In the latter case the use is regarded as less definitely defined and a more liberal construction as to the consistency of the use for various purposes adopted."

As the 33rd Street site was acquired by purchase, rather than gratuitously, in fee simple, "a more liberal construction" must, therefore, be adopted in considering whether its use is consistent with the purpose for which it was acquired. However, the real issue is not the use of the land for a stadium, but is the use of the stadium for professional baseball, for the Bill of Complaint does not question the stadium itself as a lawful use of park property as this is generally recognized.

> "A stadium or athletic field may be constructed in a public park unless inconsistent with the terms of dedication."[4]

That the use of the Stadium for professional baseball is permissible has been decided in the case of Baird v. Board of Recreation Commissioners of South Orange, 160 A. 537. An injunction was there asked restraining the Commissioners and a local baseball club from holding professional or semi-professional baseball games, for which admission was charged, on municipal property acquired subject to the restriction that the premises "shall be used solely for public park and playground purposes." In denying this injunction, the Court said that such use by the baseball club did not violate the restrictive covenant quoted above.

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4. American Jurisprudence, Vol. 39, at p. 825.

In West Virginia[5] it was held that a lease of park property for use as a race track was not such an unlawful diversion of such property to a private use. It is significant that while the lease there in question was for one year, it gave the lessee the right to renew on a five-year basis. In holding that a race track located on park property constituted a public use of such property, the Court said:

> "Racing horses is enjoyed by thousands and thousands of people, high and low, rich and poor. The use of the park for this purpose would give people recreation and pleasure, and it is not foreign to the object for which it was purchased."

The Maryland case of Riden v. Phila. B. & W. R. R. Co., reported in 182 Md. 336, takes substantially the same position in permitting the condemnation of private property for a railroad spur to be used exclusively for the benefit of the Bowie Race Track. In support of its conclusion, the Court used the following language in defining a "public use," at p. 342:

> "In this State we have held that the words 'public use' as written in our Constitution mean use by the public. We hold this view for three reasons: (1) It is the primary and more commonly understood meaning of the words. (2) At the time of the adoption of the 2d Constitution of 1851, the first of our organic instruments to contain a limitation upon the power of eminent domain, as well as the 3d Constitution of 1864, and our present Constitution of 1867, there was no practice in Maryland showing a contemporaneous construction that the term 'public use' imparted a public benefit. (3) Our definition furnishes a more definite guide for the courts."

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5. Bryant v. Logan, 49 S. E. 21.

It is, therefore, contended that there has been no unlawful diversion of park property to a private use in the present case, the use of the Stadium for professional baseball being entirely consistent with the recreational purposes for which the Stadium was intended since its inception.

3. THE USE OF PUBLIC PROPERTY MAY BE LAWFUL EVEN THOUGH FOR A PRIVATE PURPOSE.

Were the use of the Stadium by the Baseball Club held to be private, rather than public as heretofore argued, it still would not follow that such use is unlawful, for public or park property may be devoted to private uses provided there is no interference with the public purpose for which it was intended. This was the holding in Colwell v. City of Great Falls, 157 P. (2d) 1013, decided in 1945. There the Court was asked to enjoin the City from leasing its auditorium for use as a movie theater, the lease reserving to the city the right to use it for public events on specified dates. It is worthy of note that the property on which the auditorium was constructed in this case had been originally deeded to the City for "park purposes." As to the legality of the use of the auditorium for the above purpose, the Court said:

> "It is generally conceded that a municipal corporation having erected a building in good faith for municipal or park purposes has the right, when such building is no longer used by the municipality, or when parts of it are not needed for public use, or when, at intervals the whole building is not so used, and when it does not interfere with its public use, to permit it to be used either gratuitously or for a compensation for private purposes." (Underscoring added)

and later, at p. 1022:

> "It is well settled that a court of equity will not interfere at the suit of a taxpayer to restrain the officers of a municipal corporation in the exercise of their discretionary powers with regard to the control or disposition of the property of the municipality in the absence of illegality, fraud or clear abuse of their authority."

[redacted]

The above reasons also serve to distinguish the circumstances of the present case from those before the Court in Hanlon v. Levin, discussed from the aspect of Charter power earlier herein. The opinion in that case indicated that the lease of a small plot in Druid Hill Park, on which a radio tower was to be constructed, resulted in an unlawful private use of park property. The Court in effect said for that reason the lease would be an unlawful exercise of power by the Park Board, even if permitted by the terms of the Charter, because of its long-term and exclusive nature. But neither of these characteristics are present in the Stadium case, and the Hanlon case, therefore, provides no precedent for the invalidation of the Board's contract with the Baseball Club as an unlawful private use.

4. THE USE OF THE STADIUM FOR PROFESSIONAL BASEBALL IS NOT A ZONING VIOLATION.

The complainants also object to the playing of professional baseball in the Stadium on the ground that it constitutes a commercial enterprise in a residential zone and is thereby unlawful under the Zoning Ordinances.

In considering this proposition it should be emphasized at the outset that the injunction here asked is not the proper action to obtain enforcement of the provisions of the Zoning Ordinance. Here the zoning question which has been raised does not affect directly the property of any of the complainants, but only goes to the use of the Municipal Stadium. In such instance it would seem that the proper remedy would be by mandamus under Paragraph 31 of the Zoning Ordinance, which provides for enforcement of the zoning regulations through the medium of the Buildings Engineer.

Even if the question of zoning violation were properly before this Court in the present case, Section 1, Paragraph 882, of the Ordinance specifically provides for the location and use of "public parks and playgrounds" in residential use districts.

Finally, the use of the Stadium for competitive sports, etc., clearly falls within the non-conforming use provision of Paragraph 11 of the Ordinance, as such use has existed since its construction in 1922, which was prior to the effective date of the Zoning Ordinance. Its terms and restrictions are, therefore, inapplicable to the present use of the Stadium.

This concludes the discussion of that aspect of the Bill of Complaint which goes to the question of ultra vires act of the Board of Recreation and Parks in permitting professional baseball in the Stadium.

- B -

NIGHT BASEBALL AT THE STADIUM AS CONSTITUTING A NUISANCE.

The Bill in this case sets forth a variety of complaints in support of the injunctive relief prayed, which can be briefly itemized as follows:

1. Noise.
2. Lights.
3. Dust.
4. Annoyances over which defendants have no control:
   (a) Unlawful parking.
   (b) Traffic noises.
   (c) Miscellaneous trespasses.

The complainants aver that the repetition and continuance of the annoyances listed above has resulted in the curtailment and destruction of their right to reasonably use and enjoy their property, and will result in a general deterioration of property values in the neighborhood.

1. BASEBALL IS NOT A "NUISANCE PER SE."

The authorities are generally agreed that baseball is not a "nuisance per se."[6] Although there seems to be no case in Maryland in which baseball is considered from the standpoint of nuisance, there is no doubt that it will not be considered a "nuisance per se" in view of the decision in Hamilton Corporation v. Julian, 130 Md. 597, where it was said:

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6. Warren Co. v. Dickson, 195 S. E. 568 (Ga.);
Royce Independent School District v. Reinhardt, 159 S. W. 1010;
Alexander v. Teheau, 24 Ky. L. Rep. 1305;
Reffey v. Rush, 51 N. D. 188.

> " . . . bowling alleys and moving picture theaters kept and conducted for profit are not nuisances per se."

2. USE OF STADIUM FOR NIGHT BASEBALL AS NUISANCE IN FACT.

In 39 American Jurisprudence, at p. 280, "Nuisance" is defined in the following manner:

> "In legal phraseology the term 'nuisance' is applied to that class of wrongs which arise from the unreasonable, unwarrantable or unlawful use by a person of his own property and produces such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."

Obviously, the word "material" is the turning point of the preceding definition, and in Maryland its meaning has been clarified by a number of cases. The much-quoted case of Dittman v. Repp, 50 Md. 516, states that in order for injunction to issue the annoyance must result in physical discomfort.[7]

> "In all such cases the question is whether the nuisance complained of will produce such a condition of things as, in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities and of ordinary tastes and habits, and as, in view of the circumstances of the case, is unreasonable and in derogation of the rights of the complainant . . . "

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7. Blake v. Madison, 237 Wis. 498;
Wahrer v. Aldrich, 152 N. W. 456 (Wisconsin);
Hamilton v. Julian, supra.

This rule should be more strictly construed in the absence of proof of injury to property, for, as was said in Hennessey v. Carmody, 50 N. J. Eq. 616:

> "There is a material distinction between an action for a nuisance in respect of an act producing a material injury to property and one brought in respect of an act producing personal discomfort. As to the latter, a person must, in the interest of the public generally, submit to the discomfort of the circumstances of the place and the trades carried on around him; as to the former the same rules would not apply."

