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Dix W. Noel

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UNAESTHETIC SIGHTS AS NUISANCES

DIX W. NOEL

When a landowner in a pleasant locality decides to use his property for the operation of an automobile wrecking establishment, as a vantage point from which to display a striking illuminated advertisement, or for some other purpose considered unsightly by persons living nearby, there often arises the question of whether any legal wrong has been committed. The answer, assuming that there has been no violation of zoning or building restrictions, depends on whether or not the use of the property complained of constitutes a sufficient annoyance to be characterized as a "nuisance". This term does not lend itself to precise definition,[1] but frequently it is used to characterize activity on land which constitutes a more or less permanent interference with the comfortable enjoyment of neighboring property.[2] The term will be employed in this sense in connection with the present topic of unaesthetic sights.

In the development of the law of nuisances aesthetic interests usually have been treated with slight regard, as a matter of luxury and indulgence.[3] The tendency has been to refuse to enjoin a condition, or to allow damages, unless the annoyance complained of eauses some tangible discomfort as distinguished from that which depends on taste or imagination. For example, in the case of *Houston Gas and Fuel Company v. Harlow*[4] the jury found that the erection of a large gas tank near the residence of the plaintiff had resulted in the depreciation of the market value of the plaintiff's property to the extent of two thousand dollars, and that fifty percent of the depreciation was due not to any danger, or odor, but solely to the unsightliness of the tank. Judg-

[1]See Melker v. New York, 190 N. Y. 481, 487-88, 83 N. E. 565, 567 (1908); JOYCE, NUISANCES (1906) § 1; HARPER, TORTS (1933) § 179.

[2]See Baltimore & P. R. R. v. Fifth Baptist Church, 108 U. S. 317, 329, 2 Sup. Ct. 719, 726 (1883); HARPER, TORTS (1933) § 181. For general definitions of the various meanings of the term "nuisance" see JOYCE, NUISANCES (1906) §§ 2, 11; 1 WOOD, NUISANCES (3d ed. 1893) § 1; HARPER, TORTS (1933) § 179.

[3]"Mere aesthetics is beyond the power of the court to regulate." Perry Mount Park Cemetery Ass'n v. Netzal, 274 Mich. 97, 99, 264 N. W. 303 (1936) refusing to enjoin undertaking establishment. See also Wescott v. Middleton, 43 N. J. Eq. 478, 483, 11 Atl. 490, 493 (1887) refusing to enjoin undertaking establishment, where the court says: "It is not within the judicial scheme of things to make things pleasant for all the citizens of the State."

[4]297 S. W. 570 (Tex. Civ. App. 1927).

ment was rendered for the entire damage, but on appeal the amount was reduced to one thousand dollars, the court stating:

> "It seems wholly illogical to hold that, while the unsightliness of the building, which only affronts the artistic taste of the adjacent property owners, would not entitle the appellee to recover damages for any annoyance thereby caused him, such annoyance may be considered as an element of damage. . . . "[5]

This decision is representative of a general disposition of the courts to consider that mere unsightliness is not an actionable wrong, even though there may have been a substantial depreciation in the value of adjacent property.[6]

There is some indication, however, of "a growing belief that that which is offensive to the view, an eyesore, a landscape blight, may attain such significance as to warrant equitable interposition".[7] It has long been established that sights offensive to a sense of decency may be enjoined,[8] and it is submitted that the interest in freedom from unsightly conditions as well now has become of sufficient importance to receive some degree of protection. While the courts no doubt will continue in most cases to favor economic uses of land as opposed to aesthetic interests it seems likely, now that the earlier need of the country for rapid economic expansion is less pressing, that there will be a disposition in some situations to grant relief against unsightliness alone. It is submitted that courts desiring to take this course can find considerable support in the general principles of the law of nuisances, in several lines of decisions in which aesthetic considerations have at least implicitly been given weight, and in a few judicial declarations expressly recognizing that an unaesthetic sight may amount to a legal wrong.

I

The case in which the question of aesthetic interests has, perhaps, been most carefully considered is that of *Parkersburg Builders Material Company et al. v. Barrack*,[9] decided by the Supreme Court of Appeals of West Vir-

[5] *Id.* at 572.

[6] Northfield v. Board of Freeholders *et al.*, 85 N. J. Eq. 47, 95 Atl. 745 (1915); Rea *et ux.* v. Tacoma Mausoleum Ass'n, 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541 (1918) refusing to enjoin mausoleum immediately adjoining residential property; Zey *et ux.* v. Long Beach, 144 Wash. 582, 258 Pac. 492, 55 A. L. R. 470 (1927) refusing to enjoin comfort station for unsightliness alone. See also 1 WOOD, NUISANCES (3d ed. 1893) § 3.

[7] See Parkersburg Builders Material Co. v. Barrack, 118 W. Va. 608, 612, 191 S. E. 368, 370, 110 A. L. R. 1454, 1457 (1937).

[8] Cranford *et al.* v. Tyrell, 128 N. Y. 341, 28 N. E. 514 (1891) injunction against house of ill-fame as private nuisance, mainly on account of indecent sights; Farrell v. Cook, 16 Neb. 483, 20 N. W. 720 (1884) and Hayden v. Tucker, 37 Mo. 214 (1886) injunctions against use of land for standing stallions to mares in view of dwelling house.

