applicable where the two claims are in the hands of the same person, citing *Lloyd v. Galbraith*, 32 Pa. 103, and *Kendig v. Landis*, 135 Pa. 612.

In the present case, the trustee in bankruptcy holds both claims of the creditors upon which the request for marshalling is premised. The trustee in bankruptcy is not entitled to the equity in his favor.

ORDER OF COURT

NOW, May 9, 1975, a verdict is entered in favor of the plaintiff-trustee in bankruptcy and against the defendant, Louis G. Thibault, in the amount of the judgment that was confessed, interest and costs, and in favor of the defendant, Margot E. Thibault.

AUGHINBAUGH v. SHOCKEY, et al., C.P. Franklin County Branch, E.D. Vol 7, Page 8

Equity - Injunction of Ordinance Violation - Township Junkyard Ordinance - Private Nuisance - Special and Peculiar Injury - Depreciation in Property Value - Change in Neighborhood - Nuisance in Fact.

1. Equity will not act solely to enjoin the violation of an ordinance.

2. A violation of a township junkyard ordinance may constitute a private nuisance with respect to one who sufferes special and peculiar injury of an irreparable nature therefrom.

3. An individual has standing to sue for the injunction of a nuisance if he suffers damage which is different in character from that sustained by the public at large.

4. Mere depreciation in the value of property adjoining an alleged private nuisance is not sufficient to justify injunction.

5. A change in the character of the neighborhood as a result of an alleged nuisance constitutes a public effect rather than a private one.

6. Whether or not the operation of a business lawful in itself constitutes a nuisance in fact is determined by the reasonableness of conducting the business complained of in the particular locality, in the particular manner, and under the circumstances of the case.

7. Equity will not act unless its right to do so is free from doubt.

Roy S. F. Angle, Esq., Counsel for Plaintiff.

E. Franklin Martin, Esq., Counsel for Defendants.

OPINION AND ORDER

Heard before Eppinger, P. J., Keller, J.
Opinion by Keller, J., May 2, 1977:

This aciton in equity was commenced by the filing of a complaint on January 8, 1976, and service of the same upon the defendants of January 17, 1976. The plaintiff seeks a decree enjoining the defendants from operating a junk yard, storing junk and used cars on their premises; enjoining the defendants from violating the Washington Township Junk Yard Ordinance, and for general relief. Preliminary objections were filed on behalf of the defendants on February 17, 1976, and served upon the plaintiff by delivery to her attorney of record. The preliminary objections are in the nature of a demurrer, a motion to strike, a motion for a more specific pleading and on the grounds that the plaintiff has a full, adequate and complete remedy in trespass. The matter was argued before the Court en banc and is ripe for disposition.

The defendants' demurrers are predicated on the grounds that:

1. The court sitting in equity has no authority to enjoin the violation of an ordinance as prayed for.

2. The plaintiff has alleged a public nuisance, but failed to allege any injuries suffered by the public in general and, therefore, has failed to state a cause of action.

3. Only the Washington Township Supervisors have the authority to seek to abate a public nuisance and, therefore, the plaintiff has failed to state a cause of action.

The two areas of law raised by the defendants' demurrer involved an alleged violation of a Township ordinance and the law governing public and private nuisances. For convenience in discussing these two areas, we will subdivide them.

I

ORDINANCE VIOLATION

Preliminarily, we note that the plaintiff has failed to attach a copy of the "Junk Yard Ordinance" or "the applicable sections" to its complaint for the information and guidance of the defendants and the Court. While the Court may take

judicial notice of local ordinances, it is incumbent upon the party pleading them to provide accurate copies.

It is a general maxim that equity will not act merely to enjoin the commission of a crime. "A crime is an act committed or omitted in violation of a public law either forbidding or commanding it, and it is well settled that a bill (in equity) will not lie having for its sole purpose an injunction against the mere commission of a crime." *Commonwealth vs Smith*, 266 Pa. 511, 516, 109 A. 2d 76 (1920). "The proper statement of the rule is this — that the mere fact that the act complained of is a crime neither confers equitable jurisdiction nor ousts it . . . the criminal nature of an act will not deprive equity of jurisdiction *otherwise* attaching" (emphasis added). *Everett vs Harron*, 380 Pa. 123, 128-129 (1955). *Everett* cites *People ex rel. Bennett, Attorney General vs Laman*, 277 N.Y. 368, 376, 14 N.E. 2d 439, 442:

> "Whether or not the act sought to be enjoined is a crime, is immaterial. Equity does not seek to enjoin it simply because it is a crime, it seeks to protect some proper interest. If the interest sought to be protected is one of which equity will take cognizance, it will not refuse to take jurisdiction on the gorund that the act which invades that interest is punishable by the penal statutes of the state."

