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Nuisance--Aesthetic Grounds Held Valid for Injunctive Relief Against Lawful Business

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Who did the legislature, in giving this authority, intend to protect—the public as such or the public as composed of individuals? The breach of a duty, imposed by an ordinance, which is owed to individuals gives rise to civil liability, but this is not true where the ordinance is meant to protect the public in general. The court in the principal case failed to differentiate between these two concepts, which in the writer's opinion is of paramount importance. The majority of cases in the United States hold that the duty is owed to the municipal corporation and that the abutting owners and occupants cannot be made liable to individuals for injuries as a result of failure to comply with the ordinance. For an accumulation of these cases, see Annot. 24 A.L.R. 387 (1923).

The West Virginia Supreme Court of Appeals, by creating this new liability, has done that which few other courts of our land have deemed necessary. As our country grows and society becomes more complex, certain steps need to be taken to insure the safety of the public against injuries of this nature. The desirable attributes of these measures must be weighed against the burdens they create, and the burden of constant surveillance or increased liability insurance on the owners and occupants may greatly outweigh the benefits so gained.

I. A. P., Jr.

NUISANCE—AESTHETIC GROUNDS HELD VALID FOR INJUNCTIVE RELIEF AGAINST LAWFUL BUSINESS.—*Ds* operated and maintained a used automobile sales business located on their land, outside the corporate limits of a city, not subject to zoning regulations or restrictive covenants; situated, however, across a major highway from a theretofore exclusively residential area within the corporate limits. *Ps* sued to enjoin *Ds* on the grounds that the business constituted a nuisance *per accidens* or in fact, because of excessive lighting, noise, unsightliness, and diminution of value of *Ps'* property. Held, affirming the circuit court's decree, that *Ds* shall remove from their land all automobiles, trucks, light poles, wires, lights, equipment, installations and structures used by them in the conduct of the used car business. *Martin v. Williams*, 93 S.E.2d 835 (W. Va. 1956) (3-2 decision).

An examination of the facts in the opinion indicates the insufficiency of the other alleged grounds for relief, and reveals the apparent conclusion that the aesthetic argument was the major consideration relied upon by the court in reaching its decision. If it

was not, then the order that *Ds* remove all of their equipment, etc., was unnecessary.

The question of whether or not aesthetics should be considered as an acceptable legal factor to be employed in determining injunctive relief may soon become one of primary importance in our expanding society.

The general view of the courts is stated in the case of *In re Opinion of the Justices*, 234 Mass. 597, 127 N.E. 525 (1920), "aesthetic considerations alone or as the main end do not afford sufficient foundation for imposing limitations upon the use of property under the police power." *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915); *Young v. St. Martin's Church*, 361 Pa. 505, 64 A.2d 814 (1949). The court in *Livingston v. Davis*, 243 Iowa 21, 50 N.W.2d 592 (1951), stated, "that a thing is unsightly or offends the aesthetic sense does not ordinarily make it a nuisance or afford grounds for injunctive relief." See also, *Gionfriddo v. Town of Windsor*, 137 Conn. 701, 81 A.2d 266 (1951). "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity. . . ." *City of Passaic v. Paterson Bill Posting Co.*, 72 N.J. 285, 62 Atl. 267 (1920). In the case of *Moss v. Burke & Trotti*, 198 La. 76, 3 So.2d 281 (1941), the court said, "in the absence of legal zoning prohibition any business establishment may be established or located in a residential district, however it may affect the property values, unless by its very nature, its operation shall physically annoy the inhabitants."

In the past thirty years, however, views contrary to the general rule have been expressed. Seldom do these dissents conclude without reservation that aesthetics does have a valid position in the law, but all assert that *someday* aesthetics should be afforded legal recognition. *Parkersburg Builders Material Co. v. Barrack*, 118 W. Va. 608, 191 S.E. 368, 192 S.E. 291 (1937); *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440 (1923); Noel, *Unaesthetic Sights as Nuisances*, 25 CORNELL L.Q. 1 (1939); Ingalls, *The Law of Aesthetics*, 23 A.B.A.J. 191 (1937). The general opinion of this group was summarized by the court in *Perlmutter v. Greene*, 259 N.Y. 327, 182 N.E. 5 (1932): "Beauty may not be queen, but she is not an outcast beyond the pale of protection or respect."

The basic question raised in the principal case, therefore, is whether or not a court of equity can justifiably extinguish a lawful

business solely, or mainly, on the ground that its appearance is unsightly. Perhaps the answer can be ascertained by an examination of both the reasons given in refusing to afford a place for aesthetics in the law, and the results which could be reasonably anticipated if the question is answered affirmatively.