[9] 118 W. Va. 608, 191 S. E. 368 and 192 S. E. 291, 110 A. L. R. 1454 (1937), commented on in Note, *The Modern Tendency toward the Protection of the Aesthetic* (1937) 44 W. VA. L. Q. 58-61.

ginia in 1937, involving a suit to enjoin the use of land, enclosed by a wire fence seven or eight feet high, for the outdoor storage and wreckage of abandoned automobiles. The neighborhood was claimed to be essentially residential. In the circuit court the trial chancellor enjoined the defendant from continuing to use his property for the storage or dismantling of old cars except within an enclosed structure, and required that the wire fence be taken down. On appeal the decision was reversed by the Supreme Court, but solely on the ground that the neighborhood had not been proved to be residential. The opinion, written by Judge Maxwell, is devoted principally to the support of the court's conclusion that it would have enjoined a condition such as this, on grounds of unsightliness alone, if the area had in fact been residential. It is stated:

> "Happily, the day has arrived when persons may entertain appreciation of the aesthetic and be heard in equity in vindication of their love of the beautiful, without becoming objects of opprobium. Basically, this is because a thing visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes, and may produce a decided reduction in property values. Courts must not be indifferent to the truth that within essential limitations aesthetics has a proper place in the community affairs of modern society."[10]

After a reference to the defendant's business as "honorable and useful" the court adds:

> "But an outdoor lay-out of a business of that kind necessarily is not pleasing to the view. Such business, therefore, should not be located in a community of unquestioned residential character."[11]

In a concurring opinion in *Material Company v. Barrack,* the President of the court, Judge Kenna, sharply dissents from the conclusions of the other judges as to their power to enjoin the continuance of structure or condition on grounds of unsightliness alone. He asserts that the court's dictum on this point represents an unwarranted extension of the law of nuisances, and will give rise to great difficulties in attempting to create a standard by which to determine what is in fact sufficiently unsightly to be subject to injunction. Thus he says:

> "The rules that govern the law of nuisances are uncertain enough without engrafting upon them a doctrine as essentially speculative as this dictum. With that doctrine as a part of our equity jurisprudence, our courts are likely to be called upon in a large degree to embark in the business of city planning, with little to guide them except the infinite variations of taste and preference."[12]

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[10] 118 W. Va. 608, 612-13, 191 S. E. 368, 371.
[11] 118 W. Va. 608, 613, 191 S. E. 368, 371.
[12] 118 W. Va. 608, 618, 192 S. E. 291, 293.

This difficulty of establishing an objective standard, assuming that aesthetic considerations in a given case are of sufficient importance to receive protection at the cost of restricting economic uses of land, doubtless creates a problem, but is the difficulty insuperable? Will the courts in fact be obliged to become arbiters of taste in a field where there are "infinite variations of taste and preference"? It is not suggested by the majority in *Material Company v. Barrack* that courts enjoin every structure, such as a house of peculiar architecture, which may be considered unaesthetic by neighbors or by the court. It is stated, rather, that an injunction should be granted "only where there is presented a situation which is offensive to the view of the average persons in the community".[13] That there is no intent to empower the courts to establish an arbitrary aesthetic standard is indicated by a quotation from a decision sustaining a zoning ordinance, in which was stated by Justice Owen of Wisconsin:

> "The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominant human sensibilities, may well be pondered."[14]

It would seem that the method of determining what constitutes an eyesore could be the same as that employed generally in deciding what amounts to a sufficient interference with comfort to constitute a nuisance. In general, conditions are gauged "not merely according to elegant and dainty modes and habits of living, but according to the plain and sober and simple notions among the people".[15] The test ordinarily applied is "the judgment of reasonable men", and the standard is the "normal" man.[16] No doubt the process of determining the sentiments of the average man as to aesthetic matters would be in some cases very difficult; but in a case where a junk yard, a comfort station, a large mausoleum, or gas tank is erected next to a residence, probably it is not impracticable to ascertain the average man's reaction even though no interference with his physical comfort is involved, particularly if the unsightliness of the adjacent structure has led to a sharp depreciation in the market value of the property. In cases of this type, should it not be left for determination by the court or jury in each particular instance whether the condition complained of is such as to interfere with the comfort of a person of ordinary sensibilities, even though it is offensive only to sight?

It is well established that a condition offensive to the sense of hearing alone

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[13]118 W. Va. 608, 613, 191 S. E. 368, 371.

[14]State *ex. rel.* Carter v. Harper, 182 Wis. 148, 159, 196 N. W. 451, 455 (1923).

[15]See Miller *et. al.* v. Jersey Coast Resorts Corp., 98 N. J. Eq. 289, 300, 130 Atl. 824, 829 (1925) apparently roughly quoting from Walter v. Selfe, 4 De. G. & Sm. 315, 322, 4 Eng. L. & Eq. 15, 22 (1851) where the court refers to the "plain and sober and simple notions among the English people".

[16]JOYCE, NUISANCES (1906) § 20.

may constitute a nuisance,[17] and likewise offensive odors often have been held subject to injunction.[18] In these cases it has been possible for a court or jury to determine whether the noise or odor was sufficient to disturb the comfort of an ordinary person, although the same difficulties in fixing an objective standard as those encountered in the case of an eyesore may be present.[19] It has been suggested that in situations involving noises and odors the courts in fact have been protecting an aesthetic interest, inasmuch as the appreciation of beauty embraces the senses of hearing and smell as well as sight.[20] This observation seems valid in so far as relief against noise and odors has been granted upon grounds of mental disturbance as distinguished from interference with sleep and injury to health.[21] To the extent that decisions involving noise or odors are based on the physical invasion of the atmosphere, there does not seem to be a similar basis for holding a condition offensive only to sight a nuisance, although in the cases where the annoyance is from reflected light there is a transfer of physical energy involved.[22] But from a practical standpoint, might not the sight of a large gas tank, automobile wrecking establishment, or comfort station be as disturbing to the comfort of a normal individual as the odors from a stable, or the noise from a talking machine or a jazz band? No doubt in the case of offensive sights, as in the law of nuisance generally, it would be essential to consider the character of the environment,[23] and ordinarily there would be no possibility of relief except in a residential neighborhood. And it would seem that the practice of some courts of balancing interests to decide whether the complainant shall have an injunction or only damages,[24] would be particularly

[17]Meadowbrook Swimming Club, Inc. v. Albert *et al.*, 173 Md. 641, 197 Atl. 146 (1938) enjoining loud jazz music; Stodder *et al.* v. Rosen Talking Machine Co., 241 Mass. 245, 135 N. E. 251 (1922); see also 3 COOLEY, TORTS (4th ed. Haggard 1932) § 430.

