IN THE

Court of Appeals of Maryland

OCTOBER TERM, 1948

No. 58

FREDERICK E. GREEN and MINNIE C. GREEN, his wife, et al., *Appellants,*

vs.

ROBERT GARRETT, et al., Constituting THE DEPARTMENT OF RECREATION AND PARKS OF BALTIMORE CITY, THE BALTIMORE BASEBALL AND EXHIBITION COMPANY, and THE INTERNATIONAL LEAGUE OF PROFESSIONAL BASEBALL CLUBS, *Appellees.*

APPEAL FROM THE CIRCUIT COURT NO. 2
OF BALTIMORE CITY
(MASON, J.)

BRIEF FOR APPELLEES — ROBERT GARRETT, ET AL., CONSTITUTING THE DEPARTMENT OF RECREATION AND PARKS OF BALTIMORE CITY

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STATEMENT OF CASE

These appellees concur in the statement of the case as set out in the brief filed herein by the appellants.

STATEMENT OF FACTS

In the interest of brevity, the appellees in this case, constituting the Department of Recreation and Parks of Baltimore City, will hereinafter be sometimes referred to as the "Department," and the Baltimore Baseball and Exhibition Company as the "Orioles".

In 1922, during the administration of Mayor William F. Broening, the prospect of holding an Army-Marine football game in the City of Baltimore brought forth a public demand for a municipal stadium of a capacity sufficient to house the large crowd which such an event would be bound to draw. In compliance with this demand, it was decided that such a stadium should be constructed, the City Administration being of the opinion that a stadium large enough to attract sports contests of national prominence would be beneficial to the City. The question of finding a suitable site then arose, and the Mount Royal Reservoir was first considered. However, due to the objections raised by residents living in the neighborhood of the reservoir, it was decided to locate the stadium elsewhere, and this resulted in the selection of the present site on Thirty-third Street, then known as "Venable Park" (App. pp. 27-28). This area had been previously acquired by the City through a series of purchases, beginning as far back as 1906, and it is significant that in none of the deeds by which this land was so acquired was there any restriction or condition as to its use (Appellants' App. p. 232), nor had it ever been used by the City or the Department for any public purpose whatsoever (Appellants' App. pp. 249, 258-259, 264). In fact, in 1922 "Venable Park" was nothing but an unused waste of land, and the very ground

on which the Stadium is now located was then the site of an abandoned brick yard (Appellants' App. pp. 243, 260, 264). The surrounding area was likewise undeveloped, with the exception of a few isolated farm houses (App. pp. 25-26; Appellants' App. p. 260).

The Stadium was completed in time for the Army-Marine game mentioned above, which was played there on December 22, 1922 (App. p. 29; Appellants' App. p. 271). This was followed, one week later, by a professional football game between Jim Thorpe's Indians and a local team representing Baltimore (App. p. 54; Appellants' App. p. 271) which constituted an unqualified venture into the field of commercial sports, it being the Administration's policy from the outset to use the new Stadium for all possible purposes of a recreational nature (Appellants' App. p. 260). In 1928 the Stadium was the scene of a professional baseball exhibition between the Baltimore Orioles and the Washington Americans (Appellants' App. p. 274), as it was initially designed so as to be suitable for baseball as well as other types of athletic contests (App. p. 30). Still other commercial events were held there prior to 1944 in the form of stunt shows (Appellants' App. p. 297), rodeos, prize fights, midget auto races (Appellants' App. p. 295) and professional football games (App. p. 32). Navy football games have also been regularly played in the stadium since 1923, and the testimony of Mr. C. Markland Kelly, a former member of the Park Board, would indicate that these games were likewise of a commercial nature (Appellants' App. 300).

Floodlights were installed around the perimeter of the Stadium in 1939 (App. p. 24; Appellants' App. p.

313), and night games and events were frequently held thereafter (Appellants' App. pp. 318-319).

On July 4, 1944, fire destroyed the baseball park on Twenty-ninth Street which had been used up until that time by the Orioles, and arrangements were made for the team to play out the balance of its season in the Municipal Stadium (Appellants' App. p. 16). In each of the succeeding years of 1945, 1946 and 1947 the Department gave the Orioles a one-year contract permitting the use of the Stadium for its baseball games (Appellants' App. pp. 472-480), from which source the Department derived revenues sufficiently substantial to put the operation of the Stadium on a self-sustaining basis for the first time since 1924 (Appellants' App. p. 78). By the terms of these contracts the Orioles were granted the privilege of using the Stadium playing field for their "home" games during the baseball season, as well as the use of locker and office facilities, both of the latter being located in the Administration Building at the south end of the Stadium (Appellants' App. p. 473). It is true that the office was utilized by the Orioles throughout the entire year under each of the said contracts, but the continuation of this practice was enjoined under the provisions of the decree passed by the lower Court in these proceedings (Appellants' App. p. 508), with which ruling the Department is content to abide.

In years previous to 1944 the Stadium had been regularly used during the months corresponding to the baseball season for certain religious, patriotic and other events, for which specific reservation was made by the Department in each of the Oriole contracts (App. p. 43-44; Appellants' App. 478-479). In practice, not only these but other events of various types were held in the

Stadium during the course of the baseball season, as the schedule of "home" games played by the Orioles in each year was an intermittent one, thereby permitting as many other activities as might be desired (Appellants' App. pp. 68-77).

