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Nuisance-Undertaking Establishments

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NUISANCE—UNDERTAKING ESTABLISHMENTS—Plaintiffs brought an action to enjoin the defendants from using certain premises located in a residential district for a funeral home and undertaking establishment. The

²⁰ O'Donoghue v. United States (1933), 53 S. Ct. 740.

²¹ Federal Radio Commission v. General Electric Co. (1912), 281 U. S. 464, 74 L. ed. 969; Keller v. Potomac Electric Co. (1922), 261 U. S. 428, 67 L. ed. 731; Postum Cereal Co. v. California Fig Nut Company (1926), 272 U. S. 693, 71 L. ed. 478; Ex Parte Bakelite Corporation (1928), 279 U. S. 438, 73 L. ed. 789.

²² Murray's Lessee v. Hoboken Land and Improvement Co. (1855), 18 How. 272, 15 L. ed. 372; United States v. Ferreira (1851), 13 How. 40, 14 L. ed. 42; Gordon v. United States (1864), 117 U. S. 697 (appendix); In re Sanborne (1892), 148 U. S. 222, 37 L. ed. 429; Liberty Warehouse Co. v. McGinnis (1926), 273 U. S. 70, 71 L. ed. 541.

²³ Evens v. Gore (1919), 253 U. S. 245, 64 L. ed. 887.

first paragraph of the complaint alleged violation of a zoning ordinance; the second proceeded on the theory of a private nuisance. Special findings of fact disclosed that the proposed funeral home would be located in a purely residential section of city, used exclusively for residential purposes, and built up with substantial and valuable homes; that the constant presence of dead persons on premises and presence of funeral cars would create such constant reminder of death as to depress the plaintiffs, and that the peculiar nature of the business would be a constant annoyance and inconvenience, thereby disturbing the plaintiffs in the comfort and quiet enjoyment of their homes. Upon judgment in favor of the plaintiffs on these facts, the defendants moved for a new trial, which motion was denied. After the appeal was perfected, the defendants filed a verified motion to dismiss parts of the appeal, since the city planning commission had amended the zoning ordinance relied on by the plaintiffs in the first paragraph of the complaint. This being uncontroverted, the question presented by the first paragraph was considered moot, and appeal was determined by the issues presented by the second paragraph. Held, operation of a funeral home and undertaking business in a purely residential district constitutes a private nuisance which may be enjoined.¹

As a general rule, in determining what constitutes a nuisance, the question is whether the act complained of will produce such a condition as in the judgment of reasonable men is naturally productive of physical discomfort to persons of ordinary sensibilities and habits, and under the circumstances unreasonable, and in derogation of the rights of the complaining party.² However, every person holds his property subject to the right of his neighbor to devote his property to any lawful business.³ But even a lawful business may be so conducted as to cause a nuisance; and in order to warrant interference by injunction the injury must be material and essential, though the plaintiff is not bound to prove both an injury to the property itself and an interference with its enjoyment. Interference with comfortable enjoyment alone is enough for an injunction,⁴ and evidence of the depreciation of the value of the property may be considered as regards the fact of nuisance.⁵ A lawful business will not be enjoined merely because it diminishes the value of adjacent property.⁶ Authorization by zoning ordinance, however, is no defense to an action for nuisance.⁷

As regards the specific business involved in the case under consideration the Indiana court had no precedent from past Indiana decisions. It is universally held that an undertaking establishment is not a nuisance *per se*,⁸ though by reason of surrounding circumstances, it may become a

¹ Albright v. Crim (1933), 185 N. E. 304.

² Meeks v. Wood (1917), 66 Ind. App. 594, 118 N. E. 591; Baltimore etc., R. Co. v. Fifth Baptist Church (1883), 108 U. S. 317, 27 L. ed. 739; McIntosh v. Brimmer (1924), 68 Cal. App. 770, 230 Pac. 203. See Harper on Torts, 3182.

³ Siskoyou Lumber and Mercantile Co. v. Rostel (1898), 121 Cal. 511, 53 Pac. 1118; Gallagher v. Flury (1904), 99 Md. 181, 57 Atl. 672.

⁴ Owen v. Phillips (1881), 73 Ind. 284; Harper on Torts, § 186.