[18]Houghton *et al.* v. Kenrick, 285 Pa. 223, 132 Atl. 166 (1926) enjoining livery stable; Pruner & Hubbles v. Pendleton *et al.*, 75 Va. 516, 40 Am. Rep. 738 (1881) enjoining slaughterhouse. See also State *ex rel.* Carter v. Harper, 182 Wis. 148, 159, 196 N. W. 451, 455 (1923); and 3 COOLEY, TORTS (4th ed. Haggard 1932) § 433.

[19]*Cf.* Miller *et al.* v. Jersey Coast Resorts, 98 N. J. Eq. 289, 299, 130 Atl. 824, 828 (1925) where Berry, V. C., says: "Nor can I say how many popular songs may be sung in a private residence of an evening or how much music or what kind may be produced there, or whether those songs must be rendered in English or Yiddish. . . . I do not mean to intimate that excessive noise . . . could not be restrained by the court."

[20]See note, *Injunction against "Sight" Nuisance* (1936) 2 U. OF PITT. L. REV. 191, 192.

[21]In Seligman v. Victor Talking Machine Co., 71 N. J. Eq. 697, 63 Atl. 1093 (1906) the operation of a factory at night was enjoined expressly on the ground that it disturbed sleep, but in Stodder *et al.* v. Rosen Talking Machine Co., 241 Mass. 245, 135 N. E. 251 (1922) the operation of a talking machine during the day was enjoined.

[22]See (1929) 28 Mich. L. Rev. 211 and Shepler v. Kansas Milling Co., 128 Kans. 554, 278 Pac. 757 (1929), cited *infra* note 58.

[23]Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89 (1903); St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642 (1865) per Lord Westbury; 1 WOOD, NUISANCES (3d ed. 1893) § 9.

[24]Richard's Appeal, 57 Pa. 105 (1868); Madison v. Duck Sulphur Copper and Iron Co., 113 Tenn. 331, 83 S. W. 658 (1904); see CLARK, EQUITY (1919) § 215.

appropriate where some useful enterprise was objected to as offensive only to sight.

II

The only case directly in point which the court in *Material Company v. Barrack* cited in support of its dictum was *Yeager v. Traylor*,[25] decided by the Supreme Court of Pennsylvania in 1932. There the defendant proposed to construct at the rear of an apartment hotel in a residential area a garage to be used as a parking place by hotel patrons and tenants. The building was to have concrete floors with steel supports, and a ramp leading to the roof, which also was to be used for parking cars. The sides of the structure were to be almost entirely unenclosed. The lower court enjoined the construction of the building, claiming that it would be a nuisance *per se* on account of noises, gas, and vapors arising from the cars. In modifying this decree to permit the erection of a garage for permanent tenants, the Supreme Court laid down various restrictions, some of which appear to be based on aesthetic considerations alone. Thus it is stated:

> "The proposed building, in the case before us, if erected, must be enclosed entirely and conform in architectural design to the building to which it is attached. Ramps and other devices having a tendency to disturb the peace and quiet of the neighborhood must be avoided, and all means for raising and lowering the cars must be within the walls of the building. If it is proposed to supply the parking space upon the roof, an effective screen must be provided by means of a suitable balustrade or other device to hide the unsightly appearance which would be the result of such practice. . . . The decree of the court below is modified to the extent herein indicated for the erection of a garage of modern construction, of suitable and proper proportions, and architecture such as will be in keeping with the general character of the community . . . "[26]

The above requirements as to the conformity of the design of the garage to that of the hotel and as to the screen "to hide the unsightly appearance" which would result from parking cars on the roof, seem to be based on considerations of appearance only. The same may be said of the court's directions that the garage be of proper proportions, and that the architecture be in keeping with the expensive character of the community.

III

In addition to *Material Company v. Barrack* there are a few other cases, for the most part in the lower courts, in which junk yards and automobile wrecking establishments have been complained of as nuisances. In *Weishahn*

[25] 306 Pa. 530, 160 Atl. 108 (1932).
[26] 306 Pa. 530, 535, 160 Atl. 108, 109 (1932).

v. Kemper et al.[27] the use of property in a residential neighborhood for the storage of junk was enjoined. There the defendants had built up a large business with five men engaged daily in unloading trucks and re-loading the junk after it had been cut and broken by electric shears. The injunction seems to have been based principally on the presence of noise and dust; but that the court also had considerations of unsightliness in mind is suggested by a reference to the fact that at times the entire yard was filled with junk "piled higher than the fence". In another Ohio case[28] the court enjoined the operation of a junk yard, but there the decision was based mainly on an ordinance prohibiting this business within the city limits. The court held the ordinance to be a proper exercise of the police power as applied to a junk yard directly opposite residential property,[29] stating that the permitting of junk of any kind in any considerable quantity to accumulate and remain upon the lot in question beyond a reasonable time, as well as the burning and cutting, was "inconsistent with the health, peace and safety of plaintiff and the adjacent community".[30]

