Washington University Law Review

Volume 9 | Issue 1

January 1923

An Undertaking Establishment as a Nuisance

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ST. LOUIS LAW REVIEW

Published Quarterly During the University Year by the Undergraduates of Washington University School of Law.

NOTES

AN UNDERTAKING ESTABLISHMENT AS A NUISANCE.

Until the last few years attempts to enjoin undertaking parlors as nuisances had been very rare. In fact the earliest decision in a court of last resort in America concerning such a case was handed down in 1887.[1] The reasons for the increase in such litigation recently is due to the new methods employed in the undertaking business, and the tendency of

1. Westcott v. Middleton, 43 N. J. Eq. 478.

the proprietors of such businesses to locate their parlors in residential districts in order to obtain desirable surroundings. Naturally property owners have resented these seeming invasions by a trade which is unpleasant to most people, and have applied to the courts for relief. Generally, it must be said, they have obtained it.

None of the cases have gone so far as to hold the undertaking business to be a nuisance *per se*. Indeed most of the cases specifically repudiate such an idea. They recognize the business to be a legitimate and necessary one, unpleasant as it may be, which, when properly carried on, is not open to interference by the courts. It will not, therefore, be enjoined merely because located in a residential district unless the complainant can show that he has suffered some injury or inconvenience such as the law remedies, in excess of that which necessarily results from the legitimate use of another of his own premises, considering the character of the neighborhood and the general use to which adjoining property is put. Even though a person uses his property in a different manner than adjoining property is generally used and thereby causes injury or inconvenience to his neighbor, the use itself must be unlawful, or the injury such as the law recognizes as a ground for complaint, considering all the circumstances of the individual case.

The rule has been long settled in courts of equity that the discomfiture or injury caused by a lawful business, properly carried on, must be physical, and not such as merely depends on the taste or imagination, in order to invoke the aid of the court.[2] However, although it is true that in every case in which an undertaking establishment has been enjoined, some actual physical injury or discomfiture has been present or threatened, the judges, in giving their opinions, have indulged in such liberality of expression as to create the impression that mere mental discomfiture by itself is sufficient

2. Ellison v. Commissioners of the Town of Washington, 58 N. C. 57.

grounds on which to seek equitable aid. A short review of the cases will illustrate this.

In the case of *Westcott v. Middleton*,[3] the Court refused to grant an injunction against the continuance of an undertaking establishment in a residential district. The complainant in this case was a supersensitive individual who possessed an unnatural fear of death. The facts showed that there was no danger from infection and that no odors, as a result of undertaking, had escaped. Further, defendant had been engaged in business at the same place for eleven years. The Court held that an act must be judged by its effect on the ordinary individual, rather than on the supersensitive. The Court further says that the injury must be physical and not purely imaginative, although whatever is offensive, physically, to the sense, and thereby makes life less comfortable, is a nuisance.

The Court in *Densmore v. Evergreen Camp, W. O. W.*,[4] decided in about 1910, attempts to illustrate "what is offensive, physically to the senses." The injunction here was granted against the establishing of undertaking parlors in a residential district. The facts showed that there would be danger of infection, and that noxious odors would probably permeate the neighborhood. The Court quoted from *Cleveland v. Gas Light Co.*,[5] "The discomforts must be physical; not such as depend upon taste or imagination. But whatever is offensive to the senses, and by such offensiveness makes life less comfortable, is a nuisance." The Court then endeavored to show that the effect of the proximity of the undertaking establishment to the complainant's home would be to depress his family mentally, thereby reducing their powers of resistance, and thus endangering their health. Thus, the Court claims, the mere mental effect of the proximity of such a business is a physical injury!

3. 43 N. J. Eq. 478.
4. 61 Wash. 230.
5. 20 N. J. Eq. 201.

The facts in *Saier v. Joy*[6] are practically the same as in *Densmore v. Evergreen Camp, supra,* except that no danger from infection was apparent, although odors would necessarily result. The court also considered the threatened decrease in property values. In commenting on the mental effect of such a business in a residential district, the Court says, "Cheerful surroundings are conducive to recovery of one suffering from disease, and cheerful surroundings are conducive to the maintenance of vigorous health in a normal person. Mental depression, horror and dread lower the vitality, rendering one more susceptible to disease, and reduce the powers of resistance. The effect of an undertaking parlor and morgue is to deprive the home of the comfort and repose to which the owner is entitled."[7]

In *Linsler v. Booth Undertaking Co.*,[8] although the case was decided on an ordinance which authorized the location of the business where it was sought to be enjoined, the Court mentioned the mental element in passing. It said that the effect of such a business is to depress people mentally and thus injure their health. However, the Court left undecided the question as to whether the establishment would have been a nuisance in the absence of the ordinance.

In the case of *Beisel v. Crosby*[9] an injunction was sought to restrain the defendant from operating an undertaking establishment in a residential neighborhood. The defendant had placed a large, lighted sign in front of his place. Dirges were continually sung and the street was often so congested by funeral parties as to prevent the neighbors from parking in front of their homes. Also unavoidable noises were present at all times of day and night. The Court said, "Though defendant was not prompted by malice or by any

6. 164 N. W. 507 (Mich.)
7. The court cites Barth v. Christian Psychopathic Hospital Ass'n, 163 N. W. 62.
8. 206 Pac. 976 (Wash).
9. 104 Neb. 644.

evil design, and meant only to exercise the privileges of citizenship, he failed to show proper respect for the property rights and the personal feelings of plaintiffs when he opened his undertaking establishment in their midst. He was in the wrong when he encroached on the repose, the comfort and the freedom of their homes, and weakened their power to resist disease."