⁵ Conway v. Gampel (1926), 235 Mich. 511, 209 N. W. 562.

⁶ Owen v. Phillips (1881), 73 Ind. 284.

⁷ Ewbank v. Yellow Cab Co. (1925), 84 Ind. App. 144, 149 N. E. 647.

⁸ Higgins v. Block (1924), 216 Ala. 153, 192 So. 739; Meldahl v. Holberg (1927), 55 N. D. 523, 214 N. W. 802.

nuisance.⁹ Where such an establishment is located in an exclusively residential district, some courts have held that even when so located with the result that because of sentimental repugnance on the part of those who might reside near it, property values in the vicinity would depreciate, the establishment would not be enjoined.¹⁰ The courts advancing this theory are those of Oregon, Kentucky and New Jersey.

In California it was held that maintainence of an undertaking parlor in a residential district where it was not shown that foul and obnoxious odors, or danger of infectious diseases was present, but only a disturbance of quiet enjoyment and resultant mental and physical depression would not be enjoined under the California Civil Code.¹¹

The above cases, however, appear to be in the minority, and by what appears to be the great weight of modern authority, and in accord with the decision in the principal case, it is held that the location of such a business in a residential district is sufficiently objectionable to make it a nuisance.¹² The theory upon which these courts base their decisions is that the inherent nature of an undertaking establishment is such that, if located in a residential district, it will inevitably create an atmosphere detrimental to the use and enjoyment of residential property, produce material annoyance and inconvenience to the occupants of adjacent dwellings and render them physically uncomfortable. Therefore, in the absence of a strong showing of public necessity, its location in such a district should not be permitted over the protest of those who would be materially injured thereby.¹³

It is a clear deduction from the opinions cited that there is a growing tendency of the courts, through the superior relief afforded by equity, to protect the average aesthetic and cultural side of human life as centered in the home, even where such a tendency comes in conflict with the forward march of business enterprise. As the Wisconsin court said in *State ex rel. Carter v. Harper*,¹⁴ "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 well may be pondered."

R. S. O.

RIGHT OF A BANK TO PLEDGE ITS ASSETS AS SECURITY FOR A PUBLIC DEPOSIT—The directors of a bank organized under the laws of Indiana as-

⁹ *Higgins v. Block* (1924), 216 Ala. 153, 192 So. 739; *Bragg v. Ives* (1927), 149 V. 482, 140 S. E. 656.

¹⁰ *Stoddard v. Snodgrass* (1925), 117 Or. 262, 241 Pac. 73, 43 A. L. R. 1160; *L. D. Pearson and Son v. Bonnie* (1925), 209 Ky. 307, 272 S. W. 375; *Westcott v. Middleton* (1887), 43 N. J. Eq. 478, 11 Atl. 490.

¹¹ *Dean v. Powell Undertaking Co.* (1922), 55 Cal. App. 545, 203 Pac. 1015.

¹² *Cunningham v. Miller* (1922), 178 Wis. 22, 189 N. W. 531; *Sair v. Joy* (1917), 198 Mich. 295, 164 N. W. 507; *Dillon v. Moran* (1926), 237 Mich. 130, 211 N. W. 67; *Beisel v. Crosby* (1920), 104 Neb. 643, 178 N. W. 272; *Meagher v. Kessler* (1920), 147 Minn. 182, 179 N. W. 732; *Osborn v. City of Shreveport* (1918), 143 La. 932, 79 So. 542; *Jordan v. Nesmith* (1928), 132 Okl. 226, 269 Pac. 1096; *Meldahl v. Holberg* (1927), 55 N. W. 523, 214 N. W. 802; *Turrelin v. Ketterlin* (1924), 304 Mo. 221, 263 S. W. 202; *Leland v. Turner* (1924), 117 Kan. 294, 230 Pac. 1061; *City of St. Paul v. Kessler* (1920), 178 N. W. 171, 146 Minn. 124; *Arthur v. Virkler* (1932), 258 N. Y. S. 886, 144 Misc. 483.

¹³ *Cooley, Torts* (1932, 4th ed.), vol. 3, sec. 435.

¹⁴ (1923), 182 Wis. 148, 196 N. W. 451.