There are also two lower court decisions in Pennsylvania enjoining junk yards in residential districts. In the first of these,[31] the injunction was granted principally because of the likelihood of fumes, stagnant water breeding insects, and noises from the operation of electric shears; but the court also refers to the fact that junk, piled at times to a height of five feet, "will cut off the view of residents to the rear of their properties". The other Pennsylvania decision is a recent one[32] in which the nature of the yard is not described, the court taking judicial notice of what constitutes an "automobile graveyard". That aesthetic considerations played an important part in this decision is indicated by the court's overruling of an objection to the introduction of testimony designed only to establish unsightliness. The case of *Material Company v. Barrack* is distingnished, as to its actual holding, by a finding that the City of Lancaster, in which the "automobile graveyard" was located, was quasi-residential throughout, no attempt being made to distingnish the decision of the West Virginia court by showing the presence of objectionable elements in addition to unsightliness. It must be conceded, however, that in so far as the decisions of courts of last resort are concerned, there is no tendency to find that automobile wrecking establishments constitute nuisances on grounds of unsightliness alone. In addition to the actual holding in *Material Company v. Barrack,* there is a decision by the Supreme

[27]32 Ohio App. 313, 167 N. E. 468 (1928).
[28]Grundstein v. Ashland, 25 Ohio N. P. N. S. 493 (1925).
[29]The court refused, however, to enforce the ordinance as applied to a lot 200 ft. further removed, and surrounded by industrial property.
[30]25 Ohio N. P. N. S. 493, 505.
[31]Morgan *et al.* v. Zuckerman *et al.*, 49 YORK LEGAL RECORD 13 (1935).
[32]Rebman *et al.* v. Murray *et al.*, 29 MUN. L. REP. 165 (Pa. Com. Pl. 1938).

Court of Michigan[33] refusing to enjoin the operation of such a wrecking establishment situated across the highway from a cemetery. In the course of the opinion the court observed:

> "Defendant's plant may be unsightly and detract somewhat from the beauty of the view from the cemetery, but mere aesthetics is beyond the power of the court to regulate, especially in a case like this where both parties are in business for profit."[34]

Some of the language of the court indicates that the decision might have been otherwise if the neighborhood had been residential.[35]

IV

In one class of cases there is a definite tendency to grant an injunction or allow damages on account of an enterprise objectionable only to sight and to subjective sensibilities—the cases involving undertaking establishments in residential districts. Occasionally, the courts refuse to declare such an establishment a nuisance in the absence of some tangible physical annoyance, such as odors from chemicals used in embalming, noises from telephones, ambulances, doorbells, and the frequent conduct of funeral services, or disturbance from traffic congestion, or danger of contagion;[36] but during recent years the emphasis in these cases has shifted in many jurisdictions to other grounds. It frequently has been held that such an establishment may be enjoined simply because the sight of caskets, hearses, flowers, and undertaker's signs presents a constant reminder of death, leading to mental depression.[37] Thus in *Street v. Marshall,* a case involving a "funeral home" with no embalming done on the premises and consequently no odor nor danger of contagion, in answer to a contention that the establishment must be such as to affect directly health or grossly offend physical senses it is said:

> "This position is without support in the decided cases. While it is true that in many, if not all of them, the charge was made that the establishment complained of would communicate contagion, and would emit noxious gases, and offensive smells, such charge was almost universally found to be without substantial support in the evidence. A

[33]Perry Mount Park Cemetery Ass'n v. Netzal, 274 Mich. 97, 264 N. W. 303 (1936).
[34]274 Mich. 97, 99, 264 N. W. 303 (1936).
[35]In this connection the court stated: "A cemetery is not the most desirable neighbor, neither is defendant's wrecking plant, and, therefore, when the owner of the one complains of the undesirableness of the other, this fact should be kept in mind." 274 Mich. 97, 99, 266 N. W. 303 (1936).
[36]Pearson & Son *et al.* v. Bonnie *et al.,* 209 Ky. 307, 272 S. W. 375, 43 A. L. R. 1166 (1925); Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490 (1887); Stoddard *et al.* v. Snodgrass *et al.,* 117 Ore. 262, 241 Pac. 73, 43 A. L. R. 1160 (1925).
[37]Saier v. Joy, 198 Mich. 295, 164 N. W. 507 (1917); Williams *et al.* v. Montgomery, 186 So. 302 (Miss. 1939); Tureman v. Kettlerin, 304 Mo. 221, 263 S. W. 202, 43 A. L. R. 1155 (1924); Street *et al.* v. Marshall *et al.,* 316 Mo. 698, 263 S. W. 494 (1927); Beisel *et al.* v. Crosby, 104 Neb. 643, 178 N. W. 272 (1920).

careful reading of these cases will disclose that what has been stressed and in the last analysis made the basis of injunctive relief is this: *Constant reminders of death,* such as an undertaking establishment and the activities connected with it give rise to, *impair in a substantial way the comfort, repose, and enjoyment of the homes* which are subjected to them."[38]

In most of the cases cited by the court in support of the above statement the decision is based in part upon some actual evidence of odors, noises, congestion, and the like, but in several there is no doubt but that the consideration of mental discomfort has predominated,[39] and in one case the decision, as in *Street v. Marshall,* seems to be based upon this consideration alone.[40] In almost all of these cases there has been evidence of depreciation of the market value of the nearby property.