That the Maryland courts will consider the effect of an alleged nuisance on property values is apparent from the language of Adams v. Michael, 38 Md. at p. 126:

> "To justify an injunction to restrain an existing or threatened nuisance to a dwelling house, the injury must be shown to be of such a character as to diminish materially the value of the property as a dwelling, and seriously interfere with the ordinary comfort and enjoyment of it. Unless such a case is presented, a court of chancery does not interfere. It must appear to be a case of real injury, and where a court of law would award substantial damages."

and the case of Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, adds:

> " . . . persons must not stand on extreme rights and bring actions in respect to every trifling annoyance . . . "

and in Euler v. Sullivan, 75 Md. 616, which involved an alleged smoke nuisance, the Court held that the action of the lower court in instruct-

ing the jury to find for plaintiff if her house and premises had been rendered less comfortable was objectionable.

Thus, it can reasonably be said in the present case that the complainants' claim as to the curtailment of the enjoyment of their property is exceedingly tenuous unless they are able to show that the continuance of the annoyances, alleged to have caused such injury, occurring over a period of four years, has resulted in a corresponding decrease in the value of their property.[8] In this connection, it is believed that the complainants will have considerable difficulty in proving any adverse effect on property values in the neighborhood because of night baseball. In Board of Education v. Klein, 303 Ky. 234, 197 S. W. (2d) 427, decided in 1946, three hundred home owners residing in the vicinity of a stadium asked for an injunction against the prospective playing of night football games there between high school teams, the games having previously been held in the afternoon. In discussing the injunction, the Court reasoned:

> "Again it appears that the chief appellee making complaint has, near the stadium, a home that cost $6,650 in 1924 but which has now increased in value to a present worth of around $13,000. This increase, while undoubtedly accentuated by current inflationary tendencies, has nevertheless occurred in spite of anything that has happened at the stadium or that may reasonably appear to be likely to happen at the stadium in the future." (Underscoring added)

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8. Singley v. McGeogh, 115 Md. 188.

In the present case, as the annoyances alleged to constitute a nuisance have existed for a period of four consecutive years, a failure to show that their existence has adversely affected property values in the neighborhood will surely indicate that such annoyances are not sufficiently serious to justify an injunction on the theory of nuisance.

However, in the usual nuisance case the annoyance sought to be enjoined has existed for only a short period of time, or is only threatened, and there the question of its effect on property values cannot be used as a measure of its seriousness. In such case the courts are forced to judge hypothetically the effect of the annoyance alleged by the standard of a "reasonable man." In Dittman v. Repp, cited earlier, the Court said that a nuisance exists if the condition "in the judgment of reasonable men, is naturally productive of actual physical discomfort to persons of ordinary sensibilities, and of ordinary tastes and habits;"[9] and in Wahrer v. Aldrich, 152 N. W. 456, the Court said that the standard for measuring the nuisance should be gauged "neither by a neurotic nor a phlegmatic temperament. To constitute a nuisance it must be physically annoying; it is not sufficient that it offend mere taste or what is ideally desirable. An actual effect of discomfort must be produced by it upon the average nervous organization before courts will interfere."

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9. Lohmuller v. Kirk, 133 Md. 78;
Adams v. Michael, supra;
Hamilton Corp. v. Julian, 130 Md. 597.

While the general principles just discussed are pertinent to all of the annoyances cited in the Bill of Complaint, it is advisable to look briefly at each one in the light of the facts and law particularly applicable thereto.

(a) NOISE - The chief complaint here concerns the use of the amplifying system within the Stadium while the games are in progress. The principal Maryland case on the subject of noise is Lohmuller v. S. Kirk & Sons Co., 133 Md. 78, in which an injunction was asked to restrain the pounding of hammers in a silversmith's shop near the complainant's offices. The Court of Appeals affirmed the action of the lower court in dismissing the bill, saying, at p. 88:

> "Everyone taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent. Of course, the learned judge did not mean that because a party lives in a city he is compelled to endure all kinds of noises, for he said there was a limit to the discomfort and annoyances to which a party living in a city or manufacturing district is 'required to subject himself without remedy.' But what the Court meant was that in determining whether the plaintiff is entitled to the relief sought, the Court must take into consideration not only the character of the noise, but also the locality in which the alleged nuisance is created. These cases are quoted and approved in the more recent cases of Hendrickson v. Standard Oil Co., 126 Md. 577, and Singer v. James, 130 Md. 382. In the case of Gallagher v. Fleury, 99 Md. 182, Judge Pearce said: 'But the proximity of dwellings to disagreeable or objectionable structures is an inevitable incident of life in cities and towns. As was said in Hyatt v. Myers, 73 N. C. 233: 'If a man, instead of contenting himself with the quiet and comfort of a

> country residence, chooses to live in town, he must take the inconvenience of noise, dust, flies, rats, smoke, cinders, etc., caused in the use and enjoyment of his neighbor's property, provided the use of it is for a reasonable purpose, and the manner of using it is such as not to cause any unnecessary damage or annoyance to his neighbors."

> "While the noise complained of does subject the plaintiffs, when they are occupying their offices with their windows and the windows of the defendant's factory open, to some annoyance and discomfort, the record does not, in our judgment, present such a clear use of an invasion by the defendant of the rights of the plaintiff as entitle them to the relief prayed . . . It is only where it is clear that the noise complained of is productive of actual physical discomfort to a plaintiff of ordinary sensibilities, and is, under all the circumstances of the case, unreasonable and an invasion of his rights, that a court of equity can intervene by injunction."[10]

The case of Benton v. Kernan, 130 N. J. Eq. 193, decided in 1941. A group of home owners sought to enjoin the operation of a nearby quarry, complaining, among other things, of the noise caused by repeated blasting. In denying the injunction as to this annoyance, the court said:

> "As to the noise resulting from the blasting, this is but momentary following the explosions. The explosions do not occur with great frequency . . . Under the circumstances, the annoyance from the noise is something the complainants must bear. We cannot say that it injuriously affects their health or comfort to an unreasonable degree."

In the present case the amplifying system is used only for the introduction of the batters and a few miscellaneous announcements, and any annoyance to the complainants from such use is, there-

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10. See also: Dittman v. Repp, 50 Md. 516;
Singer v. James, 130 Md. 382.

fore, only spasmodic, rather than continuous and uninterrupted. Furthermore, the speaker system is used principally in the early hours of the evening, for the batters are only introduced on their appearance at the plate for the first time; and thus it can hardly be maintained that the noise therefrom interferes with the complainants' sleep.[11]

Under this heading it might also be well to look at the case of Swimming Club v. Albert, 173 Md. 641. There an injunction was sought to restrain the operation of a summer dance pavillion as a noise nuisance. The facts were that the Club was open six nights a week from nine to twelve, during which time a dance orchestra played almost continuously, the music being amplified through a loud speaker system. The Club had been in operation for a period of three years at the time suit was instituted and was located near a long-established residential area. The injunction was sought by a number of the residents and property owners of that area. The decree of the lower court, which was affirmed by the Court, was referred to in this manner:

> "It only forbids the use of the defendant's property in such manner that the loud music or noises produced thereon are transmitted to the properties of the plaintiffs in such volume as to create the nuisance which they alleged and proved . . . "

It is submitted that the above case is distinguishable from the one here in question for numerous reasons, predominant among

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11. Blake v. Madison, 237 Wis. 493.

which is the fact that the dance pavillion was located and operated in an already-established residential neighborhood, the complainants having had no opportunity to consider its presence at the time they moved to such neighborhood. On the other hand, the complainants in the instant case, in moving to the 33rd Street area after the construction of the Stadium, were thereby fully apprised, by its very nature as well as by its initial use, of what they might expect from its presence. This contention is not answerable by the allegation that the use of the Stadium was formerly less frequent, for certainly no citizen of Baltimore is entitled to insist that a public structure should be used only "infrequently" for the purposes for which it was intended. Nor can it be validly argued that the character of the use has undergone a material change by virtue of the Stadium's recent use at night. The purpose of the Board of Park Commissioners in installing lights at the Stadium was to make the Stadium available more often, and to a larger segment of the public, in pursuance of their obligation to provide a medium of recreation and enjoyment. The use of lights in public stadia has in recent years become commonplace and is entirely normal to its proper operation and use. Only if the installation of lights and the consequent use of the Stadium for night events were abnormal and inconsistent with its recreational purpose would the complainants be able to complain of its use at night.

Another important distinction from the Meadowbrook case is the fact that we are here dealing with a lawful public use of public property. In such circumstance the effect of any diminution of

the use of the Stadium on the general public, for whose recreation and enjoyment it was designed, must be carefully considered in balancing the equities of the case.

Another differentiation is evident from the fact that in the Meadowbrook case the nuisance was conducted until twelve midnight on six nights a week during the summer, whereas the baseball games are played intermittently throughout the summer, and do not average more than two or three nights a week. Furthermore, the games are generally concluded, and the Stadium lights extinguished, not later than eleven o'clock.

Finally, the character of the noise complained of in the Meadowbrook case is entirely different from that objected to in the use of the Stadium by the Baseball Club. In the latter case the principal objection is to the use of the loud speaker. This use is by no means continuous or uninterrupted, but, on the contrary, is used only spasmodically throughout the course of the game, with little use after the first three innings of play.