The Appellants reside in the vicinity of the Stadium, which is now bounded by Thirty-third Street, Ellerslie Avenue, Thirty-sixth Street and Ednor Road (Appellants' App. p. 481), in what has become a residential neighborhood, through the expansion of the city to the northeast. Without exception, their homes were acquired subsequent to the construction and use of the Stadium. Indeed, a number of the Appellants did not move into that neighborhood until after the floodlights had been installed atop the Stadium perimeter (Complainants' Exhibits Nos. 1 to 14). The record discloses nothing to indicate that any objection was registered by the Appellants with the Department as to the commercial uses of the Stadium, mentioned earlier in this statement, prior to the advent of its use by the Orioles; nor is there any mention in the record that any of the Appellants residing near the Stadium at the time the perimeter lights were installed made protest to the Department on that score. However, upon the conclusion of the 1944 baseball season certain residents of the Stadium neighborhood, among whom were the Appellants, organized what was called "The Stadium Neighborhood Protest Committee", and, through that medium, made complaint to the Department as to such use, citing the crowds, lights, traffic, noise and dust as the bases of their complaint (Appellants' App. p. 83). In what this suit has proved were fruitless attempts to satisfy these protests the Department, accepting the objections

at their face value, in the years that followed materially alleviated all of those conditions complained of over which it had control. In pursuance of this policy, it was stipulated, in the 1947 Oriole contract, that all night games were to begin no later than 8:15 P. M., which was earlier than in previous years, and that no inning should be started later than 10:45 P. M. (Appellants' App. p. 479), a restriction to which no other team in the International League was subject (App. p. 38). Thereafter, under this practice, the Stadium was evacuated and the floodlights extinguished before 11:00 P. M. on the average on those nights when baseball games were played (App. p. 44; Appellants' App. pp. 93, 100, 289, 401). Another provision of the same contract required that the operation of the public address system by the Orioles be limited to uses directly connected with the playing of baseball or for emergencies, in the absence of written authorization from the Department (Appellants' App. p. 477).

This action was supplemented by the steps taken by the Orioles to reduce the use and volume of the system to a minimum for even the permitted uses (Appellants' App. p. 355). The parking lots located to the east and west of the Stadium proper were treated first with water by means of a sprinkler system (App. p. 62) and later with regular applications of calcium chloride, a dust-laying agent, and this treatment materially reduced such dust as may have been theretofore created on those occasions when automobiles were parked on these lots during dry spells (Appellants' App. pp. 289, 290). Notwithstanding the success of these measures, which resulted in the substantial elimination of all reasonable cause for complaint, the Protest Committee renewed its

Lower Ct. did not so find

demand that the Orioles be refused the further use of the Stadium, indicating that they were prepared to litigate the question if this action were not taken (Appellants' App. p. 229). Believing the use of the Stadium by the Orioles to be in the best interests of the public generally, the Department agreed to allow the Orioles the use of the Stadium for the 1948 season, "provided the Orioles make such a request and present a written agreement which is acceptable to the Board" (Appellants' App. p. 230), whereupon this suit was instituted.

QUESTIONS PRESENTED

1. 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 Stadium for the playing of professional baseball?

2. Is the playing of professional baseball games at the Baltimore Stadium in contravention of the Zoning Ordinance of Baltimore City?

3. Was there evidence in this case as to the use of floodlights and loud speaker system, the creation of dust, illegal parking of automobiles and the conduct of baseball fans, sufficient to constitute an enjoinable nuisance?

4. Should a court of equity subject the appellees to an injunction as to nuisances over which they lack control?

ARGUMENT

I.

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 STADIUM FOR THE PLAYING OF PROFESSIONAL BASEBALL?

Looking first to the power of the Department under the Baltimore City Charter, as amended in 1946, it is seen that Section 96(a) authorizes the Board of Recreation and Parks, as head of the Department:

> (a) to establish, maintain, operate and control parks, zoos, squares, *athletic and recreational facilities* 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;" (Italics supplied).

Under the decision of *Hagerman v. South Park Commissioners,* 278 Ill. App. 33, it would appear that this section is sufficient authority to permit the Department to grant to the Orioles the use of the Stadium for its baseball games, under an agreement similar to that of 1947 (Appellants' App. pp. 472-480). It was there held that a five year lease to a concessionaire of certain small buildings located throughout the public parks was within the legal contemplation of the power there vested in the Park Board "to manage, control, maintain and regulate the parks for the benefit, health and recreation of the public," despite the absence of a more specific grant of power to lease.

However, here the general grant of power under Section 96(a), as quoted above, is particularized by Sub-

section (g) of the same section, whereunder the Department is empowered:

> "(g) to charge and collect fees for admission, services and 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.* * * *" (Italics supplied.)

The power to license or lease is surely implied from the right of the Department to charge fees for the use of its facilities, and rentals for the use of property controlled by it, and that this was the intention of the framers of this section is emphasized by the proviso that follows, and which is italicized above, which specifically refers to *leases* of such facilities for thirty (30) days or more as requiring the approval of the Board of Estimates. This provision hardly would have been added had it not been intended to grant unto the Department the power to license and lease facilities or property under its control.

It should be noted that the 1947 agreement between the Department and the Orioles simply permitted the use of the Stadium by the latter for the playing of its "home" baseball games which, in fact, amounted to a use on fifty-seven (57) occasions during that year (Appellants' App. p. 318). The lower court, in its able opinion, described the agreement as constituting a number of daily licenses in this language:

> "The Court is inclined to believe that the agreement contemplated is in the nature of a number of daily licenses rather than a leasing of the facilities." (Appellants' App. p. 494).