While it is clear that in some of the decisions involving undertakers' establishments the court is enjoining a use of property offensive only to sight, it should perhaps be added that the courts do not generally regard the mental depression resulting from the constant reminder of death primarily as an "aesthetic" consideration. There are frequent references to evidence that the constant reminder of the physical aspects of death is detrimental to health, or judicial notice is taken of this as a clear fact.[41] In so far, however, as these decisions also emphasize mere loss of enjoyment[42] this seems to be a situation where weight is in effect being given to aesthetic considerations. In this situation perhaps there is not the same difficulty in establishing an objective standard as in the case of a condition presenting an ugly or incongruous appearance. Although occasionally it is said that many would insist that the suggestion of death "would, in the end, be a salutary influence",[43] it seems more likely as stated in *Street v. Marshall* that death is "one thing from which the normal individual instinctively flees, whatever his religion or philosophy of life",[44] at least as regards its physical aspects. It is no doubt

[38]316 Mo. 698, 705-06, 291 S. W. 494, 497 (1927).

[39]See decisions cited *supra* note 37.

[40]Tureman v. Kettlerin, 304 Mo. 221, 263 S. W. 202, 43 A. L. R. 1155 (1924).

[41]Thus in the recent case of Williams *et al.* v. Montgomery, 186 So. 302, 305 (Miss. 1939) the court says: "It is psychological that a person who lives in a depressed atmosphere will normally be depressed in spirit and sensibility, and will be weakened in power to resist the vicissitudes of life, including disease." See also the other decisions cited *supra* note 37.

[42]See Williams v. Montgomery, 186 So. 302, 303 (Miss. 1939); Street v. Marshall, 316 Mo. 698, 709, 291 S. W. 494, 499 (1927); Beisel *et al.* v. Crosby, 104 Neb. 643, 646, 178 N. W. 272, 273 (1920). It seems clear that persons of normal disposition will lose their happy demeanor when a funeral passes, from either sympathy or dread, although occasionally there is testimony such as "that the living observer of a passing funeral would, or might, be buoyed up by the thought that another, and not he, was on the way to the cemetery". Street v. Marshall, 316 Mo. 698, 704, 291 S. W. 494, 496 (1927).

[43]See Rea *et ux.* v. Tacoma Mausoleum Ass'n, 103 Wash. 429, 433, 174 Pac. 961, 962 (1918) quoting from Ellison v. Washington, 58 N. C. 57, 75 Am. Dec. 630 (1859).

[44]316 Mo. 698, 709, 291 S. W. 496, 499 (1927).

true, as suggested by one judge,[45] that we are surrounded from the cradle to the grave with reminders of mortality "which the contemplative mind cannot escape having recalled to him by the falling leaf, November wind, and the newspaper accounts of Sunday accidents—all beyond remedy by injunction—"; but most minds are not contemplative, and most reminders of death do not affect a man of ordinary sensibilities to the same extent as does the constant presence of an undertaking establishment.

Another example of how a condition disturbing to sight and mental quietude only may constitute a nuisance is furnished by the case of *Everett et al. v. Paschall.*[46] There the use of a cottage in a residential area as a tuberculosis sanitarium was enjoined, notwithstanding a finding of the lower court, which denied relief, that in fact there was no danger of contagion. The reversal by the upper court was on the ground that since the fear of contagion was sufficiently real to depreciate sharply the value of adjacent property,[47] it must be held that the sanitarium disturbed the comfortable enjoyment of that property. The court gives a definition of comfort which indicates a conception of the term extending beyond tangible physical considerations. It states that comfortable enjoyment means "mental quiet as well as physical comfort", that comfort "implies some degree of positive animation of spirits, or some pleasurable sensations derived from happy and agreeable prospects", and whatever is requisite to furnish "reasonable physical, mental, and spiritual enjoyment".[48] The holding of this case was reaffirmed in *Ferry v. Seattle,*[49] where in the course of an opinion enjoining the construction of a reservoir separated from the plaintiff's property by a fifty-six foot embankment, on the grounds that apprehension of danger by a great number of persons would be caused, the court cited *Everett v. Paschall* stating:

> "It was there held that, though the fear of disease might be unfounded, imaginary, and fanciful, yet, where there is a positive dread which science has not yet been able to eliminate, such dread, robbing as it did the home owner of the pleasure in and comfortable enjoyment of his home, would make the thing dreaded an actionable nuisance, and the depreciation of the property consequent thereon would warrant a decree against its continuance."[50]

It may be said that the interest protected in *Everett v. Paschall*—a ground-

[45]Eschweiler, J., dissenting in Cunningham v. Muller, 178 Wis. 22, 33, 189 N. W. 531, 535 (1922).
[46]61 Wash. 47, 111 Pac. 879, 31 L. R. A. (N.S.) 827 (1910).
[47]It was found by the lower court that plaintiff's property would be lessened in value 33 1/3% to 50% by reason of the presence of the sanitarium.
[48]61 Wash. 47, 51-52, 111 Pac. 879, 880-81, quoting from Forman v. Whitney, 2 Keyes 165, 168 (N. Y. 1865).
[49]116 Wash. 648, 203 Pac. 40 (1921).
[50]116 Wash. 648, 664, 203 Pac. 40, 41 (1921).

less fear of injury to health—is more effective to destroy the comfortable enjoyment of neighboring property than a sight which is merely ugly or discordant, but at least the decision shows a tendency to extend the concept of comfort to merely mental disturbance at the sight of an object not in fact causing any physical danger.[51]

