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Aesthetic Considerations in the Law

Rose L. Lipman

AESTHETIC CONSIDERATIONS IN THE LAW.

The courts have often been called upon to decide cases in which æsthetic considerations form the basis of the appeal to the police power. The rule is that the police power cannot be used to promote beauty or for æsthetic purposes. In this respect, the United States is not as progressive as the more important European countries. The Europeans' appreciation and development of beauty is not hindered by constitutional restrictions as it is in the United States.

England in 1913 passed an act entitled "Ancient Monuments Consolidation and Amendment Act"[1] which provided for the preservation of objects of beauty. In the same year France had an act passed[2] which provided for the classification of real property, the conservation of which is desirable, by the Minister of Fine Arts to the Council of State. The act regulates the sale of such property, its removal or repairs. The Minister of Fine Arts can expropriate property classified or proposed for classification. For many years German states have authorized ordinances concerning municipal æsthetics. Laws have been passed to prevent disfigurement of public places; special requirements have been made with regard to the appearance of buildings in certain localities; and the evils of outdoor advertising have been suppressed. Other countries as Switzerland and Austria have followed the lead of Germany. Italy, ever since the fifteenth century, has had laws to protect her works of art, and Japan has a law protecting the beauty of landscapes and historical monuments.[3]

Can we say Americans are not as anxious for æsthetic development as are the Europeans? Such an interest is the only explanation of the growth of æsthetic considerations under eminent domain. In former times, it was felt that land could be taken only to be used by the public for necessary and useful purposes and not for public pleasure and æsthetic gratification. Inroads have been made on all sides upon this doctrine, partly by general acquiescence and partly by judicial decisions, until all that is left of it is the possibility that in a close case lack of material advantage to the public may be held to be decisive against the public nature of a taking.[4]

Is a use public which satisfies no material need but "gratifies the artistic sense of the public or supplies means for public pleasure or recreation"?[5] In a Connecticut case,[6] the Court said, "What is

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[1] III and IV George V, c. 32, p. 178. Section 22 defines "Ancient Monuments" to include "monuments, the preservation of which is a matter of public interest by reason of the historic, traditional, artistic or archæological interest attaching thereto."

[2] "Law with Regard to Historic Monuments."

[3] See WILLIAMS, LAW OF CITY PLANNING AND ZONING (N. Y. 1922) p. 396.

[4] NICHOLS, EMINENT DOMAIN (2d ed. 1917) p. 162.

[5] *Ibid.*

[6] Olmstead v. Camp, 33 Conn. 532, 551 (1866).

the exact line between public and private uses? * * * The power [eminent domain] requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised and in cases of gross error or extreme wrong controlled by the dispassionate judgment of the Courts."

Two cases, *Farist Steel Co.* v. *Bridgeport*[7] and *Bunyan* v. *Commissioners of Palisades Interstate Park*,[8] illustrate this point. The Court in the first case said that where a harbor line was established solely in order that an expensive bridge might not be hidden from view by buildings placed on each side of it, it was not a public use for which lands could be taken. In the later case we find that a New York statute[9] provided for the establishment of the Palisades Interstate Park. The Court held that the taking of a stone quarry along the Palisades of the Hudson and adjoining the state park, was a taking for a public use even though the land itself was so rugged as not to be adapted for use as a park. The Court said,[10] "The shutting down of this quarry and the removal of its accessories do present some opportunity for adornment and improvement of scenic beauty, so that the courts must hold that the land is adaptable to a public use."

It is difficult to reconcile these two cases but if we remember that the first case was decided in 1891[11] and the *Palisades* case in 1915,[12] we can see the application of the statement by the Court in the above-mentioned case of *Olmstead* v. *Camp*.[13] But even prior to that case which was decided in 1866, we had a case in New York in 1836[14] in which it was held that private property could be taken from individuals to be converted into a public square and the damage could be assessed upon the owners of adjoining property.