In *Commonwealth vs Smith*, supra, the Pennsylvania Supreme Court refused to enjoin the playing of games in a public park on Sunday, and observed that the act (Pennsylvania Blue Laws) itself provided a penalty for its violation and thus provided an adequate remedy at law. If such penalty was not an adequate deterrent, then it was for the legislature to remedy the condition rather than the court. In the case at bar, the enforcement of the Township ordinance is a responsibility of the Washington Township Supervisors. If the sanctions provided by the local ordinance are not adequate, that would be a matter for the Supervisors to rectify and not this court.

The plaintiff can indubitably aver the ordinance violation and seek relief if a private nuisance exists in fact. However, the relief requested then would not be enforcement of the ordinance, but rather specific relief from the nuisance.

Therefore the defendants' first demurrer must be sustained.

II

NUISANCE

The plaintiff must allege and prove that the acts of which he complains constitute a private nuisance.

> "While the mere violation of a municipal ordinance does not constitute a nuisance (unless . . . the ordinance so provides), if the actual thing is a nuisance . . . and it is done or maintained in violation of a municipal ordinance, it may constitute such nuisance as against which relief may be obtained by one who suffers special and peculiar injury of an irreparable nature therefrom."

Heinl vs Pecher, 330 Pa. 232, 237, 198 A. 797 (1938). The violation of an ordinance creating a public nuisance does not by virtue of that fact automatically exclude the possibility of a private nuisance. Even if such ordinance violation is a public nuisance ,an individual has standing to seek relief if he is specially affected.

> "Where a legal wrong affects the general public, an individual whose injury is the same as that suffered by the general public has no standing to sue for an injunction. Where, however, an individual suffers damage which is different in character from that sustained by the public at large he may maintain an action for an injunction."

42 Am. Jur. 2d Injunctions Sect. 27 (1969); See also *Manderson vs Commercial Bank*, 28 Pa. 379, 381 (1857).

> "It is well settled law that a public nuisance will not be suppressed or enjoined at the suit of a private individual unless he has sustained some damage or injury which is clearly special to him and apart from that which the general public sustains. . . . It is not enough that he has sustained more damage than another. It must be of a different character, special and apart from that which the public in general sustained, and not such as is common to every person who exercised the right that is injured."

Rhymer vs Fretz, 206 Pa. 230, 55 A. 959, 960 (1903).

Paragraph 9 of the plaintiff's complaint alleges a depreciation of her home and that there is "no sale" for it at the present time. The meaning of this paragraph is unclear, but for the purposes of this proceeding we will consider it as alleging a depreciation in the value of plaintiff's home. In

A. Ullman, administrator of the estate of Charles W. White, late of the Borough of Waynesboro, Franklin County, Pennsylvania, deceased.

ZIMMERMAN — First and final account, statement of proposed distribution and notice to the creditors of June Zimmerman Weber and Calvin E. Weber, executors of the estate of Emma F. Zimmerman, late of Lurgan Township, Franklin County, Pennsylvania, deceased.

GLENN E. SHADLE
Clerk of the Orphans' Court
Franklin County, Pennsylvania

(9-8, 9-15, 9-22, 9-29)

NOTICE

To: Members of the Franklin County Bar Association

At the September 7, 1978 meeting of the Board of Directors of Franklin County Legal Journal, it was decided to enlarge the membership of the Headnotes Committee in order that the printer, Robson & Kaye, Inc., would always have an adequate supply of headnoted court opinions to print. In recent weeks, the printer has been experiencing a scarcity of headnoted court opinions to print.

Service on this committee is compensated on a per opinion basis. Any member of the Bar Association who would have an interest in serving on the Headnotes Committee should contact:

JAY H. GINGRICH, *Secretary*
FRANKLIN COUNTY LEGAL JOURNAL
11 S. Washington St.
Greencastle, PA 17225
(597-2323)

Pennsylvania Co. vs Sun Co. (oil tanks), 290 Pa. 404, 407, 138 A. 909 (1927, and *Houghton vs Kendrick* (municipal) 285 Pa. 223, 228, 132 A. 166 (1926). The Pennsylvania Supreme Court held mere depreciation in the value of adjoining property is not of itself sufficient to justify an injunction.