V

In the situation where a landowner has acted maliciously, conditions of a merely unsightly nature frequently have been enjoined. Thus the modern tendency is to hold that where a high fence has been erected for the sole purpose of cutting off a neighbor's view, or interfering with his access to light and air, the fence constitutes a nuisance.[52] It has been stated in connection with cases of this type that the malicious intent must so predominate as a motive as to give character to the structure, and that it must be manifest that the real usefulness of the structure will be subordinate and incidental.[53] But notwithstanding the emphasis on the necessity of a purely malicious motive, there is an implication in these decisions that the fence in itself interferes to a material extent with the comfortable enjoyment of neighboring property. A structure of harmless character, such as a house of a style of architecture known to be distasteful to a neighbor, and complained of on the ground that it was erected for purposes of annoyance, could hardly be enjoined. The older authorities,[54] refusing to enjoin a spite fence, would seem to be correct unless it can be assumed that an unsightly structure of this kind does in fact interfere with the comfortable enjoyment of adjacent property. This point is illustrated by the dissenting opinions in *Brush v. Mockett,* where Reese, C. J., says, "It does not strike me that the fence was so unsightly as to shock the sensibilities of anyone, however refined they may be", and Letton, J., states,

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[51]See, however, Northfield v. Board of Freeholders, 85 N. J. Eq. 47, 95 Atl. 745 (1915) where the New Jersey court refused to enjoin a tuberculosis hospital because there was no tangible or material injury to adjoining property. And in Stotler v. Rochelle, 83 Kan. 86, 91, 109 Pac. 788, 790 (1910) an injunction against a cancer hospital was granted only because surrounding property owners had "reasonable grounds" to fear infection. There is a similar conflict of opinion as to an insane asylum in a residential district. See Barth *et al.* v. Psychopathic Hospital, 196 Mich. 642, 163 N. W. 62 (1917) granting an injunction, partly because plaintiff would be "annoyed and inconvenienced by the sight of such an institution", and Heaton *et al.* v. Packer *et al.*, 131 App. Div. 812, 116 N. Y. Supp. 46 (1st Dep't 1909) refusing to grant an injunction.

[52]Burke v. Smith, 69 Mich. 380, 37 N. W. 838 (1888); Brush v. Mockett, 95 Neb. 552, 145 N. W. 1001 (1914); Barger v. Barrington, 151 N. C. 433, 66 S. E. 439, 25 L. R. A. (N.S.) 831 (1909); 1 COOLEY, TORTS (4th ed. Haggard 1932) § 56; HARPER, TORTS (1933) § 187; 11 R. C. L. 877-78.

[53]Rideout v. Knox, 148 Mass. 368, 19 N. E. 390 (1889); Holbrook v. Morrison, 214 Mass. 209, 100 N. E. 1111, 44 L. R. A. (N.S.) 228 (1913).

[54]Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177 (1896). See Falloon v. Schilling, 29 Kan. 292, 44 Am. Rep. 642 (1883).

> "While I agree with the modern doctrine, I think the motive is not material, unless the structure is offensive, unsightly, or is built for no useful purpose. If the fence was lawful, proper, and not unsightly, the courts should not interfere."[55]

Logically, therefore, the modern decisions which declare that a spite fence constitutes a nuisance are a further indication of a tendency to protect against unaesthetic sights.

VI

There are a few special situations where conditions offensive to sight alone have been enjoined, primarily on grounds of interference with rest and physical comfort, but where aesthetic considerations also may well have been a factor. In one of these cases, *The Shelburne, Inc. v. Crosson Corp. et al.*,[56] the complainant operated a large hotel in Atlantic City, on the boardwalk. The lessee of the defendant had erected on the roof of an apartment house adjoining the hotel an electric sign sixty-six feet high and seventy-two feet long, holding 1,084 fifteen-watt colored lights. At night the light from this sign shone directly into some of the bedrooms of the complainant's hotel, disturbing the guests. There were other signs along the boardwalk but the others did not project light directly into bedrooms. Inside the hotel a dance orchestra played until midnight, so near the rooms in question as to disturb the guests. The complainant sought to enjoin the operation of the sign at night. It was held that operation after midnight, but not before, would be enjoined. The court considered that in so far as the sign disturbed sleep, after the orchestra had ceased, it interfered "with the ordinary comfort, physically, of human existence". No express reference was made to aesthetic considerations, but allusions by the court to the varied colors of the lights and the famous quality of the hotels along the boardwalk suggest that such considerations may in fact have played a part in the decision.

In a somewhat similar case[57] the defendant, while erecting a building adjacent to that of the plaintiff at a distance of four feet, maintained a row of nitrogen lights at a point directly opposite the bedroom of the plaintiff. The lights were turned on at midnight almost every night, and the rest of the plaintiff was seriously disturbed. The court held that these lights had constituted a nuisance, and awarded damages, stating that this use of property by the defendant was unreasonable. In this case also the court made no reference to aesthetic considerations, but the decision furnishes another example of how a condition offensive to sight alone may constitute a nuisance, even though the physical injury involved perhaps could have been

[55] 95 Neb. 552, 559-60, 145 N. W. 1001, 1003-04 (1914).
[56] 95 N. J. Eq. 188, 122 Atl. 749 (1923).
[57] Nugent *et al.* v. Melville Shoe Corp. *et al.*, 280 Mass. 469, 182 N. E. 825 (1932).

averted by a shade or some other device. Where, however, mere light from defendant's premises does not disturb sleep, it seems doubtful that there is any nuisance involved. In the unusual case of *Shepler v. Kansas Milling Co.*[58] a battery of grain storage tanks sixty feet in height and painted white had been erected opposite the residence of the plaintiff. These tanks reflected the rays of the afternoon sun to the front porch of the residence, to the "great annoyance and discomfort" of the plaintiff. The court considered this to be *damnum absque injuria* and declined to allow damages, rejecting as fanciful the notion that a milling company could be controlled as to the height or color of its tanks simply because they "might offend the sensibilities of plaintiff in the exercise and enjoyment of his front porch on a sunny afternoon!"