In 1856 the selectmen of a Vermont town laid out a highway through private lands adjacent to the court house and town hall. It was held[15] that the highway could be laid out to ornament and improve the looks of the public buildings though the highway could not be established "for the purpose of embellishment alone or mainly."

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[7] 60 Conn. 278, 22 Atl. 561 (1891).

[8] 170 App. Div. 941, 153 N. Y. Supp. 622 (3rd Dept. 1915).

[9] N. Y. Laws (1900) c. 170; amended by N. Y. Laws (1906) c. 691; further amended by N. Y. Laws (1910) c. 361.

[10] *Supra* note 8.

[11] *Supra* note 7.

[12] *Supra* note 8.

[13] *Supra* note 6.

[14] Owners of Ground v. Albany, 15 Wend. 374 (N. Y. 1836).

[15] Woodstock v. Gallup, 28 Vt. 587 (1856).

In the same year as *Olmstead* v. *Camp* [16] the case of *Higginson* v. *Nahant* [17] held valid the laying out of a highway by eminent domain which was "capable of being used for no purpose of business or duty, and leading to no other major landing place," but was laid out for the public solely to reach places of "pleasing natural scenery."

In Massachusetts the construction of "public use" is broad. An act of Massachusetts of 1898 limited buildings in the neighborhood of Copley Square, Boston, to a certain height, providing at the same time for the payment of compensation to those property owners who should suffer by the limitation. In the case of *Attorney General* v. *Williams* [18] the act was upheld as an exercise of the power of eminent domain, and the principal question discussed by the Court was whether the use could be regarded as public. The Court said, "It is agreed by the defendants that the legislature in passing the statute was seeking to preserve the architectural symmetry of Copley Square. If this is a fact, and if the statute is merely for the benefit of individual property owners, the purpose does not justify the taking of a right in land against the will of its owner. But if the legislature for the benefit of the public was seeking to promote the beauty and attractiveness of a public park in the capital of the commonwealth, and to prevent unreasonable encroachment upon the light and air which it had previously received, we cannot say that the law-making power might not determine that this was a matter of such public interest as to call for an expenditure of public money, and to justify the taking of private property."

A New York statute provided for the addition of a twenty-foot strip to each side of a portion of a Brooklyn avenue, the strips being reserved as ornamental courtyards for the benefit and improvement of the avenue. It was held,[19] "It is not necessary that every part of all highways should be used for the passage of vehicles and pedestrians; it is proper that some regard be had for the æsthetic tastes, the comfort, the health, and the convenience of the public, and if the Legislature had enacted that Clinton Avenue should be increased in width to the extent provided in this act, and had provided that a strip in the center of the highway, forty feet wide, should be devoted to trees and flowers, as is done in many of our cities, it would hardly have been questioned that this constituted a public use in the same sense that a park preserve is generally recognized as a public use." [20]

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[16] *Supra* note 6.

[17] 11 Allen 530 (N. Y. 1866).

[18] 174 Mass. 476, 55 N. E. 77 (1899); see William v. Parker, 188 U. S. 491, 23 Sup. Ct. 440 (1903).

[19] *In re* Clinton Ave., 57 App. Div. 166, 68 N. Y. Supp. 196 (2d Dept. 1901).

[20] Today the right to acquire land for parks by condemnation is unquestioned. In declaring this right and upholding a statute limiting the height of buildings around Copley Square in Boston, the Supreme Court of Massachu-

In a Colorado case there is involved the question whether the use of Cascade Canyon, for a summer resort was a "beneficial use." The Court held,[21] "We say that the creation of a summer resort is a beneficial use. Is it of no benefit to the public to spend money in making a beautiful place in nature visible and enjoyable? If a person takes a stream, and after putting in waterfalls, ponds, bridges, walls, shrubbery, and blue grass sod, works it into a beautiful home, that is a beneficent use. It is a benefit to the weary, ailing and feeble that they can have the wild beauties of nature placed at their convenient disposal."