In *Cunningham v. Miller*[10] the Court found that the bringing in of the dead occurred at all times and was visible to the neighbors. The Court also found that, though the business was conducted as sanitarily as possible, nevertheless flies escaped. Odors also were present. The value of the adjoining properties was decreased, and the neighboring families rendered nervous and depressed. An injunction was granted on the grounds that the use of the property was not reasonable under the circumstances. The Court dwelt at length upon the mental element.

From the above cases, the danger of misinterpretation of the real reasons for the decision of the Court in some of them is evident. Although in no case has the decision rested solely on the mental effect of an undertaking parlor on the people in the neighborhood, the impression has been left that the establishment of an undertaking parlor in a residential district is a nuisance on this ground alone. Fortunately, however, the courts in several cases where the mental element alone was present have refused to grant injunctions.

In the case of *Dean v. Powell*,[11] relief by injunction was sought against an undertaking parlor on the sole ground that the plaintiffs were mentally depressed by the proximity of the establishment. The complainants did not allege any danger from infection, or that any smells would be present. The injunction was refused, the Court holding that

10. 189 N. W. 531 (Wis.).
11. 203 Pac. 1015.

the mere fact that the business would render the plaintiffs less comfortable, and depress them mentally, is not sufficient to uphold the granting of an injunction in the absence of any danger from infection or the presence of odors.

A like decision in an analogous case [12] was handed down in 1918 by the Supreme Court of Washington. The effect of this decision would seem to overrule that part of the opinion in *Densmore v. Evergreen Camp, supra,* that refers to the mental element. In this case, the defendant, a mausoleum corporation, was planning to build an addition to its crypts. The evidence showed that these crypts would be absolutely sanitary and that no odors would escape. The addition would have been about thirty feet from the plaintiff's home. The plaintiff alleged that the constant arrival of bodies, and the presence of the reminders of death so near to his premises would adversely affect the health of his family by depressing them mentally.

The Court, however, refused to grant an injunction and said, "No decision has been called to our attention wherein any court has awarded injunctive relief, rested upon the sole ground of the mere presence of a cemetery or other place of sepulture, unattended by injurious or offensive drainage or fumes, sensible to the complainant, and our search leads us to believe that no such decisions have been rendered."

In view of this late decision by a court of last resort in which the Court states that it has searched the books for cases and found none, it is safe to say that the doctrine seemingly upheld by the above cases has, in fact, never been applied. Undoubtedly undertaking parlors cannot in many cases be carried on without the presence of odors, danger from infection, or some other injury of which the law has up to the present time taken notice, and are, therefore, nuisances. However, no reason is apparent why such establish-

12. Rea v. Tacoma Mausoleum Co., 103 Wash. 429.

ment should be enjoined if they can be shown to be conducted free of all danger of physical injury and inconvenience. The courts have uniformly held them not to be nuisances *per se* in residential neighborhoods, as had been said. To hold that they become nuisances on the sole ground that they are repugnant, mentally, to most people, is in fact to declare them nuisances *per se* and thereby unjustly restrict a lawful and necessary business.

The attempts of the courts to show that the mental effect becomes a physical injury, if successful, will result in opening up a flood of litigation that will threaten decisions hundreds of years old on the faith of which valuable rights have been acquired and large sums of money spent. Such a doctrine cannot logically be confined to cases involving undertaking establishments alone. It necessarily must be extended to every case in which an injunction is sought against the operation of a business. Whenever a business is likely to have a depressing mental effect on the people living nearby the Court's duty will be to issue an injunction. The limits to which such litigation would extend is almost inconceivable. The rule for determining whether an act or procedure constitutes a nuisance will not be based on its physical and material effect upon the person or property of another but upon its effect on the mind solely.

Physical and material injury to property or person is capable, more or less, of accurate measurement. An unpleasant odor can be definitely identified and its actual effect determined. The injury caused by the constant vibration of a great engine is possible of exact ascertainment. Such things as noises, stenches, and the like are open to thorough investigation and their effects on the person and property of an individual can be conceived with substantial accuracy. The element of chance is practically eliminated and the fair and logical dispensation of justice is possible.

Such exactitude in determining the effect of a mental injury is impossible. The elements of chance would pre-

dominate. The adoption of any doctrine by the courts of equity based solely on the effect of a lawful business on the mind would introduce a form of gambling into equitable jurisprudence. The impossibility of separating the damage caused on the mind by an act from that which is the result of the taste or imagination is apparent. The rules of psychology would necessarily have to be substituted for rules of law and equity in measuring the effect of an act. All certainty would be destroyed. The status of a legitimate business would no longer depend upon settled rules but upon the whim of an individual or individuals. Fortunately, the decisions in many cases involving undertaking establishments are not what they seem to be on first glance, and the rule still is in force that the mere disturbance of a person mentally is not such a violation of a personal or property right as to justify a court of equity in interfering with the operation of a lawful business.

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