Whether this agreement be dubbed lease, license or privilege is of little consequence, for its terms speak for it and clearly indicate the exercise of a power authorized by Sections 96(a) and (g) of the Amended Charter. It is worthy of further comment to observe that under subsection (g) the power to make an agreement of the type herein questioned does not lie within the uncontrolled discretion of the Department, but is subject to final approval by the Mayor and City Council of Baltimore through the instrumentality of its Board of Estimates.

But is the Charter power of the Department, as exercised by it with respect to the use of the Stadium by the Orioles, otherwise restricted? To answer this question it is necessary to examine the history of the Stadium and its site to determine whether there has occurred a dedication to purposes with which its use for professional baseball would be inconsistent. The evidence is undisputed that the Stadium site was *purchased in fee* by the Mayor and City Council of Baltimore; that the title thereby acquired by the City was free of any condition or restriction as to its use (Appellants' App. p. 232); that at the time of its acquisition it was unimproved land (Appellants' App. p. 243), and continued in that condition until the Stadium was constructed thereon in 1922; that the Stadium was then intended as "a great sports center" (Appellants' App. p. 263), to be used "for all purposes for which a stadium could be used" (Appellants' App. p. 260); that the dimensions of a baseball diamond were considered in the Stadium's original design (App. p. 31), clearly indicating that the intention was to use it for baseball, as well as for other purposes; that its initial use for an Army-Marine football game

(App. p. 29) was followed a week later by a professional football game featuring Jim Thorpe's Indians, the latter being a "commercial" use (Appellants' App. p. 271); that nothing in the subsequent use of the Stadium indicates any deviation from these purposes for which it was intended at its inception (App. p. 32; Appellants' App. pp. 295, 297). In the face of these circumstances, it cannot be logically argued that the Stadium is dedicated to "park" purposes within any meaning of the term dedication. If there has been a dedication, it is not to "park" purposes as such, but to the recreation of the public for the witnessing of all types of events, of either a civic or an athletic nature, without any distinction such as would prevent its use for professional baseball.

It also must be realized that a Stadium of this size, and representing a large expenditure from public funds, was not constructed simply for the purpose of providing a playing field for the recreation of the participants in the events and games there played. Such use is purely incidental to the principal purpose of providing a facility for the public to witness such events and games. In other words, its recreational purpose is served in the witnessing, rather than in the playing. Were this not true the use of the playing field for games between college teams from other states, as is frequently the case, would clearly constitute a misuse of public property intended for the recreation of the citizens of the City of Baltimore and the State of Maryland. Obviously, the purpose of such a stadium was and is to provide recreation to those of the public desiring to attend and witness events held therein, and the fact that the event may consist of a football or baseball game, professional or otherwise, a rodeo or an Easter Sunrise Service is entirely

incidental, and can be safely left to the discretion of the Department.

Similar reasoning was employed by this Court in the case of *Riden v. Phila., B. & W. R. Co.*, 182 Md. 336, 35 A. (2d) 99, which case concerned the condemnation of private property for purposes of the construction of a railroad spur designed to carry patrons to and from the Bowie race track. In its opinion this Court said that the words "public use" simply mean "use by the public," and went on to add, at p. 342:

> "The criticism was made in Nevada that our construction of the words 'public use' would enable the State to condemn property for business enterprises such as hotels and theatres. * * * 'But why,' demands one of the leading authorities on the subject in defense of the Maryland rule, 'may not the Legislature provide for acquiring by condemnation a site for a hotel or theatre to which the public shall have the right to resort and which shall be subject to public regulation in its management and charges? Is not this a mere question of expediency and public policy? And is not our opinion upon this question the outgrowth of the state of society in which we live and the usages and practices to which we are accustomed? In ancient times vast sums of money were expended in the construction and maintenance of public theatres, which was regarded as among the most important of public institutions * * *. Some discretion must be left to the Legislature. It is not to be presumed that they are wholly destitute of integrity and judgment. The people have left it for them to determine for what public uses private property may be condemned. If they abuse their trust the responsibility is not upon the courts, nor the remedy in them'."

In *Bryant v. Logan,* decided in West Virginia, and reported in 56 W. Va. 141, 49 S. E. 21, it was held that a lease of *park property* for use as a commercially operated race track was not an unlawful diversion of such property to a private use, it being there said that:

> "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 the people recreation, and it is not foreign to the object for which it was purchased."

And again, in *Baird v. Board of Recreation Commissioners of South Orange,* 110 N. J. Eq. 603, 160 A. 537, the Court refused to enjoin the use of property, acquired subject to the restriction that the premises "shall be used solely for public park and playground purposes", for professional baseball games, holding that the use by the baseball club did not violate such restriction.

Although firmly believing the foregoing argument to provide complete legal justification for the use of the Stadium by the Orioles, and without receding from that position in any respect, it will be assumed for the further purposes of the argument on this question that the Stadium is dedicated to purposes with which its use for professional baseball is at variance. It is submitted that even on this assumption such use of the Stadium by the Orioles is under such circumstances as to be yet lawful, for the authorities have generally held that public or park property may be devoted to private uses where such use results in no interference with the purposes for which the property was dedicated. This was the holding in *Colwell v. City of Great Falls,* 117 Mt. 126, 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, for the reason that the auditorium site was restricted by deed to "park purposes." As in the instant case, the lease reserved unto the City the right to use the auditorium for public events on specified dates. In refusing the injunction, the Court stated:

> "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 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." (Italics supplied).