In the use of the power of eminent domain many states have reached the point where private property may be condemned solely for æsthetic purposes.[22] But if æsthetic considerations are necessary ones in our society then the means of promoting them must be enlarged.[23] Mr. Chandler in an article entitled "Attitude of the Law toward Beauty" [24] says, "Naturally the recognition of beauty as an element to justify the exercise of police power, which regulates without direct compensation to the person limited, has lagged after its recognition in the field of eminent domain where damages are paid. The police power is always drastic; whatever burden it entails, the individual has to bear alone, and the courts, therefore, are cautious about imposing it. At the same time the regulation of the use of private property in the interest of beauty is so general in its application that if it is to be done effectively, it must be done under the police power. We might as well try to conserve health and safety by eminent domain as to conserve beauty in that way."

But can we conserve beauty under the police power? The question whether mere ugliness not involving any consideration of decency can be placed under police restraint has hardly advanced beyond the range of tentative discussion.[25]

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setts recognized the æsthetic considerations involved, saying in the Williams case that parks "are expected to minister, not only to the grosser sense, but also to the love of the beautiful in nature, in the varied forms which the changing seasons bring."

[21] Cascade Town Co. v. Empire Water Co., 181 Fed. 1011, 1017 (C. C. D. Colo. 1910).

[22] 1 NICHOLS, *loc. cit. supra* note 4: "From the earliest times public money has been spent to make public buildings attractive, and under American constitutions it has long been considered proper for the nation, state or city to erect memorial halls, monuments, and statues, and to plan public buildings upon a more expensive scale than if designed for utility alone [*supra* note 18]. The public mind has thus been educated to feel that æsthetic and artistic gratification are purposes public enough to justify the expenditure of public money, and to authorize the exercise of eminent domain in behalf of similar purposes was but a short step beyond."

[23] American Bar Association Journal, VIII (Aug., 1922) 472.

[24] *Ibid.*

[25] FREUND, POLICE POWER (1904) p. 158. The various forms of offensiveness over which the police power is exercised do not as yet include unsightly objects.

One of the classic definitions of Police Power is that of Chief Justice Shaw, given in his opinion in *Commonwealth* v. *Alger*.[26] Chief Justice Shaw in that case says, "We think it is a settled principle, growing out of the nature of well-ordered civil society, that every owner of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the general enjoyment of others having an equal right to the enjoyment of their property, not injurious to the rights of the community. All property in this Commonwealth is * * * held subject to those general regulations which are to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious and to such reasonable restraints and regulations established by law as the legislature, under the Constitution, may think necessary and expedient. This is very different from the right of eminent domain, —the right of a government to take and appropriate private property whenever the public exigency requires it, which can be done only on condition of providing a reasonable compensation therefor. The power we allude to is rather the police power; the power vested in the legislature by the Constitution to make, ordain, and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the Commonwealth and of the subjects of the same."

We must remember, however, that the police power is limited. To constitute a valid exercise of the so-called police power of the State, there must be shown some public advantage to be gained by thus interfering with the personal liberty and property rights of the individual.[27]

Is the development of æsthetics such public advantage? The author answers emphatically in the affirmative. As yet no judicial body of the State or of the United States has been progressive enough to uphold the exercise of the police power on the theory that the development of æsthetics constitutes a public advantage.

In 1905, in *Passaic* v. *Patterson Bill Posting Co.*,[28] the Court says, "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone that justifies the exercise of the police power to take private property without compensation. In Illinois, a statute was passed forbidding the erection of any advertising sign within five hundred feet of a park or boulevard. The Supreme Court held it illegal[29] saying that matters of taste could not be regulated by statute when not connected

[26] 7 Cush. 53 (Mass. 1851).

[27] 2 WILLOUGHBY, CONSTITUTIONAL LAW (1910) p. 1231.

[28] 72 N. J. L. 285, 62 Atl. 267 (1905).

