Nuisance-Undertaking Establishments

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which was created to consider claims against the United States. Such a function is a legislative function, and the court in the principal case was correct in holding the Court of Claims a legislative court.

In view of the principal case, it seems difficult to justify the result in the case of O'Donoghue v. United States\(^2\) which was decided at the same term. In the latter case, it was held that the Courts of the District of Columbia were judicial courts under Art. 3 and that therefore the salaries of the judges could not be reduced. Yet, judgments of the courts of the District of Columbia are held to be advisory, and it is held that such courts may carry on legislative functions, and that they are therefore legislative courts,\(^2\) and that consequently the Supreme Court has no appellate jurisdiction.\(^2\) The cases cited settled the proposition that functions essentially administrative or legislative cannot be imposed upon judicial courts.\(^2\)

The O'Donoghue case seems to overrule the above authority and hold that judicial courts can render advisory opinions and perform functions essentially legislative. Yet the principal case concerning the Court of Claims was decided at the same session and is in line with the authority that a judicial court cannot have thrust upon it legislative and administrative functions, but that such result can only be obtained in the case of legislative courts. The Supreme Court, it seems, has decided the same question in both cases differently. It is difficult to rationalize the result.

Although Evens v. Gore\(^2\) is rationalized on the grounds that a reduction of a federal judge's salary is unconstitutional, it may be questioned as to the correctness of holding that an income tax on a judge's salary is a reduction as contemplated by Art. 3. Evens v. Gore holds that an income tax results in an unconstitutional reduction of a judge's salary, but goes on to say that the property of a Federal judge may be taxed. A tax on one is just as much a diminishment of the salary as a tax on the other. Holmes in his dissent in Evens v. Gore says that it is not the purpose of Art. 3 to make judges a privileged class exempt from supporting institutions which benefit them. It is difficult to see how a statute requiring a man to pay taxes that all other men have to pay can be made an instrument to attack his independence. What the Constitution really intended to protect against, it seems, was a direct reduction of a judge's salary, and not to exempt the judges from the ordinary duties of citizens by exempting them from payment of income taxes.

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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

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\(^1\) O'Donoghue v. United States (1933), 53 S. Ct. 740.


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.
3 Skokoyou Lumber and Mercantile Co. v. Rostel (1928), 152 Cal. 511, 53 Pac. 1118; Gallagher v. Flurry (1904), 99 Md. 181, 57 Atl. 672.
4 Ewbank v. Yellow Cab Co. (1925), 54 Ind. App. 144, 149 N. E. 647.
nuisance. 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. 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.

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. 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.

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, "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.

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9 Higgins v. Block (1924), 216 Ala. 153, 192 So. 739; Bragg v. Ives (1927), 149 V. 483, 140 S. E. 666.
14 (1923), 182 Wis. 148, 196 N. W. 451.