Particularly applicable is the language used by the Court in the case of *Clarey v. Philadelphia,* 311 Pa. 11, 166 A. 237, where the leasing of the Municipal Convention Hall for professional sporting events was questioned as an unlawful use, because the ground on which the hall was built had been dedicated "as a public park forever" by city ordinance:

> "Unquestionably this hall, built with public funds upon property dedicated to public purposes, must be held to be devoted to public use. But there can be no sound reason why, when the hall is not required for public purposes, the city may not permit its use by private persons. From its very nature as a building designed to accommodate large groups of people, the hall cannot possibly be in demand for public gatherings for more than a small portion of the time, and necessarily must frequently be idle, yet with little diminution in the cost of maintenance. *There can be no objection to the City's receiving a return from the use of the hall by private persons upon occasions when it would otherwise be idle. To say,*

> *under the facts of this case, that the City is engaging in private business — that of promoting sporting events or leasing buildings—is absurd.* Complainant's contention is, in effect, that the hall must stand unused at all times when it is not in demand for strictly public use. Although he objects only to the use of the hall for professional sporting events, if his objection is sustained for the reasons he gives, or any reasons, the effect is to confine the use of the hall to purely public functions and thereby exclude its use for all private affairs, with the result that the city will be barred from receiving any revenue for its maintenance, and the entire cost thereof will have to be borne by the taxpayers. Such argument must be rejected. It is not sound in law or business practice. It would be folly to require this large and expensive public structure to be kept idle when it is not needed for public use, and when it might be used by private persons for a proper rental, for the mutual advantage of the taxpayers of the city and those permitted to use it." (Italics supplied).

This principle has been applied as well in Maryland, in *Gottlieb-Knabe Co. v. Macklin,* 109 Md. 429, 71 A. 949. There a taxpayer sought to enjoin the leasing of a municipal auditorium to officers of the State Militia, who, in turn, sublet the building from time to time for private concerts, etc., sharing the revenue derived therefrom with the City. The Court denied the injunction, on the ground that a municipality is empowered to rent its property when not needed for public use, and in so holding the Court said, at p. 435:

> "We are of the opinion that the term 'renting' as here used embraces the power to let or hire the use for a single evening or any number of evenings—whether consecutive or not. A liberal construction of such a Charter power is required to enable the

> City, in the interest of its general taxpayers, to minimize the loss of revenue from its unused property."

and, at p. 436:

> "The doctrine of ultra vires ought to be reasonably and not unreasonably understood and applied, and that whatever may be fairly regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be ultra vires."

From this it is seen that Maryland has definitely recognized the principle that public property may be used for a private purpose where no interference with the public use results therefrom.

No testimony was offered by the appellants to indicate that the intermittent use of the Stadium by the Orioles, during the entire four year period preceding the initiation of this suit, in any way interfered with or precluded the use of the Stadium for other purposes. Under the authorities just quoted, it therefore follows that the circumstances of the Orioles' use of the Stadium are such as to constitute a lawful use thereof, well within the power of the Department to grant.

In their brief on this question of power of the Department to enter into such agreements, the appellants rely heavily on the case of *Hanlon v. Levin,* reported in 168 Md. 674, 179 A. 286. The Court there held invalid a lease of a small section of Druid Hill Park to a radio station for the erection of a broadcasting tower. At the time this case was decided the power of the Board of Park Commissioners to lease property under its control stemmed

from a provision of the 1927 City Charter, which read as follows:

> "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." (Italics supplied.)

This Court there held that, as the section of Druid Hill Park subject to the lease had been *dedicated and used as a public park* since 1860, it was park property rather than property *"acquired on behalf of the City,"* and that under the above quoted provision the Board had no authority to execute the lease in question. But such restriction is conspicuously absent from the present Charter, since its amendment in 1946, and it is reasonable to believe that the decision in the *Hanlon* case was responsible for its deletion by the Charter Commission.

The *Hanlon* opinion also supports its holding with the view that it was not the intent of the Charter to grant unto the Board of Park Commissioners broader powers with respect to leasing than were granted unto the Mayor and City Council of Baltimore, the City's power in that regard being restricted by the general provision prohibiting the alienation of its title to "water front, wharf property, land under water, public landings, wharves and docks, streets, lanes and *parks,*" (Italics supplied) as well as by other procedural provisions relating to the granting of specific franchises or rights in such property. It will be noted that in the present case,

as already discussed, the agreement with the Orioles in no way constitutes an alienation of the City's title to the Stadium, nor has the Stadium or its site been dedicated or used as a "park."

Another feature of the *Hanlon* case which is absent from the present case is the fact that the lease there invalidated was for a period of ten (10) years, and was found to constitute a grant of the exclusive use of the Druid Hill Park plot which, in fact, it clearly was. But by looking again at the argument made earlier herein on the subject of exclusive use as it relates to the use of the Stadium by the Orioles, it will be seen that the facts of the present case are in sharp contrast with those in the *Hanlon* case as to this aspect, both as to term and extent of use.

Again in the *Hanlon* case the Court stated that if the Board were permitted to execute the lease in question there could well result a situation under which the Board might lease away the entire park system. This possibility is now removed by the provision of Section 96(g) of the present Charter, which requires approval by the Board of Estimates of all leases of facilities under the control of the Department which extend for a period of thirty (30) days or more.

A final distinction is found in the fact that here the use of the stadium is consistent with the purposes for which it was intended, as well as with its use prior to 1944, whereas in the *Hanlon* case the property leased was dedicated as a *park* and always had been used as a *park,* to which its proposed use for broadcasting purposes was in no way related.

Thus, it is contended that the case of *Hanlon v. Levin, supra,* has no application whatsoever to the question now

before this Court, and that to refuse to grant the injunction here prayed would be in no manner inconsistent with that decision.