For these reasons, it is strongly urged that the holding of the Meadowbrook Swimming Club v. Albert case is in no way applicable to the nuisance here alleged.

(b) LIGHTS - Serious attention must be accorded this subject, as the granting of an unqualified injunction, prohibiting the use of lights, would, of course, put an end to night baseball at the Stadium.

Unfortunately, there seem to be but few cases discussing the use and effect of lights as a possible nuisance, and only one has been discovered dealing with floodlighting - Noyes v. Huron & Erie Mtge. Corp., 41 O. W. N. 201, decided in Ontario, Canada. There the plaintiff claimed damages, alleging that the floodlighting of the defendant's building interfered with the conduct of his business. After holding that floodlighting was not a nuisance per se, the Court decided in favor of the defendant, saying that the floodlighting of a building was nowadays a usual use of property.

It should be noted that only a few of the complainants appear to be able to testify that the use of the lights causes them any serious annoyance. This is because of the position of most of the houses which surround the Stadium, the majority of them being in rows perpendicular to the periphery, and thereby shielded from any light ensuing therefrom. Most of the homes located on the streets immediately adjacent to the Stadium, however, face the light, although not all of the owners of such homes are objectors. There is the possibility that even these homes may be shielded from the glare by the shade of the trees located along the streets.

It is apparent that the glare of the Stadium lights cannot be objectionable until late in the evening, as it can be presumed that the complainants' houses will be lighted from the inside until the normal hour to retire; and it will be argued later that the games are concluded at such hour.

Therefore, the question of use of the Stadium lights as an annoyance depends entirely on whether the amount of light entering the home is sufficient to interfere with the sleep of "persons of ordinary sensibilities and of ordinary tastes and habits" in the judgment of a reasonable man.[12]

(c) DUST - The dust annoyance of which the Bill complains is apparently the result of the parking of automobiles in the unpaved areas surrounding the Stadium. The holding in the case of Centoni v. Ingalls, 298 Pac. 47 (Cal.), is indicative of the attitude of the courts generally as to the type of annoyance. There it was said that dust will constitute a nuisance only if it "causes perceptible injury to the property, or so pollutes the air as sensibly to impair the enjoyment thereof."[13] It is doubtful that the complainants will be able to show such an injury to their persons or property resulting from dust, as is contemplated by the test just quoted.

The Bill of Complaint also mentions "dirt" as an additional annoyance to which the complainants have been subjected. It is understood that the dirt to which it refers is that which is carried into the streets surrounding the Stadium by automobiles parking within the Stadium area, where such area has become muddy due to rain. The complainants appear to have an adequate remedy in this respect through recourse to the Bureau of Sanitation, the department of the

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12. Dittman v. Repp, cited under Note 10;

13. Adams v. Michael, cited under Note 9.

City which is responsible for the cleaning of the streets. However, the fact that these public streets occasionally become dirty is hardly an annoyance of which the complainants can take advantage for the purpose of this suit, as this constitutes no real injury as to them.

(d) ANNOYANCES OVER WHICH DEFENDANTS HAVE NO CONTROL.

These constitute the balance of the causes of complaint listed earlier in this Memorandum, namely, unlawful parking, traffic noises and miscellaneous trespasses to the complainants' property. It is contended that these annoyances cannot properly be considered as subject to relief by an injunction directed to the defendants, inasmuch as neither of the defendants have the power to control the source of such annoyance. These annoyances are caused by the activities of citizens of Baltimore attending the ball games, and are only the indirect consequence of the use of the Stadium for night baseball. Any injunction which the Court might issue restraining the defendants from permitting these annoyances could not be enforced by the Court short of requiring the discontinuance of night baseball altogether. Such action by the Court would have the effect of casting a serious shadow over the right of the people of the City of Baltimore to congregate for the purposes of recreation in the Stadium, or in any other public place not located directly in the business section of the city. In this respect the language used in Sheets v. Armstrong, 307 Pa. 385, is particularly pertinent, where it was said in regard to the use of a public auditorium:

> "It is said that the use of the building will bring large numbers of people to it and will cause traffic congestion in its vicinity. These are among the plagues of city dwellers under present day conditions, but it would be difficult to badge as a nuisance a building aiding in bringing about such a situation."

Of course, if it can be shown that the crowds attending the baseball games materially exceed the limit of annoyance to be naturally expected from an average crowd, there may be some merit to this aspect of the complainants' case. The case of Thoenbe v. Mosley, 257 Pa. 1, indicates that equity will act in an extreme case:

> "We would not hesitate to enjoin the gathering of disorderly, dissolute, drunken or depraved persons, whose coming together must necessarily annoy the residents of nearby houses . . . "

If the baseball fans of Baltimore City can be characterized by the above language, then the complainants are entitled to the injunction which they ask.

It should be noted that the only one of these annoyances against which relief is specifically asked is unlawful parking, and as to this the third prayer for relief asks that the respondents be enjoined from "permitting or causing to be permitted the parking of automobiles in such a manner as to prevent your complainants from the normal and reasonable access to and from their respective homes." As contended earlier, neither the Baseball Club nor the Board of Recreation and parks has any control of the parking of automobiles other than on the Stadium grounds. Although the City of Baltimore is not named as a party defendant, it may be argued by the complainants that as the Board is the

City's agent it should be held responsible for the parking situation. This is answerable by the well-established law of this State, peculiar to Baltimore City and its relation to the Police Department, to the effect that the City is not responsible for the acts of the Department, as it is controlled by the State. The most recent case on this point is that of Green v. Baltimore, 181 Md. 372. This principle is likewise applicable to those annoyances, in addition to unlawful parking, which are caused by the crowds attending the games, i. e., noise of automobile horns and the various trespasses alleged.

Annoyances of this type are clearly correctible by action of the Police Department, but the question is whether this is sufficient to justify a court of equity in refusing relief. This will depend on whether recourse to the police authorities constitutes an "adequate remedy at law" in which case Equity will not act. There can be no question that unlawful parking of automobiles and disorderly conduct are restrained by police ordinance or regulations which would appear to furnish adequate protection to the complainants in those respects. The Restatement of the Law of Torts[14] takes the following position on this subject:

> "When a suit is brought by a private person to enjoin a tort, such as . . . nuisance . . . the fact that the conduct in question is criminal as well as tortious may require consideration of the relative adequacy of the remedies of public prosecution or police prevention of crimes. Since the adequacy test is applied hypothetically, the problem is one of probabilities. To the extent that a criminal prosecution or police protection would probably attain some or all of the objectives of the injunction suit, the availability of these remedies is a factor to be considered in determining the appropriateness of injunction. . . "

14. Vol. IV, Ch. 48 (Injunction), at p. 763.

The case of Baird v. Board of Recreation Com. of S. Orange, cited earlier, takes an even stronger attitude toward this question:

> "As to the jurisdiction of the court of equity to restrain violations of ordinances or crimes, there can be no question as to the total lack thereof."

In Rohan v. Detroit Racing Assn., 314 Mich. 326, a case decided in 1946, where an injunction was sought to enjoin the operation of a race track on public property, in holding that the race track did not constitute a public nuisance, the Court said this:

> "Plaintiffs also claim that the congestion of traffic and the improper use of streets, alleys and driveways by patrons of the race track creates a public nuisance. These are matters subject to local police regulation and do not constitute a public nuisance . . . "

and it was similarly held in Civic Assn. of Dearborn v. Horowitz, 318 Mich. 333, within the last year, that an injunction could not be granted against the operation of carnivals, which was based on the annoyance to nearby residents from the noise, trespass, unlawful parking, etc., the Court said:

> "Defendants do not have it within their control to regulate the parking of cars on the highway. This is a subject for official regulation by the township authorities."[15]

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15. See also: Bartlett v. Moats, 120 Fla. 61;
Thoenbe v. Mosley, 257 Pa. 1;
Sheets v. Armstrong, 307 Pa. 385;
Essick v. Shillam, 347 Pa. 373.

The Maryland Courts also have recognized the principle that as to certain types of nuisances Equity should not act if an adequate remedy exists through recourse to the police authorities. In the case of Bonaparte v. Denmead, 108 Md. 174, the Court refused to issue the injunction prayed, using this language, at p. 187:

> "In the present case the ordinances of the city provide an adequate remedy, at least in the first instance, for all the annoyances complained of. The restraint of disorderly conduct or profanity could be secured through the police."

and in Hart v. Wagner, 184 Md. 40, which involved an injunction to restrain the burning of trash in an alley, it was stated:

> "If under the allegations of the bill, this were a public nuisance, the complainant's remedy would necessarily be by indictment, but such is not the case here. The principles applicable to private nuisances are the ones that apply and these are clearly set forth in the case of Block v. Baltimore, 149 Md. 39, 59, 129 A. 887, 894, and in cases there cited."

The appeal was taken in that case from the lower court's ruling on demurrer, and the court went on to add that the defense of adequate remedy at law through the enforcement of city ordinances might also be applicable to private as well as public nuisances, but only after examination of the facts of the case. Thus, while this decision draws a distinction between public and private nuisances, it at the same time recognizes the applicability of the principle in either instance.