VII

A precedent heavily relied upon by the court in *Material Company v. Barrack* to support its dictum that things offensive to sight alone may constitute a nuisance was the decision of the Supreme Court of the United States in *Euclid v. Ambler Realty Co.*[59] sustaining the constitutionality of a zoning ordinance designed to establish exclusive residential districts. This decision was cited as indicative of a tendency to recognize "the right and duty of society to protect itself from undesirable and disagreeable conditions". Additional decisions, particularly those permitting the elimination of outdoor advertisements for aesthetic reasons,[60] could have been cited to illustrate an expanding conception of the police power with respect to the protection of the public against mere unsightliness; but to what extent are these public law decisions in point on the question of whether similar conditions may be condemned by the courts as nuisances? This was one of the matters upon which the concurring judge in *Material Co. v. Barrack* took issue with the majority, asserting that decisions sustaining zoning or building restrictions as a valid exercise of power by the legislative branch of the government, directly elected by the people, have nothing to do with the law of nuisance as applied by a court. It is submitted, however, that upon analysis these public law decisions do have a substantial bearing on the question of whether conditions offensive to aesthetic sensibilities constitute a nuisance.

In the leading decision on this branch of the police power, *General Outdoor Advertising Co. v. Department of Public Works,*[61] it was squarely held

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[58]128 Kan. 554, 278 Pac. 757 (1929).

[59]272 U. S. 365, 47 Sup. Ct. 114, 54 A. L. R. 1016 (1926).

[60]General Outdoor Advertising Co. Inc. *et al.* v. Department of Public Works, 289 Mass. 149, 193 N. E. 799, *appeals dismissed on motion of appellants,* 56 Sup. Ct. 495-96 (1935) and cases cited in Gardner, *The Massachusetts Billboard Decision* (1936) 49 HARV. L. REV. 869, 883-886.

[61]289 Mass. 149, 193 N. E. 799, *appeal dismissed,* 297 U. S. 725, 56 Sup. Ct. 495 (1935).

that no federal or state constitutional rights were violated by the refusal by the State Department of Public Works "solely on grounds of fitness and taste" to allow the continued operation of an electric illuminated advertisement facing Boston Common from the roof of an office building near the State House.[62] The sign, a large steel structure displaying the trade name of an automobile, had been constructed at a cost of approximately thirty-five thousand dollars, after the owner had obtained the requisite permit, which under existing statutes and regulations expired at the end of the year, unless sooner revoked. An application for a renewal of the permit was denied, after a public hearing, because of objections by various civic associations and societies, and by residents in the vicinity.

It is significant that the structure which was thus eliminated in order to preserve the beauty of public buildings and natural scenery was not appropriated by the state under the power of eminent domain, with compensation to the owner, but was removed without recompense under the police power. Under that power, as stated by Chief Justice Shaw in *Commonwealth v. Alger,*[63] the owner of property is restrained "not because the public have occasion to make the like use of the property, or to take any benefit or profit to themselves from it, but because it is a noxious use, contrary to the maxim *sic utere tuo ut alienum non laedas.* It is not an appropriation of the property to a public use, but a restraint of an injurious private use by the owner, and is, therefore, not within the principle of property taken under the right of eminent domain." It, therefore, is essential, if interference with the use of private property without compensation is to remain clear of constitutional prohibitions against the deprivation of property without due process of law, that the use interfered with be noxious and unreasonable. The use must violate the same maxim which is so often employed in the definition of a common law nuisance—*sic utere tuo ut alienum non laedas.*[64] That the courts in fact regard the police power question as closely akin to that of what constitutes a nuisance is shown by their use of analogies from the law of nuisance to support decisions as to the constitutionality of building regulations and zoning ordinances.[65]

[62]The Department was acting pursuant to statutes passed under Article 50 of Amendments to the Massachusetts Constitution, ratified 1918, reading, "Advertising on public ways, in public places, and on private property may be regulated by law".

[63]7 Cush. 53, 86 (Mass. 1851).

[64]See Ross v. Butler, 19 N. J. Eq. 294, 298, 97 Am. Dec. 654, 657 (1868); JOYCE, NUISANCES (1906) § 11; HARPER, TORTS (1933) § 182.

[65]Thus in General Outdoor Advertising Co. v. Dep't of Public Works, 289 Mass. 149, 183, 193 N. E. 799, 814-15 (1935) the court cites such decisions as Stodder v. Rosen Talking Machine Co., 241 Mass. 245, 135 N. E. 251 (1922) enjoining a talking machine as a nuisance, and Shelburne, Inc. v. Crossan Corp., 95 N. J. Eq. 188, 122 Atl. 749 (1923) enjoining colored lights which shone into complainant's hotel after midnight. And in Euclid v. Ambler Realty Co., 272 U. S. 365, 387-88, 47 Sup. Ct. 114, 118 (1926) the court states: " . . . in solving doubts, the maxim *'sic utere tuo ut alienum non*

In *General Outdoor Advertising Co. v. Department of Public Works* the court indicates clearly that the use of property for the sign involved is noxious. It is stated that the main feature of the right asserted by the Advertising Company is "the superadded claim to use private land as a vantage ground from which to obtrude upon all of the public travelling the highways, whether indifferent, reluctant, hostile, or interested, an inescapable propaganda"—a claim which the court definitely rejects, adding later on that the regulation sustained "is not a mere matter of banishing that which in appearance is disagreeable to some. It is protection against intrusion by foisting the words and emblems of signs and billboards upon the mass of the public against their desires."[66] Evidently the court considers that the sign is or comes close to being a public nuisance,[67] and it seems clear in this case that the nuisance consisted only in the unaesthetic effect of the structure, impairing the beauty of the Common. There was no indication that the sign, situated at the top of an office building, would serve as a screen for refuse, or as a shield for loiterers or criminals, nor was there any indication that it constituted a fire hazard, or distracted the attention of motorists from the road.[68] In another public law case, *State ex rel. Civillo v. New Orleans,*[69] sustaining the exclusion of a Piggly-Wiggly store from a residential area, the court relies even more explicitly on the conception of nuisance to support its decision, stating:

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laedas' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of the power."