II.

IS THE PLAYING OF PROFESSIONAL BASEBALL GAMES AT THE BALTIMORE STADIUM IN CONTRAVENTION OF THE ZONING ORDINANCE OF BALTIMORE CITY?

These appellees contend that the Baltimore City Zoning Ordinance has no application to either the Stadium or the playing of professional baseball games therein. The Stadium is and always has been used by the public for recreational purposes, and the nature of the events or contests held therein cannot change this fundamental use. In this instance the use follows the purpose, and if the purpose does not violate the provisions of the Zoning Ordinance, neither does a use consistent with that purpose. The list of Residential Use District exclusions in the Ordinance (Par. 8) contains no category which restricts the location of a municipal stadium, its use by the public, or the playing of baseball games per se in a Residential Use District. However, the appellants contend that the playing of *professional* baseball games in the Stadium comes within the contemplation of Paragraph 8(a) 2, "Amusement parks, other than public parks and playgrounds," and Paragraph 8(a) 5, "Business," and is thereby excluded from the Residential Use District in which the Stadium is located. Considering first their contention that the playing of professional baseball games transforms the Stadium into an "amusement park," it is seen that here the distinction between professional and non-professional games is of no significance, for this category would operate to exclude an amusement park operated for charitable or civic purposes, as well as one operated for private profit; further-

more, if the playing of baseball games in the Stadium can be said to constitute a use as a "amusement park," the same conclusion must be reached as to its use for football and other types of athletic games. As the Stadium was frequently used for such games prior to the enactment of the Zoning Ordinance, in 1931 (Appellants' App. pp. 46-53), there is established a non-conforming use for an "amusement park" such as would permit the playing of professional baseball games after that date. This result would also serve to dispose of the contention that the playing of baseball games in the Stadium by the Orioles is excluded as a "business" under Paragraph 8(a) 5 of the Ordinance, as Paragraph 11 later provides that:

> "* * * A non-conforming use may be changed to a use of the same classification * * *" *Beyer v. City of Baltimore,* 182 Md. 444, 453, 34 A. (2d) 765.

While the analysis just made produces a result favorable to the appellees' position, it is believed that the Commissioners could not have intended to extend the category of "amusement park" to include a use of the type here in question.

Consideration should next be given to the appellants' contention that the contested use of the Stadium by the Orioles is excluded under Paragraph 8(a) 5 of the Ordinance as a "business." However, before discussing this point, these appellees wish to state that the appellants' contention as to the application of Paragraph 8(a) 5 is entirely dependent upon the nebulous distinction that exists between professional and non-professional games held in the Stadium; that to so hold would be contrary to the intention of the Zoning Commissioners who drafted the Ordinance, and would require the Depart-

ment to look to the application of the proceeds of events scheduled at the Stadium in order to insure against a violation of the zoning law. That such a distinction should be given no weight in this case is also apparent from the testimony which establishes that whatever the effect on the surrounding neighborhood of the playing of a professional baseball game in the Stadium, it is in no way different from that which results from the playing of non-professional games there (App. pp. 37, 45, 49, 63).

But irrespective of the merits of such a distinction, it has been established that on a number of occasions prior to 1931 the Stadium was used for "commercial" or "business" purposes. Soon after its construction, a professional football game was held there (App. p. 54; Appellants' App. p. 271), and again in 1928 a professional baseball game was played, one of the participating teams being the Orioles (Appellants' App. p. 274). In each of these instances the teams were owned or controlled by private interests, which received a portion of the proceeds therefrom. On eight occasions prior to 1931 Navy football games were also held in the Stadium which, according to the testimony of Mr. C. Markland Kelly, formerly a member of the Park Board, were conducted on a commercial basis to the same extent as in the case of the Orioles or any other professional team using the Stadium (Appellants' App. p. 300). It is probable that even other instances occurred, prior to 1931, where the Stadium was similarly used for so-called "commercial" or "business" purposes, but the passage of time and inadequate records on this score made it impossible to present further evidence thereof. Nevertheless, the playing of the games mentioned above is sufficient to constitute a non-conforming use within the meaning of Para-

graph 11 of the Ordinance under the decisions of this Court. It has been consistently held that a non-conforming use need not exist at the time of the passage of the zoning legislation in order to be "existing." *Chayt v. Zoning Appeals Board,* 177 Md. 426, 9 A. (2d) 747; *Landay v. Zoning Appeals Board,* 173 Md. 460, 196 A. 293; *Appeal of Haller Baking Company,* 295 Pa. 257, 262, 145 A. 77, 79. Neither is the Court required to speculate as to the number of acts necessary to constitute an existing use, *Appeal of Haller Baking Company, supra; DeFelice v. Zoning Board of Appeals of Town of East Haven,* 130 Conn. 156, 32 A. (2d) 635, and here this is particularly true, as the number of "acts" were limited by the inability of the Stadium authorities to obtain more "commercial" events prior to 1931. *Campbell, et al. v. Board of Adjustment of Borough of South Plainfield, et al.,* 118 N. J. Law 116, 191 A. 742. General Hancock, the Stadium Director from 1923 until 1945, made this statement:

> "The majority of events were not commercial. I can't explain how that happened. I don't recall any reason. We went after events we thought we could get, commercial events. * * *" (App. p. 32).

The decision in *Chayt v. Board of Zoning Appeals, supra* requires that an existing use for business combine the following 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."