In view of the above decisions, it might be well to look briefly at the question of whether the annoyances now under discussion, which indirectly result from the Stadium's use for night baseball, are of a public or private nature. According to the Hart case, no injunction can issue as a matter of law if these annoyances are of the former type. A definition of "public nuisance" is found in the case of Burley v. City of Annapolis, 182 Md., at p. 312:

> "Public nuisance, that is to say, those nuisances which have a common effect and produce a common damage . . . "

and again in Block v. Baltimore, 149 Md. 39:

> " . . . the test is whether the damage of which the appellants complain is different in kind from that suffered by the general public."

in 39 American Jurisprudence, at p. 288, this simple definition is used:

> "A nuisance is public because of the danger to the public."

An obvious example of a public nuisance is an uncovered manhole in the street. But in most cases the distinction is not so clear, and this is so in the present case. While the effect of the annoyances caused by the patrons of the ball games seems to be peculiar to those residing in the vicinity of the Stadium, yet there are numerous cases holding that when the effect of annoyances extends to an entire community,[16]

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16. U. S. v. Luce, 141 F. 385;
Danrizio v. Merchants Transportation Co., 274 N. Y. S. 174;
City of Selma v. Jones, 202 Ala. 82;
Miller v. State, 74 Okl. Cr. 111.

as alleged here, that is sufficient to make it a public nuisance.

Thus, under the Hart case, if the annoyances caused by the crowds going to and from the Stadium and the parking in the Stadium area are found to be in the nature of a public nuisance, the protection afforded by the Police Department provides an adequate remedy as a matter of law. On the other hand, if such annoyances are found to constitute a private nuisance, the Court is still obliged in the instant case to hold that as a matter of fact there is an adequate remedy at law by recourse to the Police Department.

3. OTHER FACTORS TO BE CONSIDERED IN DETERMINING NUISANCE.

The Courts, without exception, agree that the question of nuisance must be considered in the light of the surrounding circumstances, and thereby found to be an unreasonable condition, before an injunction can issue. Lohmuller v. S. Kirk & Sons Co., 133 Md. 78 (cited before) puts it in this language:

> "It is only where it is clear that the noise complained of is productive of actual physical discomfort to a plaintiff of ordinary sensibilities, and is, under all the circumstances of the case unreasonable, and an invasion of his rights, that a court of equity can intervene by injunction." (Underscoring added)

In the present case there are numerous "circumstances" that must be considered and, generally speaking, these circumstances favor the defendants' case. They are as follows:

(a) Complainants came to the Stadium - While the theory of "coming to the nuisance" is no longer considered an absolute defense to the charge of nuisance in the absence of prescriptive right, yet it still is given considerable weight as a factor to be considered in determining whether an enjoinable nuisance exists. A recent illustration of the application of this principle is the case of Board of Education v. Klein, 303 Ky. 234, 197 S. W. (2d) 427, mentioned earlier herein, from another standpoint. It will be recalled that this case involved a suit by three hundred home owners in the vicinity of a stadium who sought to enjoin its proposed use for night football, it having been previously used for that purpose in the afternoon. The Court refused to issue the injunction asked, and, in support of this decision, said:

> "All of appellee property owners have moved to the stadium neighborhood since the establishment of its present location and since the beginning of afternoon football games in the stadium . . . "

It is expected that the complainants will maintain that the construction of the Stadium and its use for daytime sports prior to their residency in the neighborhood has no bearing on the merits of this case, as the innovation of the night baseball complained of did not occur until after they had moved to the neighborhood. But in the Klein case, just quoted, the Court applied the rule in the face of the very same situation.

Another case reaching a similar result is that of Benton v. Kernan, 130 N. J. Eq. 193,[17] and an examination of the facts there is worthwhile. An injunction was asked against quarry blasting on grounds of noise, vibration, etc. It was admitted that the complainants had moved to the neighborhood subsequent to the initiation of the blasting, but it was claimed that the blasting was not then as frequent as it later became. The Court in refusing to enjoin the blasting, said this:

> " . . . the existence and operation of the quarry, necessarily would give rise to an expectation of noises that result from such an establishment.
>
> "While we do not hold that the fact that the quarry was in existence long before the complainants moved into the locality is conclusive, it is an element to be considered in determining the reasonableness of the disturbance as to them . . . At any rate persons moving into the vicinity of a quarry in operation had less reason to expect perfect quiet than persons in the country or a residential remote from industrial activities would naturally expect."

Although this State has also taken the position that the fact of "moving to the nuisance" is not conclusive, the Court of Appeals has recognized the principle as a factor to be seriously considered. In Bonaparte v. Denmead, 108 Md. 174 (cited earlier), the Court said this concerning offensive odors and profane language:

> "Everyone taking up his abode in the city must expect to encounter the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."

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17. Cited under B2(a) "Noise."

Certainly, the complainants in this case, in moving to the Stadium area, were aware of its presence and the uses to which it had previously been put. Also, the fact that the Stadium is now used more actively because of baseball is hardly a proper complaint, as an reasonable person moving into the area at the time when it was considered a "white elephant" would surely have realized the possibility that it might be more frequently used in the future. Neither were the complainants entitled to assume from the absence of lights that the Stadium would not be used at night. It was common practice throughout the country to conduct open-air sports at night, using floodlights, for a number of years prior to the installation of lights at the Stadium and before most of the complainants had moved to the neighborhood. For this reason, they might well have been expected to anticipate the Stadium's use for night activities. Those of the complainants who moved into the neighborhood subsequent to the installation of the lights in 1939 obviously must have anticipated the Stadium's use at night. Before leaving this subject, the holding of Platte & D. Ditch Co. v. Anderson, 8 Col. 131, should be mentioned for the reason that it indicates that in the case of public property, the doctrine of "coming to the nuisance" is a complete defense. It was there said:

> "Where one buys a city lot, bordering upon ground set apart or dedicated to any public use, he takes it subject to all the annoyances incident to the purposes of the dedication . . . "

But while in the above discussion of the doctrine of "coming to the nuisance" it has been assumed that no prescriptive right has evolved from the use of the Stadium since 1922, this is in fact not the case. In answer to such a claim of prescriptive right on the part of this defendant, the Board of Recreation and Parks, as to the use of the Stadium, it will, of course, be contended by the complainants that the prescriptive use thereof does not begin until the use of the Stadium for night baseball. The fallacy of this argument is obvious when it is pointed out that in considering this question there is no real basis for distinction between various types of athletic events held in the Stadium, or even as to the time of day during which they are conducted. The fact remains that in December of 1922 the facilities of the Baltimore City Stadium were "commercially" used for a professional football game, the receipts from which were divided between the private promoters thereof and the Board of Park Commissioners. This type of use has been repeated down through the years, until the contract was granted to the Baltimore Baseball and Exhibition Company. So, it is seen that there has in reality been developed a prescriptive right in the Board of Park Commissioners, and its successor, the Board of Recreation and Parks, to use the Stadium for "commercial" sports events for a duration of twenty-six years.[18]

(b) The balance of the equities favor the defendants - This principle is well stated by the Restatement of the Law of Torts,[19] as follows:

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18. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268 (Cited earlier); City of Baltimore v. Fairfield Imp. Co., 87 Md. 352.
19. Volume IV, Ch. 48 (Injunction), at p. 711.

> "In other cases harm enters into the definition of the tort. This is true of nuisance. The law expresses a compromise between the conflicting interests of neighbors, in which many harms must be borne as incidents of communal life. Where the harm is an inescapable result of useful activities, it is tolerated in high measure, though not without limits, and in any case the harm must be substantial to make it a nuisance."

In Maryland the doctrine of balancing the equities is held to be particularly applicable where the public interest is involved. The case of Huebschmann v. Grand Co., reported in 166 Md., states, at p. 621:

> "There are cases in which the principle of balancing conveniences and inconvenices is properly recognized, but they are cases in which some element of estoppel enters and where the question is affected by a public interest. In those cases, where the inconvenience or loss resulting to the complainant from the continuance of the nuisance is slight as compared with the inconvenience to the public or the loss to the defendant resulting from its abatement, equity will refuse relief."

In the present case "some element of estoppel" lies in the existence and use of the Stadium for competitive sports, attracting large crowds, long before the complainants took up residence in the neighborhood. That the question here is "affected by a public interest" is apparent in that it concerns a lawful use of the Stadium attended by the public in pursuit of recreation. The inconvenience to the complainants if such use is permitted to continue is "slight as compared with the inconvenience to the public" if night baseball were enjoined, for if the latter were the case thousands of citizens of Baltimore would be deprived of this recreation, and at the same time the City and the taxpayers would be adversely affected by the resulting loss of revenue.

In addition, a definite cloud would be thrown over the prospect of a more modern stadium, as now planned.