[29] Sign Works v. Training School, 249 Ill. 436, 94 N. E. 920 (1911).

with the safety, comfort, health, morals and natural welfare of the people and that the citizen was free to determine the architecture of his house and the appearance of his property for himself, even though the result might be shocking to the æsthetic taste.

This case was followed by the case of *Thomas Cusack Co.* v. *City of Chicago.*[30] The ordinance of the city of Chicago forbidding the erection of signboards in residential blocks without the consent of the owners of a majority of the frontage was the subject of litigation in both the State and United States Supreme Courts and both held it valid. But the ground upon which they did so was not that signboards were a defacement, but that they were dangerous. They might be torn down by the wind and injure somebody, they increase the risk of fire and other fantastic argument that billboards are a menace to public safety. The United States Supreme Court said that "the prohibition of billboards in residence districts was justified in the interest of safety, morality, health and decency of the community." Aesthetic considerations were completely ignored. In that case and the cases following we see the Court not willing to acknowledge beauty as a justification for the exercise of the police power, but without admitting it they are more and more giving weight to the consideration of the development of æsthetics. They may profess to put their decisions on other grounds but in their hearts it is the directing motive.

In Florida, in the same year as the *Cusack* case,[31] an ordinance appeared to have been passed for purely æsthetic reasons and it was held [32] invalid and unconstitutional.

There are several cases in New York similar to the *Cusack* case and the Court of Appeals has distinguished them from cases involving laws passed for æsthetic purposes [33] and held that they were in no way inconsistent with the general rule that æsthetic considerations alone could not be a ground for taking private property under the police power.[34]

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[30] 267 Ill. 344, 108 N. E. 340, *aff'd*, 242 U. S. 526, 37 Sup. Ct. 190 (1917). In Welch v. Swasey, 214 U. S. 91, 29 Sup. Ct. 567 (1909) in upholding the constitutionality of the Boston height limitations, Mr. Justice Peckham held constitutional the use of the police power to limit the height of buildings in Boston on the ground of danger from fire and said "That in addition to these sufficient facts, considerations of an æsthetic nature also entered into the reasons for their passage would not invalidate them."

[31] *Ibid.*

[32] Anderson v. Shackelford, 74 Fla. 36, 76 So. 343 (1917).

[33] City of Rochester v. West, 164 N. Y. 510, 58 N. E. 673 (1900); Gunning System v. City of Buffalo, 75 App. Div. (N. Y.) 31 (4th Dept. 1902); Whitmier and Filbrick Co. v. City of Buffalo, 118 Fed. 773 (C. C. W. D. N. Y. 1902).

[34] *Supra* note 28; Crawford v. City of Topeka, 51 Kan. 756, 33 Pac. 476 (1893); State v. Whitlock, 149 N. C. 542, 63 S. E. 123 (1908); Curran Bill Posting Co. v. City of Denver, 47 Colo. 221, 107 Pac. 261 (1910); People *ex rel.* Wineburgh Adv. Co. v. Murphy, 195 N. Y. 126, 88 N. E. 17 (1909). This case involved an ordinance of New York City which limited the height of

Whenever it is clearly shown that the object of the ordinance is to relieve conditions and not to satisfy the artistic taste of some of the community it will be upheld.[35]

In *People* v. *City of Chicago*[36] the Supreme Court of Illinois has held against the right of a city to prevent the establishment of retail stores in a residential section saying that there is nothing inherently dangerous to the health or safety of the public in a retail store and that any objection to such a store in a residential district arises solely from æsthetic considerations. The Court then assumes that such considerations are "disconnected entirely" not only from the "public health" and "morals" but from "comfort" and the "general welfare."