It is submitted that there can be no question as to the adaptability of the Stadium for athletic contests of various types, including baseball (Appellants' App. pp. 266,

267); that the factor as to employment within the purpose is likewise satisfied by the playing of professional and Navy games at the Stadium prior to 1931, for the reasons already given; and that there is so established a non-conforming use of the Stadium for the playing of professional baseball as a "business."

As its final contention on the question of zoning, the appellants' brief appears to argue that the frequency of the Stadium's use for professional baseball works an extension of the non-conforming use established prior to 1931. In this respect Paragraph 11 of the Zoning Ordinance provides as follows:

> "* * * 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. * * *"

The Ordinance deals with uses of land, and it is clear that the above provision is intended to have application only to those instances involving an actual enlargement of the area of a non-conforming use, and has no relation to the matter of frequency of such a use. *Shayt v. Zoning Appeals Board*, supra.

In concluding the discussion on this subject, it should be pointed out that the use which the appellants contend to be a violation of the provisions of the Zoning Ordinance has existed since July of 1944, and that the appellants now raise the question for the first time in this case; further, that during this protracted period no effort has ever been made by the appellants to obtain relief through the medium of the Buildings Engineer, as provided in paragraph 31 of the Zoning Ordinance.

III.

WAS THERE EVIDENCE IN THIS CASE AS TO THE USE OF FLOODLIGHTS AND LOUD SPEAKER SYSTEM, THE CREATION OF DUST, ILLEGAL PARKING OF AUTOMOBILES AND THE CONDUCT OF BASEBALL FANS, SUFFICIENT TO CONSTITUTE AN ENJOINABLE NUISANCE?

The authorities are consistent in holding that baseball is not a *nuisance per se*. *Warren Co. v. Dickson,* 185 Ga. 481 195 S. E. 568; *Royse Independent School District v. Reinhardt,* 159 S. W. 1010 (Tex); *Alexander v. Tebeau,* 24 Ky. L. Rep. 1305, 71 S. W. 427; *Riffey v. Rush,* 51 N. D. 188, 199 N.W. 523.

To justify the issuance of an injunction for reason of a nuisance in fact, this Court has long held that:

> "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 * * *" *Dittman v. Repp,* 50 Md. 516.

and so it was held in *Euler v. Sullivan,* 75 Md. 616, 23 A. 845, that the action of the lower court in instructing the jury to return a verdict for the plaintiff if it found that her home had been rendered "less comfortable" was error.

Whether a claimed nuisance results in "actual physical discomfort" can best be judged from its effect, if any, on the value of the claimant's property, which principle was first propounded in *Adams v. Michael,* 38 Md. 123, 126,

and recently confirmed by this Court in *Five Oaks Corporation v. Gathmann,* ..... Md. ....., 58 A. (2d) 656;

> "* * * 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 a similar view was taken in *Hennessey v. Carmony,* 50 N. J. Eq. 616, where it was said that:

> "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 one 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 rule would not apply."

The principle of determining the existence of an alleged nuisance from its effect on the value of the property subjected to it is particularly adaptable to cases, such as this one, where a nuisance is claimed to have continued for a substantial period of time, on the theory that if the nuisance is of a real and existing character it is reasonable to assume that its existence will be reflected in the market value of the property which it is said to affect. In the present case the appellants have offered testimony to the effect that all the conditions of which they complain have existed since the incipiency of the use of the Stadium by the Orioles, a period of *four years.* Yet they have submitted no evidence of any

kind to indicate that the existence of such condition has adversely affected the value of their homes. On the other hand, Mr. James Carey Martien, who qualified as an expert in real estate appraisal, testified that he had made a study of property values in the immediate Stadium area, including the homes of many of the appellants and their witnesses, which he extended to a comparison with values in other similar residential sections of Northeast Baltimore. From this study Mr. Martien testified:

> "Q. Tell his Honor whether or not you found any difference in the fractional increment of values in those sections than you found in those around the Stadium? A. I found them relatively in accord with what was around the Stadium. In some cases the Stadium values being higher" (Appellants' App. p. 365).
>
> * * * * * *
>
> "Q. What would you say this increment in residential properties has been in Baltimore generally from July, 1944 to the present day? A. Anywhere from 50 to 100%.
>
> "Q. Do I understand it is your testimony that the properties in the neighborhood of the Stadium are standing up in value as well as those in any other part of the city? A. From my observation, and a study of the area, I find that they have" (Appellants' App. p. 366).

The strength of Mr. Martien's testimony lies in the fact that it gives full consideration to the inflation in real estate values which has occurred since the war by the use of a comparative basis for his conclusions.

The same approach was taken in *Board of Education v. Klein*, 303 Ky. 234, 197 S. W. (2d) 427, *decided in 1946*, where an injunction sought by some three hundred home owners residing in the vicinity of a stadium to restrain

the playing of night football therein was refused. There 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."

While it is submitted that Mr. Martien's testimony as to property values in the Stadium neighborhood is sufficient of itself to demonstrate that the conditions of which the appellants complain cannot be characterized as nuisances within the meaning of the cases earlier cited, this conclusion can as well be supported by other facts in the case which will now be discussed.

At the hearing below, numerous residents of the Stadium neighborhood were called by both the appellants and the appellee, The Baltimore Baseball and Exhibition Company, to testify on the question of the conditions complained of as a nuisance. Those appearing on behalf of the latter were in many cases immediate neighbors of the appellants and their witnesses, and their testimony was diametrically opposed to that offered by the appellants. It can be observed from reading the testimony offered on behalf of the appellants that in only a few instances was complaint made as to all of the conditions discussed under this question. Furthermore, the condition most commonly complained of was the noise of the loud speaker system, which Judge Mason found to constitute a nuisance and consequently enjoined in his decree. Thus the injunction of this condition dis-

poses of what the record indicates to be the primary complaint of the appellants as to the existence of a nuisance.