The allegation of paragraph 10 that the neighborhood has changed from pleasant residential to very undesirable by the way the defendants operated their junk yard would seem to plead a public effect and injury rather than a private special injury. In *Phillips vs Donaldson*, 269 Pa. 244, 246 the Supreme Court of Pennsylvania stated:

> "A lawful business can never be a nuisance in fact or in anticipation, if it is carried on reasonably and with due regard for the health and peace of others: *Rhoades v. Dunbar*, 57 Pa. 274. There is a distinction between a public nuisance, common to all members of the public alike, and a private nuisance or acts affecting a member of the public. A public nuisance is an inconvenience or troublesome offense that annoys the whole community in general, and not merely some particular person, and produces no greater injury to one person than to another — acts that are against the well-being of the particular community — and is not dependent upon covenants. The difference between a public and a private nuisance does not depend upon the nature of the thing done but upon the question whether it affects the general public or merely some private individual or individuals: 20 Cyc. 1152; 4 Blackstone 166."

The thrust of paragraph 11 allegation that Woodring Road belongs to the heirs of Charles D. Woodring and "defendant have only a right-of-way over the road" is lost upon us entirely. Paragraphs 5 and 6 inform us that the property of the plaintiff and the defendants abut Woodring Road, which is a private road. Paragraphs 8(d) and (e) allege defendants' business invitees park on the Road blocking it for use by plaintiff, and defendants permit "parts, nails and other debris" to fall on the Road while loading and unloading their vehicles making use of the Road by plaintiff and her guests dangerous.

If Woodring Road is, in fact, a private road, if the plaintiff and defendants have an easement to use it for certain specific purposes, and if defendants are interfering with plaintiff's use of her easement; then she may indeed be entitled to equitable relief. However, she must first plead the facts relied upon; and if she is entitled to relief in that specific area, it would be limited to use of the Road and that would have nothing to do with the operation of the junk yard business on defendants' land.

On the other hand, if Woodring Road has been opened to public use, then excess or improper use of the road by the defendants as alleged in paragraphs 8(d) and (e) would only be a public nuisance despite the fact that the plaintiff used the road more frequently than others because she is a resident of the immediate area. *West Mount Airy Neighbors, Inc. vs Cottman Transmission*, 67 D&C 2d 530 (1974). Plaintiff's damage may be greater, but it is not "of a different character, special, and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." *Rhymer vs Fretz*, supra, at page 232.

Paragraph 12 of the complaint alleges:

> "The Plaintiff does not have an adequate remedy at law and if the nuisance aforesaid is permitted to continue, irreparable injuries will result to her, ruining the quiet, peaceful enjoyment of her home and real estate and her health and well-being."

The Plaintiff has not alleged the facts necessary to permit this Court to conclude that defendants' junk yard is a nuisance per se. Not being a nuisance per se, it is incumbent upon the plaintiff to allege in her pleadings and at trial prove the business is a nuisance in fact. *Young et al. vs St. Martin's Church et al.*, 361 Pa. 505 (1949).

> " 'In this age, persons living in a community or neighborhood must subject their personal comfort to the commercial necessities of carrying on trade and business. . . . The wrong or injury resulting from the pursuit of a trade or business must be plainly manifest or certain to follow.' "

Erie vs Gulf Oil Corp., 395 Pa. 383, 387 (1959).

> " 'It has been said that a fair test as to whether a business lawful in itself, or a particular use of property constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case.' "

Reid vs Bradsky, 397 Pa. 463 469, 470 (1959).

> "Equitable relief must be predicated on an injurious invasion of a fixed and determined property right. By injury is meant something affecting the capacity of the property for ordinary use or causing a discomfort in the enjoyment of it that threatens the health or welfare of the occupant, with resultant

> injury to the property. The damages must be of a substantial character."

Penna. Co. vs Sun Co., 290 Pa. 404, 409 (1927).

The plaintiff has cited *Altman vs Ryan*, 435 Pa. 401 (1969) in support of her contention that she has stated a cause of action alleging private nuisance. In that case the plaintiffs sought injunctive relief from the defendants' unreasonably noisy business activities carried on between 11:00 P.M. and 7:00 A.M. disrupting the sleep and rest of the plaintiffs. After a partial hearing the defendants agreed "to decrease and/or eliminate the noise and disturbance emanating from the operations during normal sleeping hours. . .", and a decree to that effect was entered. When the nocturnal noise did not substantially abate, an additional hearing was held and a decree entered enjoining the defendants' loading operation from the hours of 11:00 P.M. to 7:00 A.M. The Pennsylvania Supreme Court affirmed the decree noting that the defendants would not be put out of business by the restriction; that the defendants have no vested right to load trucks at any hour of day or night; and the neighbors of the area have a right to be free of disturbing noises during normal sleeping hours.

The plaintiff's paragraph 12 when read in context with some, but certainly not all, of the subparagraphs of paragraph 8 might constitute allegations of a private nuisance which might fit within the rationale of *Altman vs Ryan*, supra. However, it is for the pleader to assert the material facts, and not for the Court to speculate as to the specific meanings of allegations.