A review of the leading cases establishes the rule that the police power cannot be used to promote æsthetics. But why shouldn't our Courts consider that changing social conditions are complicating urban life and that there is great necessity for altering legal principles to meet those changes? In the *Matter of Wulfsohn* v. *Burden*,[37] Chief Judge Hiscock recognizes this necessity when he says, "Of course zoning regulations are an exercise of the police power and as we approach the decision of this question we must realize that the application of the police power has been greatly extended during a comparatively recent period and that while the fundamental rule must be observed that there is some evil existent or reasonably to be apprehended which the police power may be invoked to prevent and that the remedy proposed must be generally adapted to that purpose, the limit upon conditions held to come within this rule has been greatly enlarged. The power is not limited to regulations designed to promote public health, public morals or public safety or to the suppression of what is offensive, disorderly or unsanitary but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people by promoting public convenience or general prosperity."

Justice Holmes of the United States Supreme Court defines the police power in *Noble State Bank* v. *Haskell*:[38] "It may be said in a general way that police power extends to all the great public needs * * * It may be put forth in aid of what is sanctioned by usage or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

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a sky-sign to nine feet. The Court declared that "the physical danger to the public does not arise from the advertisements. The advertisements, announcement or direction have no relation to the safety of the structure itself."

[35] St. Louis Gunning Co. v. City of St. Louis, 235 Mo. 99, 137 S. W. 929 (1911); *Ex parte* Savage, 63 Tex. 285, 290 (1911); Kansas City Gunning Co. v. Kansas City, 240 Mo. 659, 144 S. W. 1086 (1912); Horton v. Old Colony Bill Posting Co., 35 R. I. 507, 86 Atl. 314 (1914).

[36] 261 Ill. 16, 103 N. E. 609 (1913).

[37] 241 N. Y. 288, 150 N. E. 524 (1925).

[38] 219 U. S. 104, 31 Sup. Ct. 186 (1911).

The police power is not static but progressive. It moves with the movement of public opinion.[39] The time has come when the Courts should drop the mask of an exclusive concern for safety and health and frankly approve reasonable regulation of the use of property in the interests[40] of beauty.

ROSE L. LIPMAN.

NEGLIGENCE—MAINTENANCE OF ELECTRIC WIRES.

One creating a possible danger is under a duty to take all possible precautions to insure the safety of those who might be in the vicinity engaged in an act which could be reasonably anticipated. Electricity of high voltage is inherently dangerous. Very little knowledge of its qualities is possessed by the average layman. Within the past few decades an increasing amount of litigation has arisen concerning electricity. The carrying of electric current through wires strung upon poles along streets and highways has added to the danger of our already complex life. Electrical companies, while not insurers of the absolute safety of the public against all dangers arising from the lawful erection and maintenance of their lines[1] are bound to exercise reasonable care in the maintenance thereof.[2] While some states require a high degree of care, the law in this State seems to be that "where potentiality of injury from electric current exists, reasonable care requires only foresight apparently commensurate with the danger."[3]

In a recent New York Court of Appeals case[4] the defendant had acquired by deed a right of way across the grantor's property to erect and to maintain high tension electric wires. The grantor's successor erected a railroad siding running diagonally under defendant's wires. At the expense of the railroad the wires were raised to a height of twenty-nine and one-half feet above the siding. Subsequently a contractor began to construct a roadway nearby. A movable crane with a boom forty feet in height was stationed near to or at the crossing. It was used to lift materials from cars standing upon the siding. All realized the danger of the boom forming a contact with the wires. The defendant had notice. The contractor had notice. The defendant did not refuse to erect higher poles but insisted that the contractor pay for the change. The latter refused.

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[39] *Supra* note 24.

[40] *Ibid.*

[1] W. U. Tel. Co. v. Thorn, 64 Fed. 287 (C. C. A. 3rd, 1894).

[2] *Ibid.;* N. Y. & N. J. Tel. Co. v. Bennett, 62 N. J. L. 742, 42 Atl. 759 (1899); JOYCE, ELECTRIC LAW (1900) §438.

[3] Van Leet v. Kilmer, 252 N. Y. 454, 169 N. E. 644 (1930).

[4] Buell v. Utica Gas & Electric Co., 259 N. Y. 443, 182 N. E. 77 (1932).