In his opinion Judge Mason stated that he found no convincing proof that the use of the Stadium lights for night baseball games produced actual discomfort to persons in the neighborhood (Appellants' App. p. 506) and refused to enjoin their use at such games. It is not denied that some light escapes from the Stadium when it is used at night for baseball or for any other purpose, but this is spilled light rather than direct light (Appellants' App. pp. 331, 343), and is consequently of very low intensity.

In this regard Mr. Clarence Adams, a qualified lighting engineer, testified before the lower court as to the results of a test which he had recently made of the effect of such spilled light on the appellants' enjoyment of their homes. This test was made at night and consisted of taking light meter readings from various points corresponding to the location of many of the appellants' homes, for which purpose the Stadium lights were fully turned on. Every location tested was found to be subjected to light of a less intensity than is required under standard practice for the lighting of a street used by medium vehicular and light pedestrian traffic (Appellants' App., p. 327). It is interesting to observe in the testimony of Mr. Frederick E. Green, one of the appellants, at whose home the highest reading was obtained in the lighting test, the following assertion:

> "Q. Were the lights on in the Stadium last night? A. (By Mr. Green) That's what I was reading the paper by. *The lights in the Stadium last night were*

> *not nearly as bright as they generally are when they are playing games there.*" (Italics supplied) (Appellants' App., p. 118).

Yet it was clearly established by subsequent testimony that not only were all the lights turned on for the test (App., p. 52; Appellants' App., pp. 341, 347), but in fact the lighting conditions were such as to cause a *greater amount of spill* to the east and west of the Stadium than would occur at a night baseball game (Appellants' App., p. 341), Mr. Green's home being situated to the east of the Stadium.

Still another indication that the appellants have suffered no real injury from the Stadium lights lies in the fact that they are generally extinguished between 10:45 and 11:00 P. M. on nights when baseball games are played (App., p. 44; Appellants' App., pp. 93, 289, 401). This is the result of the provision contained in the 1947 agreement under which no inning can be started after 10:45 P. M. (Appellants' App., p. 479).

In the case of *Bartlett v. Moats,* 120 Fla. 61, 162 So. 477, the operation of a dance hall in a residential area was enjoined only as to those hours of the night which are commonly held and considered 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."

In *Blake v. City of Madison,* 237 Wis. 498, 297 N. W. 422, it was ruled on demurrer that the allegations of the bill of complaint as to the use of floodlights and a loud speaker for baseball in an amusement park would constitute a cause of action "* * * if continued beyond a reasonable hour every night" and result in "physical

annoyance to persons of ordinary sensibilities * * *." These appellees assert that the Stadium lights are extinguished at a reasonable hour when night baseball games are played, and that the testimony fails to indicate that their operation prior to that time causes any physical annoyance to the appellants in the ordinary enjoyment of their homes.

The general principles laid down by the Maryland cases earlier discussed are equally applicable to the appellants' contention that a dust nuisance is caused at the Stadium as a result of the Oriole baseball games. More specifically, the case of *Centoni v. Ingalls,* 113 Cal. App. 192, 298 P. 47, holds that dust will create a nuisance only if it "* * * causes perceptible injury to the property, or so pollutes the air as simply to impair the enjoyment thereof." Admittedly, some dust is occasioned during dry spells from the use of the Stadium parking lots, but the appellants have made no showing of injury to property or of air pollution such as would constitute a nuisance. Can it be said that the Stadium area is the only residential section in the City of Baltimore sometimes subjected to dust? Certainly living in a residential area in a city of this size does not insure to the residents the purity of "country air." As was said in *Bonaparte v. Denmead,* 108 Md. 174, 69 A. 697:

> "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 a certain extent."

This legal philosophy is similarly applicable to the remaining causes of complaint, i.e., illegal parking in streets and alleys surrounding the Stadium, and the

conduct of baseball fans going to and from the Stadium. It should be said that neither of these contentions are peculiar to the Stadium's use for baseball, and that it is inevitable that they will occur to a limited extent whenever crowds gather and converge at the Stadium, or at any other place in the city of a like nature.

In order to prevent the blocking of alleys by parked automobiles the Police Department makes a practice of posting "NO PARKING" signs in all the alleys in the vicinity of the Stadium (Appellants' App., pp. 306, 308-309). If these violations continue to occur the answer to the difficulty can be found in the more strict enforcement by the Police Department of the parking restriction in such alleys. More stringent enforcement measures by the Police Department will also serve to minimize whatever cause for complaint the appellants may have with respect to the action of the baseball fans after they leave the Stadium. However, in this connection a number of observers, including members of the Police Department, testified that the baseball crowd was an orderly one and as well or better behaved than the crowds attending high school football games and other events held at the Stadium (App., pp. 37, 45, 49, 63). Furthermore, the instances of disorderly conduct cited by certain of the witnesses who testified for the appellants are so few as to be termed isolated, and in no case were of a serious nature in the criminal sense. It was said in *Susquehanna Fertilizer Co. v. Spangler*, 86 Md. 562, 39 A. 270, that:

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

and in *Sheets v. Armstrong*, 307 Pa. 385, 161 A. 359, this language was employed with respect to crowds gathering at a proposed auditorium:

> "It is said that the use of the building will bring large numbers of people to it and will cause traffic congestion in the 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."