The case of Schnepfe v. Consol. Gas & Elec. Co., 164 Md. 630, quotes with favor 32 Corpus Juris 81, wherein this is said:

> "The weight of authority is to the effect that when the issuance of an injunction will cause serious public inconvenience or loss, without a corresponding great advantage to the complainant, no injunction will be granted."[20]

In view of the foregoing authorities, it can be strongly contended that the circumstances of the present case fall squarely within the scope of the application of the above doctrine, and that the balance of the equities weighs heavily in favor of the continuance of night baseball at the Stadium.

(c) The annoyances complained of do not interfere with the complainants' rest - This subject is treated separately due to the importance of its antithesis to the complainants' case.

It has been previously pointed out that the annoyance resulting from the use of lights at the Stadium can occur only after

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20. See also: Susquehanna Fertilizer Co..v. Spangler, 86 Md. 562 (cited earlier;
Brooks v. Patterson, 31 So. (2d) 472 - Fla.;
Livezey v. Belair, 174 Md. 568;
American Jurisprudence, Vol. 28, p. 254;
Pomeroy's "Equitable Jurisprudence," 4th Ed., par. 1945.

the hours of darkness and subsequent to the time that the complainants retire for the night. The latter would also seem to be true, to some extent, as to the noise of which complaint is made, since the effect of any noise on the complainants would be aggravated if occurring while they are trying to sleep. Thus, it becomes increasingly apparent that the question of possible interference with sleep is an important issue in this case.

The test in this regard is not the personal habits of the individual plaintiffs, but, rather, the sleeping habits of the ordinary or average individual. This is precisely the test laid down in the case of Bartlett v. Moats, 120 Fla. 61, where an injunction was asked to restrain the operation of a public dance hall located in a residential area. The Court granted an injunction as to the operation of the dance hall during "those hours of the night which are commonly held and considered to be the hours of rest; that is, from the hour in the evening when people in that community are accustomed to retire for the night, on through the balance of the night," and this is likewise inferential from the language of Blake v. City of Madison, 237 Wis. 498 (cited earlier). That case was an action for damages, in which it was alleged that the use of floodlights and loud speaker system for baseball and other activities held in an amusement park interfered with the comfort and rest of the neighborhood. The Court held that, as to the demurrer, the allegations of the Bill of Complaint would be sufficient to constitute a cause of action "if continued beyond a reason-

able hour at night" and indicated physical annoyance to "persons of ordinary sensibilities."

In Maryland it has been held, in the case of Adams v. Michael, 38 Md. 123, and other cases referred to earlier, that the annoyance must seriously interfere with "the ordinary comfort and enjoyment" of the complainant's home.[21] This would indicate that the effect of the lights and noise on the complainants' sleep should be considered only on the basis of the time at which an ordinary man would be expected to retire.

(d) Possible effect of injunction, if granted, on "New" Stadium - In the spring of 1947 the voters of Baltimore were asked for their approval by ballot of the expenditure of $2,500,000 for the reconstruction and modernization of the Municipal Stadium. The loan was approved by a substantial majority, and it is apparent from the publicity connected with this loan that the citizens of Baltimore who voted in favor thereof did so with the definite understanding that the Stadium would be used by the Baseball Club for night baseball.

If an injunction were to be granted in the present case discontinuing, either directly or indirectly, the use of the Stadium for night baseball, this would serve to thwart the expressed wish of the public, and throw the Stadium question into a turmoil.

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21. See also: Dittman v. Repp, as quoted on p. 13

(e) An injunction should not be issued prohibiting use of Stadium for night baseball if such use results in a nuisance that is correctible - In Livezey v. Bel Air, 174 Md. 568, it is said that:

> "Injunctive relief should not be granted except on a clear and satisfactory showing of grave and irreparable injury to private rights, and where the effect of the injunction will be to endanger the public health and security, no injunction should issue until the municipality is given an opportunity of abating the injurious conditions by adopting some substitute, by correcting any faults in the operation of the system, by acquiring the property damage, or by other appropriate measures."

Similarly, in the case of Taylor v. Baltimore, 130 Md. 133, the Court said:

> "While, therefore, there was error in dismissing the bill in this case, nevertheless no injunction should be issued until the municipality is given a reasonable time in which to correct the conditions of which the appellant complains."

See also the case of Singer v. James, 130 Md. 382, where the Court quotes with favor, at p. 387, from Chamberlain v. Douglas, 24 N. Y. App. Div. 582, as follows:

> "Injunctions restraining the carrying on of a legitimate and lawful business should go no further than is absolutely necessary to protect the rights of the parties seeking such injunction. When a person is engaged in carrying on such business he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner."

In 54 Miss. 540, it was held, in the case of Green v. Lake, that an absolute injunction should not issue as to a noise nuisance, except under the following circumstances:

> "A chancellor ought to be well satisfied that the grievance is serious and well-founded, and that there is no remedy short of the cessation of such use, before he will abate it as a nuisance by injunction . . . If the grievance can be removed by the aid of science and skill, a court of equity will go no further than to require those things to be done."[22]

Even if the Stadium is found to be a nuisance because of the annoyances alleged, it is urged that the Court should issue no injunction unless the complainants are also able to prove that such annoyances cannot be corrected, inasmuch as the use of the Stadium for night baseball is not a nuisance per se, as argued earlier. Unless the Court is convinced that the annoyances here complained of amount to a nuisance which cannot be corrected or alleviated by the defendants, it is submitted that no prohibitive injunction should be issued as will preclude the continuance of night baseball at the Baltimore Municipal Stadium.

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22. See also: Chamberlain v. Douglas, 24 N. Y. App. 582.

Respectfully submitted,

Thomas N. Biddison
City Solicitor

Edwin Harlan
Deputy City Solicitor

John Thrasher Jr
Assistant City Solicitor

Baltimore, March 23, 1948.

- INDEX TO AUTHORITIES -

* * *

FREDERICK E. GREEN and MINNIE C. GREEN, his wife, et al Complainants	:	IN THE
vs.	:	CIRCUIT COURT #2
ROBERT GARRETT, President, J. MARSHALL BOONE, MRS. HOWARD W. FORD, S. LAWRENCE HAMMERMAN, BERNARD HARRIS, R. WILBURT MARSHECK, WESTON B. SCRIMGER, in their official capacities and comprising and constituting the DEPARTMENT OF RECREATION AND PARKS OF BALTIMORE CITY and BALTIMORE BASEBALL AND EXHIBITION COMPANY, a Maryland Corporation, and the INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, Respondents	:	OF BALTIMORE CITY

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APPELLANTS' DESIGNATION OF
TRANSCRIPT OF RECORD ON APPEAL

The Appellants designate, for inclusion in the transcript of the record on appeal in the above-entitled matter, the following:

1. Material pleadings

   (a) Bill of Complaint

   (b) Exhibits attached to the Bill of Complaint

      (1) Pursuant to Rule 21 of the Court of Appeals of Maryland, Exhibits Nos. 1 to 14 are not to be set out in full, but their effect is stated to be as follows: Photostatic copies of the deeds by which the Complainants derived title to their respective properties, and photostatic copies of receipted tax bills or cancelled checks covering the payment of taxes on the said property.

      (2) Plaintiffs' Exhibit No. 15 - Plat is duplicated by Plaintiffs' Exhibit No. 18. Therefore it is agreed that only Plaintiffs' Exhibit No. 18 shall be included in the transcript.

      (3) Plaintiffs' Exhibit No. 16 (Reporter's Designation Exhibit No. 19) - Agreement dated April 2, 1947, between Board of Park Commissioners and the Baltimore

Baseball and Exhibition Company.

(c) Demurrer and Answer of the Baltimore Baseball and Exhibition Company.

(1) Respondent's Exhibit No. 1 - schedule of events

(d) Demurrer and Answer of the Department of Recreation and Parks of Baltimore City.

(1) Respondents' Exhibit No. 1 - schedule of events

(2) Respondents' Exhibit No. 2 (herein called "Exhibition No. 2") - This is a statement of earnings and disbursements from Baltimore Stadium.

(e) Stipulation as to pre-trial conference.

(f) Petition of International League of Professional Baseball Clubs to intervene and Order thereon.

2. Entire Transcript of Testimony

(a) Plaintiffs' Exhibits Nos. 17-31. It is agreed that only the material parts, that is, the area surrounding the Stadium and the legend of the map, of Plaintiffs' Exhibit No. 30 need be reproduced.

(b) Defendants' Exhibits Nos. 1 to 14.

3. Opinion of the Court

4. Decree of the Court

5. Order for an Appeal

6. This designation

The Appellees in the above-entitled matter stipulate that the matters included in Appellants' Designation of the Transcript of the Record on Appeal shall constitute the entire transcript of the record upon appeal.

Thomas N. Biddison

Thomas N. Biddison, City Solicitor of Baltimore City

J. Kemp Bartlett

J. Kemp Bartlett, Counsel for Baltimore Baseball and Exhibition Company

Eben J. D. Cross.