Equity has the power to enjoin the operation of the defendants' junk yard. However, the plaintiff has commingled allegations of a public nuisance with possibile pleadings of a private nuisance. It is uncertain whether plaintiff intends to allege the business operation is a nuisance per se or in fact. The plaintiff has alleged conditions or conduct that might be dangerous. " 'The injury must be actually threatened, not merely anticipated; it must be practically certain, not merely probable.' " *Erie vs Gulf Oil Corp.*, supra, at page 389.

"One thing is quite certain, equity will not interfere unless its right to do so is free from doubt." *Penna. Co. vs Sun Co.*, supra, at page 409." We conclude the defendants' second and third demurrers must be sustained.

The defendants contend that the plaintiff's complaint should be dismissed on the grounds that she has a full, adequate and complete remedy in trespass. We find no merit to the contention, and it is dismissed.

The plaintiffs will be required to file an amended complaint pursuant to this Opinion. We, therefore, do not find it necessary to address ourselves in any great detail to defendants' preliminary objections in the nature of a motion to strike and for a more specific pleading. However, for the benefit of counsel we do note:

1. "The test as to impertinent matter is that of relevancy to the issue before the Court." *Whiteman vs Sarmento*, 22 D&C 2d, 384, 388 (1960). We find it difficult to detect relevancy in paragraphs 8(a), (b), (f), (g), (h), (j), (k), (l) and (p) absent greater specificity.

2. Greater specificity in the pleading of noise and its effect on the plaintiff and occupants of her property is highly desirable.

3. If plaintiff proposes to rely upon the Washington Township Junk Yard Ordinance as establishing standards or for any other purpose, the fact should be pleaded and a copy of the Ordinance or applicable sections thereof incorporated in the complaint.

ORDER

NOW, this 2nd day of May, 1977, the defendants' demurrers are sustained. The defendants' preliminary objection alleging an adequate remedy at law is dismissed.

The plaintiff is granted twenty (20) days from date hereof to file an amended complaint.

Exceptions are granted the parties.

CORMANY v. BASS, ET AL., C.P. Franklin County Branch, E.D. Vol. 7, Page 123

Equity - Uniform Fraudulent Conveyances Act - Fair Consideration - Debt

1. Under Section 3 of the Uniform Fraudulent Conveyances Act, 39 P.S. 3354, there is fair consideration when in exchange for a lawful obligation an antecedent debt is satisfied.

2. A "debt" within the meaning of Section 1 of the aforementioned act includes an executory promise to reconvey real property.

Robert C. Schollaert, Esq., Attorney for Plaintiff

Courtney J. Graham, Esq., Attorney for Defendants

OPINION AND DECREE NISI

Eppinger, P.J., August 24, 1978:

William D. Bass, Jr. (William) wanted to open a pizza shop of his own. His grandparents, Charles E. Bass and Phoebe D. Bass were willing to help him. To do this, they would have to mortgage their property. But considering their advanced age, the bank declined to accept the mortgage.

William suggested that the grandparents convey the property to him, he would mortgage it and get a loan for $20,000. Later when his business was successful he would refinance the loan, pledging his business as security and reconvey the property to his grandparents. They did as he requested, accepting his oral promise to reconvey to property to them. William's business was not a success. He defaulted on the loan and the property was sold at Sheriff's Sale. William assigned all of his interest in the proceeds after payment of judgment debts to his grandparents.

William's grandparents were not the only ones pursuaded to help him. Ruth M. Cormany (Mrs. Cormany) co-signed a note with William for $7,000.00. When William defaulted on this loan, Mrs. Cormany paid the balance due and sued William on the note and obtained a default judgment for $5,371.20. Alleging William's assignment of his interest in the fund in the hands of the Sheriff was invalid, Mrs. Cormany filed an action in equity asking the Court to set aside the assignment to the extent necessary to satisfy her judgment. The matter was submitted to the chancellor to be decided upon the record, including the depositions that had been filed.

Section 4 of the Uniform Fraudulent Conveyances Act of May 21, 1921, P.L. 1045, 39 P.S. Sect. 354 states:

> Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent, is fraudulent as to creditors, without regard to his actual intent, if the conveyance is made or obligation is incurred without fair consideration.

William's assignment of his interest to his grandparents made him insolvent. So this act applies. The question is whether the assignment was made for a fair consideration.

There is a fair consideration under Sect. 3 of the Act, 39 P.S. Sect. 353 when, in exchange for such obligation an antecedent debt is satisfied. Debt is defined in Section 1 of the