[66]289 Mass. 149, 169, 182, 193 N. E. 799, 808, 814 (1935).

[67]A nuisance is said to be public if it annoys the public generally. Unless there is also some special injury to an individual, the only remedy is by a criminal prosecution on behalf of the public. If a private individual suffers particular damage, apart from the common injury, he may bring a private action for an injunction or damages. JOYCE, NUISANCES (1906) §§ 13-14; HARPER, TORTS (1933) §§ 179, 194.

[68]It should be observed that many decisions permitting the elimination or regulation of billboards as a valid exercise of the police power, including decisions of the United States Supreme Court, have emphasized considerations of safety, morality, and decency to the exclusion of aesthetic considerations. See Cusack Co. v. Chicago, 242 U. S. 526, 529, 37 Sup. Ct. 190, 191 (1917). But *cf.* St. Louis Poster Advertising Co. v. St. Louis, 249 U. S. 269, 39 Sup. Ct. 274 (1919) where a prohibition of billboards in residential areas was sustained even though it was admitted on demurrer that the billboards in question were fireproof and sanitary, and had never been complained of by city officials as detrimental to public health or morals. The Court conceded that, "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else." In the case of Perlmutter *et al.* v. Greene *et al.*, 259 N. Y. 327, 182 N. E. 5 (1932) it was held that the state superintendent of public works could erect on highway property a screen to obscure a billboard at a dangerous curve in the road. While the court placed its decision primarily on the ground that this was a reasonable safety measure to prevent distraction of the motorist's attention from the road, it was added, "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wing of safety, morality, or decency. . . . If, incidentally, the outlook from the road is improved by shutting off the view of the billboard, so much the better."

[69]154 La. 271, 97 So. 440 (1923).

> "An eyesore in the neighborhood of residences might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health."[70]

It seems clear that these public law decisions, though they depend in part on an expanding conception of the police power, also indicate that the conception of what constitutes a nuisance likewise is expanding to include unaesthetic sights.

To return for a moment to billboards it is interesting to note that in one case it has been specifically stated that such a structure may constitute a common-law nuisance.[71] The billboard in question which "would completely obscure the vision for fourteen feet above the surface and would in a limited way obscure the light and air", was being erected on a lot in a residential area at a point about ten feet from the street. The court granted an injunction against the structure, mainly on the ground that it involved a violation of a restrictive covenant in a deed, but added:

> "The original and the amended bill each charged that this would be a nuisance, and we are of the opinion that such a structure in a residential neighborhood such as this was designed to be would be a nuisance."[72]

The objection made in this case was simply that the billboard extended beyond an agreed building line, and it seems clear that unsightliness was the only ground for considering it a nuisance. There was no indication that the presence of the sign forward of the building line would increase the annoyance to the plaintiff by making conditions more unsanitary or more dangerous.

VIII

While zoning and building restrictions have diminished the problem of protection against unsightliness to some extent, it is evident that numerous cases continue to arise in which structures and conditions not in violation of any restrictions are complained of by neighbors, and in many localities conditions which are unsightly are not of frequent enough occurrence to warrant legislative action. What then should be the attitude of the courts toward such cases? Clearly it is undesirable to multiply restrictions upon the free use of one's own land without substantial cause, but in some instances the unsightliness objected to seems sufficient to interfere with the reasonable enjoyment by others of their property. Surely it can no longer be alleged, since the decisions upholding the legislative restrictions of billboards

[70]154 La. 271, 284, 97 So. 440 (1923). Quoted with approval in Walnut & Quince St. Corp. v. Miller *et al.*, 303 Pa. 25, 34, 154 Atl. 29, 32 (1931). See also State *ex rel.* Carter v. Harper, 182 Wis. 148, 159, 196 N. W. 451, 455 (1923).

[71]Woodburn *et al.* v. Russell, 213 Ill. App. 553 (1919).

[72]213 Ill. App. 553, 557-58 (1919).

to promote aesthetic ends, that the maxim *de minimis non curat lex* still applies to unsightly conditions. Nor can it be said that such a condition is innocuous, especially where the market value of neighboring property has sharply declined. The principal objection to judicial intervention in such a situation, the difficulty of establishing an objective standard, no doubt will continue to constitute an obstacle to relief in many cases of alleged unsightliness, but at least within limited categories involving such conditions as automobile wrecking establishments, junk yards, gas tanks, and the like, it appears that the difficulties of determining the effect on the ordinary reasonable man are but little greater than in those branches of the law of nuisances, dealing with contamination of the atmosphere by odors, or with disturbance by noise. It has been seen that in some types of cases, such as those involving undertaking establishments, the present tendency is to emphasize the purely mental injury to adjoining property owners, arising from the constant sight of depressing occurrences. It also has appeared that if a landowner has acted maliciously, a structure objectionable to sight and peace of mind only will be enjoined. Unquestionably, the aesthetic sensibilities of the public generally are increasing, and it is submitted that the time has now come when the law of nuisance should definitely be expanded to protect, in many cases, this growing interest in freedom from unsightliness. In the light of such opinions as that expressed in *Material Company v. Barrack,* and of other authorities which have been considered, it seems safe to predict that there will be a noticeable development in this direction.