Eben J. D. Cross, Counsel for International League of Professional Baseball Clubs

Wilmer H. Driver

Wilmer H. Driver, Attorney for Frederick E. Green and Minnie C. Green, his wife, et al

FREDERICK E. GREEN, et al	:	
	:	
	:	IN THE
vs.	:	
	:	CIRCUIT COURT NO. 2
ROBERT D. GARRETT, et al in their official capacities and comprising the DEPARTMENT OF RECREATION AND PARKS OF BALTIMORE CITY and BALTIMORE BASEBALL AND EXHIBITION COMPANY, a Maryland Corporation	:	OF
	:	BALTIMORE CITY
	:	
	:	
	:	

* * * * * * *

COMPLAINANTS' MEMORANDUM OF AUTHORITIES.

This Memorandum of Authorities deals with the following questions which Complainants feel are presented by the pleadings in the case:

(1) The capacity of Complainants to seek equitable relief against the execution by the Respondents of an agreement permitting the use and occupancy of Baltimore Stadium by the Respondent, the Baltimore Baseball and Exhibition Company.

Conceded

(2) The capacity of Complainants to seek equitable relief against the Respondents to restrain a nuisance.

(3) Does the Department of Recreation and Parks of Baltimore City have the power to enter into an agreement with the Baltimore Baseball and Exhibition Company granting the latter the privilege of using the Baltimore Stadium for the playing of professional baseball, and the second floor of the Stadium Building for general offices?

(4) Do the allegations of the Bill of Complaint and the proof sufficiently establish that the playing of baseball games at the Baltimore Stadium constitutes a nuisance against which Complainants are entitled to injunctive relief?

1. Capacity of Complainants to seek equitable relief against the execution by Respondents of an agreement permitting the use and occupancy of Baltimore Stadium by Respondent, Baltimore Baseball and Exhibition Company .

Complainants contend that the execution of such an agreement as Complainants' Exhibit 16 is illegal, void and ultra vires the powers of the Department of Recreation and Parks. The authorities upon this contention are presented in Part 3 of this Memorandum. If this contention is upheld, there can be no doubt but that Complainants, as citizens, taxpayers and owners of property adjoining Baltimore Stadium, are entitled to maintain a bill in equity for injunctive relief against the execution by Respondents of such an agreement.

In Hanlon vs. Levin, 168 Md. 674, a resident and taxpayer of Baltimore City filed a bill against the Board of Park Commissioners of Baltimore, and the Baltimore Broadcasting Company to have declared null and void a certain rental agreement and to restrain them from erecting and maintaining a broadcasting tower and building in Druid Hill Park. At page 681-682 the Court said:

"Having decided that the board of park commissioners was without power or authority to enter into the lease in question, can their action be attacked by appellee? We think this question must be answered in the affirmative. He is a resident and taxpayer of Baltimore City, and equity will at his instance enjoin the conveyance or diversion to unlawful use of municipal property or funds. 19 R.C.L. page 1164, par. 438. See also, Baltimore vs. Gill, 31 Md. 375; St. Mary's Industrial School vs. Brown, 45 Md. 310; Peter vs. Prettyman, 62 Md. 566; Williams vs. Baltimore, 128 Md. 140, 97 A. 140; Dillon, Municipal Corporations (5th Ed.) Vol. 4, Sec. 1579.

"His position is different from one who attempts to enjoin a public nuisance, because in that case a plaintiff must show some special injury to himself besides that which is sustained by the general public. Bauernschmidt vs. Standard Oil Co., 153 Md. 647, 139 A. 531; Turner vs. King, 117 Md. 403, 83 A. 649; Weller, Chairman, vs. Mueller, 120 Md. 633, 87 A. 1045."

2. The Capacity of Complainants to seek equitable relief against Respondents to restrain a nuisance.

The Bill of Complaint(Par.2) alleges that the Complainants reside in close proximity to the Baltimore Stadium, and in Paragraphs 16-17) that the playing of baseball in the Baltimore Stadium has created a nuisance consisting of the following elements:

(1) the games are carried on at night from 8 P.M. until 11 P. M. and on Sundays from 2 P. M. until 5 P. M.;

(2) the games attract large crowds of people who park their automobiles so as to deprive complainants of ingress and egress to and from their properties;

(3) the crowds attracted use the parking area adjacent to the Stadium in such a manner as to raise great clouds of dust which invade Complainants' homes and force them to close their windows during hot weather;

(4) the crowds attracted are boisterous and by their noise moving to and from the Stadium, make it impossible for Complainants to obtain their normal sleep and otherwise enjoy their homes;

(5) the loud speaker system used at the Stadium is operated in such a manner as to be heard great distances, the noise therefrom likewise deprives Complainants' of the reasonable enjoyment of their homes;

(6) the flood lights used at night games reflect into Complainants' homes and deprive them of rest until extinguished;

(7) the boisterous crowds drawn to the games commit frequent trespasses and acts of destruction upon Complainants' property.

The sufficiency of these seven elements as constituting a nuisance will be considered in Part 4 hereof. If a nuisance is found to result from the playing of baseball, Complainants are so specially affected by the nuisance as to be entitled to injunctive relief. The facts above detailed show that the use of the Stadium in the past and the proposed future use results in injury and material damage to Complainants' property rights sufficient to justify injunctive relief against the Department of Recreation and Parks and the Baltimore Baseball and Exhibition Company.

Mayor, etc. of Baltimore vs. Sackett, 135 Md. 56.

3. Does the Department of Recreation and Parks of Baltimore City have the power to enter into an agreement with the Baltimore Baseball and Exhibition Company granting the latter the privilege of using the Baltimore Stadium for the playing of professional baseball and the second floor

of the Stadium Building for general offices?

The Department of Recreation and Parks is one of the executive departments of the municipal corporation, The Mayor and City Council of Baltimore. Baltimore City Charter (1946), Sec. 29 XIV. As such it has only such powers as have been conferred upon it, and these powers are to be strictly construed. Complainants contend that while the agreement (Complaints' Exhibit No. 16) is called a privilege, it is in fact an exclusive leasing of the Baltimore Stadium to the Baltimore Baseball and Exhibition Company subject to a few exceptions set forth in Paragraph XIII thereof, and further contend that the Baltimore Baseball and Exhibition Company exclusively uses and occupies in fact offices on the second floor of the Stadium Administration Building all the year around. Such an agreement is ultra vires of the Department of Recreation and Parks.

In Hanlon vs. Levin, 168 Md. 674, Levin, a resident and taxpayer of Baltimore City, filed a bill of complaint against the Board of Park Commissioners of said City and Baltimore Broadcasting Corporation, for the purpose of having declared null and void a certain rental agreement previously executed between the said defendants, and to have them permanently restrained from acting under said agreement in erecting, constructing and maintaining a certain broadcasting tower and building in Druid Hill Park, one of the public parks of Baltimore City, purchased by the City in 1860, and previously dedicated to the public use. A copy of the lease between the two defendants was filed as an exhibit and made a part of the bill of complaint, from a consideration of which it appears that a parcel of land 75' x 75' in Druid Hill Park was leased by the Park Board to the broadcasting corporation, upon which the latter was to erect a broadcast

tower and building, which were to be used in connection with Radio Station WCBM. The lease was for a term of ten years, with renewal provisions contained therein, and its consideration was stated as follows:

> "That the Board of Park Commissioners and the Mayor of the City of Baltimore shall have free times at hours appropriate to the purpose served, for broadcasting information of a civic, educational and non-political nature over Radio Station WCBM."

The Court decided that the Park Board was without power to enter into the lease in question and said:

> "But notwithstanding that the Board of Park Commissioners is a sub-department of the City, it is contended that this agency has, with reference to the execution of leases of park property, broader powers than the City, and the argument is based upon the language of Sec. 91 of the Charter, plus certain expressions used by this Court in the Williams cases (124 Md. 502 and 128 Md. 140). The section of the Charter reads: 'The Board of Park Commissioners shall have charge and control of all public parks . . . belonging to and controlled by or in the custody of the Mayor and City Council; and it shall have power and authority to rent or lease property, which it may acquire . . . whether by purchase, condemnation or otherwise, at such reasonable rentals and for such terms as to said Board may seem proper'. But this section myst be read in connection with the other sections of the Charter, and from a consideration of all the legislative intent, must be determined; and this may be found either by express declaration or by the general scope and policy of the Act. (Citing 121 Md. 656; 12 C. J. 707; 54 Md. 87).
>
> "By express language, authority to the Park Board for leasing property is limited to that 'which it may acquire on behalf of the City', and it is admitted that Druid Hill Park was acquired by the City and not by the Park Board, but even if this were not so, would the Park Board, under this section have authority to lease park property which had been dedicated to public use? To answer this in the affirmative we must conclude that the Legislature intended the Board to have broader powers in respect to leasing park property than were extended to the Mayor and City Council of Baltimore, an unreasonable presumption.

"We hold, therefore, that Section 91 was only intended to give authority to the Park Board to execute leases for property which it held for the City, but only so long as such property had not become a part of the public parks of the City, and therefore remained undedicated to the public use. If, after such property has been dedicated to the public and become a part of its system of public parks, the Park Board can validly lease, as attempted in this case, a part of the park, the situation is entirely conceivable whereby additional leases may be executed until the entire park may be occupied and controled by private enterprise, thus destroying the purpose for which the parks were created. (Court holds 124 Md. 502 and 128 Md. 140 do not conflict with this)."