In considering generally this question of nuisance it must be remembered that the appellants do not dispute the fact that in each instance they "came to the Stadium", and established their homes in its vicinity, with full knowledge as to its existence and the fact of its use for various events attended by large crowds. While these appellees recognize that the principle of "coming to the nuisance" is not a factor such as would conclusively determine the right of the appellants to injunctive relief, nevertheless the courts in many instances have given considerable weight to this doctrine in considering nuisance questions. This principle has been applied as recently as 1946 to facts similar to those of the present case in *Board of Education v. Klein, supra.* The Court there assigned as one of its reasons for refusing to enjoin the use of a stadium for high school football games played at night the fact that:

> "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. * * *" (Italics supplied.)

In *Benton v. Kernan,* 130 N. J. Eq. 193, the Court denied the injunction prayed as to a noise nuisance, stating:

> "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 area remote from industrial activities would naturally expect."

The appellants attempt to avoid the application of this principle by emphasizing that the use of the Stadium was less frequent prior to the advent of the Oriole baseball games there. But certainly the appellants, in purchasing their homes near the Stadium, had no right to assume that the use of a public facility of this nature would be permitted to lie comparatively idle during the summer season, at the expense of the tax-paying public. There can be no doubt that they must have realized from the very presence of the Stadium, and the variety of games, events and other activities previously held therein, that it would continue to be used in the future to whatever extent the Department deemed necessary to fulfill its recreational purpose.

IV.

SHOULD A COURT OF EQUITY SUBJECT THE APPELLEES TO AN INJUNCTION AS TO NUISANCES OVER WHICH THEY LACK CONTROL?

While the failure of the appellants to produce any evidence of nuisance resulting from the actions or conduct of "baseball fans" either on or off the Stadium site

has already been fully demonstrated, further comment is warranted on this subject in view of the relevancy of that principle of law which is concisely stated in *Baird v. Board of Recreation Commissioners of South Orange, supra,* in the following language:

> "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."

Unlawful parking of automobiles and disorderly conduct are both subject to legal restraint in the form of police ordinances and regulations which the Police Department of Baltimore City is obligated by its function to enforce (App., pp. 7, 8). It is equally clear that the jurisdiction of the "park police" assigned to the Department is limited to the Stadium site and does not extend to the surrounding neighborhood (App., p. 47). Thus, neither the Department nor the Orioles has any means of control over the conduct of the "fans" on the streets of the neighborhood as would enable them to remedy the nuisances of which the appellants complain, even if such did exist. A case similar in point, in which the Court recognized and applied this principle, is that of *Rohan v. Detroit Racing Assn.*, 314 Mich. 326, 22 N. W. (2d) 433, decided in 1946, where an injunction was sought by nearby residents to restrain the operation of a race track located on public property. In refusing the injunction, the Court made this statement:

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

Private nuisance abated. Thus, improper conduct.

and it was similarly held in *Civic Association of Dearborn v. Horowitz*, 318 Mich. 333, 28 N. W. (2d) 97, in 1947, where the Court declined to grant an injunction as to the operation of a carnival on the ground of nuisance, including in its opinion the following language relating to the violation of parking regulations by the carnival patrons:

> "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."

In considering this question it must be remembered that the Mayor and City Council of Baltimore is not a party to this case, and that the authority and jurisdiction of these appellants does not extend to the Police Department of Baltimore City, but even were the Mayor and City Council of Baltimore a party hereto, it is submitted that the element of control over the conduct of the baseball fans would still be lacking, for it is well established that the City has no control over the operation of its Police Department, and it is therefore not responsible for the latter's actions or failure to act. *Green v. Baltimore*, 181 Md. 372, 30 A. (2d) 261, *Altvater v. Baltimore*, 31 Md. 462.

The Maryland decisions have likewise recognized the principle that courts of equity are constrained to act in the case of nuisances correctible through recourse to the police authorities. In *Bonaparte v. Denmead, supra*, the Court used this language in refusing the injunction there prayed:

> "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 this principle has been more recently recognized in *Hart v. Wagner*, 184 Md. 40, 40 A. (2d) 47.

Were it to be held otherwise in the present case, the implications of such a holding would cast a definite shadow over the right of the general public to convene at the Stadium for the purpose of witnessing other types of events as well as baseball games, with the result that its recreational value to the people of Baltimore would be seriously impaired.

CONCLUSION

In conclusion, these appellees strongly urge that the lower court, having had opportunity to view the witnesses in a lengthy and exhaustive hearing, was correct in its findings, to wit:

1. That the power of the Department to permit the playing of professional baseball games in the Stadium is affirmatively granted by the provisions of Section 96 of the Baltimore City Charter, as amended in 1946; that this power is in no way restricted as to its exercise with respect to the Stadium, nor was the act of the Department ultra vires because of the existence of any prior dedication of the Stadium site for park purposes; and that under these circumstances the use of the Stadium by the Orioles is lawful in that such use is not exclusive nor does it result in interference with any other purposes for which the said Stadium was also intended.

2. That the playing of professional baseball games in the Stadium, surrounded by a residential area, does

not constitute a violation of the Baltimore City Zoning Ordinance.

3. That the conditions of which the appellants complain do not amount to a enjoinable nuisance.

4. That unlawful parking of automobiles and disorderly conduct of baseball fans, alleged by the appellants, are conditions over which these appellees have no control, and that these appellees should therefore not be subjected to an injunction premised on such conditions.

Your appellees respectfully submit that the findings of the learned chancellor below should be affirmed.

Respectfully submitted.

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Solicitors for the Appellees, Robert Garrett, et al., constituting the Department of Recreation and Parks of Baltimore City.