For convenience the provisions of the Baltimore City Charter of 1927, under which the Hanlon case was decided, and the corresponding provisions of the Charter of 1946 are here placed in juxtaposition:

1927 Charter	1946 Charter
Sec. 31. "The executive power of the Mayor and City Council of Baltimore shall be vested in the Mayor, the departments sub-departments, municipal officers not embraced in a department herein provided for and such special commissioners or boards as may hereafter be provided for by laws or ordinances not inconsistent with this Charter, * * * The said executive departments shall be as follows: * * * * * * * * * * * * * * * V. Department of Parks and Squares composed of: Board of Park Commissioners."	Sec. 29. "Executive Departments. The executive power of the City shall be vested in the Mayor, the departments, commissions and boards herein provided for and such special officers, commissions and boards herein provided for and such special officers, commissions and boards as may hereafter be provided for by law or ordinance not inconsistent with the Charter ..... The said executive department, commissions, boards and bureaus shall be as follows: * * * * * * * * * * * * * * * * * * * XIV. Department of Recreation and Parks 1. Bureau of Recreation 2. Bureau of Parks 3. Bureau of Music.
Sec. 1. "The inhabitants of the City of Baltimore are a corporation, by the name of the "Mayor and City Council of Baltimore," and by that name shall have perpetual succession, may sue and be sued, may purchase and hold	Sec. 1. Corporate Entity. The inhabitants of the City of Baltimore are a corporation, by the name of the 'Mayor and City Council of Baltimore,' and by that name shall have perpetual succession, may sue and be sued, may purchase and hold real, personal and mixed property

1927 Charter	1946 Charter
real, personal and mixed property and dispose of the same for the benefit of said city, as herein provided, and may have and use a common seal, which may be altered at pleasure."	and dispose of the same for the benefit of said City, as herein provided, and may have and use a common seal, which may be altered at pleasure."
Sec. 7. "The title of the Mayor and City Council of Baltimore, in and to its water front, wharf property, land under water, public landings, wharves and docks, highways, avenues, streets, lanes, alleys and parks, is hereby declared to be inalienable."	Sec.3."Property Rights; Trusts. All the property and franchises of every kind belonging to, in the possession of, or hereafter acquired by the City are vested in it and it may dispose of any property belonging to it in the manner and upon the terms provided in the Charter.. .".
Sec. 8. "The Mayor and City Council of Baltimore may grant for a limited time and subject to the limitations and conditions contained in this Charter, specific franchises or rights in or relating to any of the public property or places mentioned in the preceding section; provided that such grant is in compliance with the requirements of this Charter, and that the terms and conditions of the grant shall have first been authorized and set forth in an ordinance duly passed by the city. Every such grant shall specifically set forth, define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication under any such grant; and, notwithstanding any such grant the Mayor and City Council of Baltimore shall at all times have and retain the power and right to reasonably regulate in the public interest the exercise of the franchise or right so granted; and the said Mayor and City Council of Baltimore shall not have the power by grant or ordinance to divest itself of the right or power to so regulate the exercise of such franchise or right. . . ".	Sec.159. "Franchises - Limited Grants Only. The title of the City in and to its water front, wharf property, land under water, public landings, wharves and docks, streets, lanes, and parks, is hereby declared to be inalienable. The City may grant for a limited time and subject to the limitations and conditions contained in the Charter, specific franchises or rights in or relating to any of the public property or places mentioned in the preceding sentence; provided that such grant is in compliance with the requirements of the Charter, and that the terms and conditions of the grant shall have first been authorized and set forth in an ordinance duly adopted. Every such grant shall specifically set forth and define the nature, extent and duration of the franchise or right thereby granted, and no franchise or right shall pass by implication under any such grant; and, notwithstanding any such grant the City shall at all times have and retain the power and right to reasonably regulate in the public interest the exercise of the franchise or right so granted; and the City shall not have the power by grant or ordinance to divest itself of the right or power so to regulate the exercise of such franchise or right."

1927 Charter	1946 Charter
Sec.10. "Before any grant of the franchises or right to use any highway, avenue, street, lane or alley, or other public property, either on, above or below the surface of the same shall be made, the proposed specific grant, except as provided in the proviso to section 37 of this Charter, embodied in the form of a brief advertisement, prepared by the Board of Estimates, at the expense of the applicant, shall be published by the Comptroller for at least three days in one daily newspaper published in Baltimore City to be designated by the Board of Estimates, and all the provisions of section 37 of this Charter shall be omplied with."	See Section 159
Sec.37. Relates to manner of granting franchises.	Sec.160 Relates to manner of granting franchises, etc.
Sec.13."Nothing contained in this Charter shall prevent the Mayor and City Council of Baltimore, from, in any manner, disposing of any building or parcel of land no longer needed for public use; provided, that such disposition shall be authorized and provided for by ordinance, and shall be approved by the Commissioners of Finance by their uniting in the conveyance thereof, and shall be made at public sale, unless a private sale be expressly authorized by the Board of Estimates and so entered on their minutes; nor from renting for fixed and limited terms any of its property not needed for public purposes, on approval of the Commissioners of Finance."	Sec.169. "Property - Sale or Lease. Nothing contained in the Charter shall prevent the City from in any manner disposing of any building or parcel of land no longer needed for public use; provided, that such disposition shall be authorized and provided for by ordinance, and shall be approved by the Board of Estimates, which approval shall be evidenced by the execution of the conveyance thereof by a majority of said Board, and shall be made at public sale, unless a private sale be expressly authorized by the Board of Estimates and so entered on their minutes. Unless otherwise provided by ordinance, the Comptroller is authorized to lease such property not needed for public purposes on a month to month basis. He is authorized to lease such property for fixed terms provided such leases are first approved by the Board of Estimates."

1927 Charter	1946 Charter
Sec.91. "The Board of Park Commissioners shall have charge and control of all public parks, squares, boulevards leading to parks, springs and monuments belonging to and controlled by or in the custody of the Mayor and City Council of Baltimore; and it shall have power and authority to rent or lease property, which it may acquire on behalf of the city, whether by purchase, condemnation or otherwise, at such reasonable rentals, and for such terms as to the said Board may seem proper."	Sec.96. "Recreation and Parks - General Powers and Duties. The Board of Recreation and Parks shall have the following powers and duties: (g) to charge and collect fees for admission, services nand the use of facilities, and rentals for the use of property controlled by it; provided that no lease of such facilities shall be made for a period of thirty days or more (or for successive periods aggregating thirty days or more) without the prior approval of the Board of Estimates. All moneys collected by the Department shall be accounted for and paid to the Treasurer at such intervals as he may prescribe;"

Complainants contend that the rule of the Hanlon case, that the Park Board was without authority to lease property which has been dedicated to the public and become a part of the system of public parks, is equally applicable to the Department of Recreation and Parks.

Respondents contend that the Department of Recreation and Parks has power to enter into the agreement in controversy by virtue of Paragraph 96, sub-section (g) of the Baltimore City Charter (1946). In the Hanlon case the Court rejected a similar contention with regard to Section 91 of the 1927 Charter.

Respondents may seek to distinguish the Hanlon case on the ground that there the lease involved contemplated a use of part of the park as a broadcasting station, which use is inconsistent with the use of the park by the public; while here the so-called agreement contemplates a use of the Stadium in accordance with its purposes and not inconsistent with but in furtherance of the public uses for which the lands were acquired.

But the land was acquired as part of Venable Park and the City cannot by building a Stadium thereon devote land so acquired to use for the playing of professional baseball. To do so would be allowing a preferential use to a group of persons of land acquired for use as a park by the general public and of a structure erected with park funds which were held in trust for park purposes.

In Baird vs. Board of Recreation Commissioners, 108 N.J.Eq. 91, 154 A. 204, the Court held that the conduct of the business of professional baseball does not come within park or playground purposes and enjoined the playing of professional baseball upon land which under New Jersey statutes and the deed of dedication was restricted to use for a park and playground.

Respondents may point to the terms of the agreement as conferring no exclusive right to use the Stadium and contend that, therefore, the use here involved is not inconsistent with the use of the Stadium by the general public. Complainants, however, contend that any use permitted the general public of the Stadium and the second floor of the Administration building is seeming rather than real.

In the case of Lincoln Park Traps vs. Chicago Park District, 323 Ill. App. 107, 55 N. E. (2d) 173, the plaintiff, a non-profit corporation, had entered into an agreement whereby it leased a portion of Lincoln Park for a term of twenty-six years. The plaintiff built a $40,000.00 club house thereon and provided facilities for trap shooting. Non-members of the plaintiff club were under the terms of the lease allowed to shoot if they secured lockers. On a bill by Plaintiff to enjoin cancellation of the lease, the Court held that parks may not be operated in such a manner that a preferential use thereof is

granted to anyone person or to any group of persons. After reviewing the provisions of the lease, the Court concluded that any use of Plaintiff's facilities permitted the public was seeming rather than real. Since the lease was tantamount to a grant of exclusive use of a portion ofa public park, it was held not a valid lease.

The Bill of Complaint further alleges that the Stadium is located in a residential area and that the agreement permits the operation of a commercial enterprise in an area zoned for residential use.

The Zoning Ordinance (No. 1247, approved March 30, 1931) provides in Paragraph 8 that no land or building shall be used in a residential area for:

"2. Amusement parks other than public parks and playgrounds"

"5. Business"

Complainants contend that to permit the use of Baltimore Stadium for the business of operating a professional baseball team is contrary to the above provisions of the Zoning Ordinance. Respondents contend that the Stadium constitutes a non-conforming use in a residential area since it was built in 1922 before the adoption of the Zoning Ordinance. But the real question thus presented is whether a use of the Stadium for the business of operating a professional baseball team was in existence at the time the Zoning Ordinance was adopted.

Paragraph 11 of the Zoning Ordinance provides:

"11. NON-CONFORMING USES. A non-conforming use is a use

that now exists and that does not comply with the regulations for the use district in which it is established. A non-conforming use may not be extended, except as hereinafter provided, but the extension of a use to any portion of a building, which portion is now arranged or designed for such non-conforming use, shall not be deemed to be an extension of a non-conforming use. A non-conforming use may be changed to a use of the same classification or to a use of a higher classification. A non-conforming use, if changed to a use of a higher classification, may not thereafter be changed to a use of a lower classification. If a use, for which an ordinance is required under the provisions of paragraph 4, is changed to a use for which no ordinance is required under those provisions, it may not thereafter be changed to a use for which an ordinance is required without such an ordinance. Nothing contained in this ordinance shall be construed to prevent the continuance of any use which now legally exists."

In Chayt v. Board of Zoning Appeals, 177 Md 426, 434, the Court quoted the following passage from Appeal of Haller Baking Co. 295 Pa. 257, 261, 145A 77, 79:

"As understood in the ordinance, 'existing use' should mean the utilization of the premises so that they may be known in the neighborhood as being employed for a given purpose; i.e. the conduct of a business. Ordinarily an existing use for business combines two factors: (a) Construction or adaptability of a building or room for the purpose, and (b) employment of the building or room or land within the purpose."

See also: Mayor etc. of Balto. vs Shapiro - Md.-, 51A2d 273.

Non conforming uses found in existence should not be enlarged or extended without authority from statute or ordinance.

Colate v. Jirout - Md. - , 47 A2d 613

Knox v. Mayor etc. of Baltimore 180 Md. 88, 23 A2d 15.

Upon the above authorities Complainants contend that there is no evidence of a non-conforming use of the Stadium for the business of playing professional baseball prior to 1931 and therefore the agreement is in violation of the Zoning Ordinance.

4. Do the Allegations of the Bill of Complaint and the proof sufficiently establish that the playing of baseball games at the Baltimore Stadium constitutes a nuisance against which Complainants are entitled to injunctive relief.

Complainants have heretofore set out (see Part 2) the seven elements of the nuisance about which they complain. The following authorities sustain their contention that these elements are sufficient to entitle Complainants to injunctive relief.

Meadowbrook Swimming Club, Inc. v. Albert 173 Md. 641 involved a bill seeking injunctive relief against a noise nuisance alleged to result from the operation by the defendant of an amusement place including a large swimming pool and dance floor. The music in conjunction with other sounds for which the defendant was not responsible were alleged to deprive complainants of sleep and rest on four nights of the week during the summer. Injunctive relief was granted. The Court quoted from the Chancellor's opinion as follows:

"Though not a nuisance per se, any business so conducted

as to become such may be enjoined. Bonaparte v. Denmead, 108 Md. 174, 69 A. 697. Neither is the element of legality nor public use and high quality conclusive.

"The law is clear that where a trade or business as carried on interferes with the reasonable and comfortable enjoyment by another of his property, a wrong is done to a neighboring owner for which an action lies at law or equity. In such cases it makes no difference that the business was lawful and one useful to the public and conducted in the most approved method. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 A. 900; Scott v. Bay, 3 Md. 431; Lurssen v. Lloyd, 76 Md. 360, 25 A. 294; Northern Cent. Ry. Co. v. Oldenburg & Kelley, 122 Md. 236, 89 A. 601. Jackson v. Electro Products Co., 132 Md. 128, 103 A. 453.

"The rule which must control is whether the nuisance complained of will or does produce such a condition of things as in the judgment of reasonable men is naturally productive of actual physical discomfort to persons of ordinary sensibilities, tastes, and habits, such as in view of the circumstances of the case is unreasonable and in derogation of the rights of the party. (Hamilton Corp. v. Julian, 130 Md. 597, 101 A. 558; Woodyear v. Schaefer, 57 Md. 1, 12) subject to the qualification that it is not every inconvenience that will call forth the restraining power of a court. The injury must be of such a character as to diminish materially the value of the property as a dwelling and seriously interfere with the ordinary comfort and enjoyment of it. Adams v. Michael, 38 Md. 123; Gallagher v. Flury, 99 Md. 181, 182, 57 A. 672; Euler v. Sullivan, 75 Md. 616, 618, 23 A. 845."

In Gilbough v. West Side Amusement Co., 64 N.J.Eq. 27, 53 A 289, injunctive relief was sought to restrain a noise nuisance arising from the close proximity of a baseball park to the residences of the plaintiffs. The park was operated on Sunday, and the plaintiffs alleged that the shouts and stampings incident to baseball-spectator activity so disturbed their rest as to constitute an unlawful and inequitable obstruction to the enjoyment of their property. The court stated that, in modern civilization, people were forced to endure those noise annoyances which should reasonably arise from the necessary operations of society, and that the necessity and purpose of any given noise would be a factor in determining whether it constituted a nuisance. The court also pointed out the time relation involved. Here, the noise was particularly disturbing on Sundays when the complainants were trying to rest. An injunction was granted restraining the defendant from allowing the production of such noise at that particular time. The court, in stating that mere noise may constitute a nuisance, said that the occurence of constant disagreeable noise was not conducive to mental health, especially when it tended to break up sleep and rest."

In Cronin v. Bloemecke, 53 N.J.Eq. 313, 43 A 605, plaintiffs sought to enjoin a nuisance alleged to result from the playing of baseball at Shooting Park. One of the elements of the nuisance was disorderly persons upon the highways drawn by such games. The Court held that the right to relief by injunction against the special nuisance to one's dwelling house by reason of crowds of disorderly persons upon the highways drawn there by entertainments given by a third person upon his own lands for pecuniary profit is based upon fundamental principles which have been recognized and enforced wherever they have been called in

question. Citing Rex v. Moore, 3 Barn & Adol. 184; Walker v. Brewster, LL 5 Eq. 25; Bellamy v. Wells, 39 Wkly. Rep. 158; Barber v. Penley, 2 Ch. 457.

See also: Seastream v. N. J. Exhibition Co., 67 N.J. Eq. 178, 58 A 532.

In Warren Co. v. Dickson, 195 S.E. 568; the Court said at page 570:

"The playing of ordinary games of baseball, or the operation of a park for such games in a lawful, decent and orderly manner, and accompanied only by the usual cheers and noise of spectators where these contests are harmlessly played and enjoined is not a nuisance per se. Such games or pursuits may, however, become a nuisance per accidens, where there is indecent, disorderly or improper conduct of the players or spectators, or where in a residential community there is accompanying noise which is excessive and unreasonable, or which recurs at unusual and unreasonable hours of night, so as to prevent sleep of ordinary, normal, reasonable persons of the neighborhood."

In Hansen v. Independent School Dist. No. 1 -- Id. -- , 98 P2d 959, the plaintiff sought to enjoin the use of Bengal Field for the playing of professional baseball. One of the grounds upon which relief was asked was that the use of the field for professional baseball games resulted in a nuisance consisting of eight elements largely similar to the seven elements involved in the instant case.

The court found the evidence sufficient to sustain the contention of complainants that the use of the field consituted a legal nuisance per accidens consisting of four elements; namely, the flooding of complainants' homes with excessive light, pre-

venting or hindering sleep and rest; creation of excessive noise; trespass of balls and people; and the parking of automobiles in such a manner as to greatly hinder ingress and egress to complainants' property. An injunction was issued restraining the continuance of these acts.

At page 961 the Court said:

"Respondent places considerable stress on the argument that appellants had acquiesced in the use of the field for football games and that baseball was no more of a nuisance than football. The testimony is uncontradicted, however, that football games were played almost exclusively in the afternoons; that the crowds were not nearly so large; that there was no trespass of balls from the football games; and lights, of course, were not used. Defendant's Exhibit A shows from April 20th until September 5th, a period of approximately 158 days, there were played 59 games, all but two of which were night games; thus there was a baseball game on approximately one-third of the nights during the summer months."

Upon the aforegoing authorities, Complainants submit that they are entitled to the relief prayed in their Bill of Complaint.

Respectfully submitted,

Solicitor for Complainants