"[T]he courts perhaps feel that the recognition of sight nuisances would necessitate protracted control by the court and inordinately enlarge a field already unwieldy and governed by a myriad of shifting values." Note, 25 VA. L. REV. 461 (1938). More specifically, the difficulty in determining what causes an actionable injury to the aesthetic sensibilities of the individual should be an added deterrent to the courts not to enter this field. Note, 44 W. VA. L.Q. 58 (1938).

The argument that such determinations would present no more of a problem in cases involving aesthetics than in cases involving noise or odor is of little value. Comment, 2 U. PITT. L. REV. 191 (1935). Compare the probable results in the opinions of a number of judges from diversified areas in a case involving a fertilizer factory or a boisterous dance hall in an unzoned, unrestricted, unincorporated residential area, as against a case involving the aesthetic qualities of a building, old or modernistic, or an art gallery, or an enclosed show room for new automobiles, or perhaps a decrepit old house in similar surroundings. What possible criterion can be used; what possible results can be accurately forecast?

The more probable, final result in a case involving aesthetics, as opposed to those dealing with noise or odor, should also be taken into account. That which emits offensive odors may be filtered or sweetened. *Hannum v. Gruber*, 346 Pa. 417, 31 A.2d 99 (1943). That which is noisy may be muted or restricted. *Ritz v. Woman's Club of Charleston*, 114 W. Va. 675, 173 S.E. 564, 182 S.E. 92 (1934). But that which is allegedly unsightly may not be practically capable of modification, and may too often result in the annihilation of a lawful business and the corresponding loss of sacred property rights. Authority for such an assertion is the principal case.

The results of two pertinent cases should be observed. *Yeager v. Traylor*, 306 Pa. 530, 160 Atl. 108 (1932), is perhaps the only case holding squarely in favor of employing aesthetic considerations in granting injunctive relief. The court found against the defendant, but the decree was for inconsequential modification, not

extinction, of the lawful business involved. Fortunately, the business structure was capable of such modification, or the result might well have been more drastic.

Feldstein v. Kammauf, 121 A.2d 716 (Md. 1956), was decided one month after the principal case. It involved a junk yard located in a partially residential area. The court upheld the injunction on several grounds, but refused to order the defendant to conceal his junk material from plaintiff's sight, because to do so "would in effect put appellant out of a lawful business."

An examination of the relevant West Virginia cases reveals that in each one the theory, that injunctive relief should be granted on aesthetic grounds, was rejected. *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S.E. 105 (1915); *Nunley v. City of Montgomery*, 94 W. Va. 189, 117 S.E. 888 (1923); *Parkersburg Builders Material Co. v. Barrack*, *supra*.

By way of dictum in the *Barrack* case, the majority opinion indicated that if the unsightly business involved—a junk yard—had been located in an exclusive residential area, relief might have been granted. In the same case, however, Judge Kenna, in a concurring opinion, sharply dissented with that dictum pointing out that not only would such a decision be contrary to the existing law in our state, but that it would also be a violation of private property rights. He further stated, "it seems palpable that in a state where the courts have held the legislative exercise of the police power is unconstitutional is based solely upon aesthetic considerations, the court should not extend their own power beyond that of the legislature by holding that they have the right to enjoin as a nuisance that which is merely unsightly." Such an argument appears to be reasonable in view of the result in the case under discussion.

The court in *Perry Mount Park Cemetery Ass'n v. Netzel*, 274 Mich. 97, 264 N.W. 303 (1936), in reversing a decree similar to the one upheld by our court, was even more bluntly direct in its criticism of the lower court's action, stating, "the decree goes too far. It strikes down defendant's business. It should regulate and not destroy."

A pertinent reference to courts called upon to decide similar cases is *Demarest v. Hardham*, 34 N.J. Eq. 469 (1887). The court said, "to grant their [plaintiff's] prayer is to destroy the defendant's business. Power attended with such disastrous consequences should

always be exercised sparingly, and with the utmost caution. All doubts should be resolved against its exercise."

In view of the legal history of aesthetics, the almost unanimous reluctance of the courts to recognize it as a valid consideration, and the possible consequences incident to this court's decision, it is hoped that courts in the future will exercise the utmost diligence and judgment in deciding whether or not to grant injunctive relief based on aesthetic grounds.

C. H. B., Jr.

TAXATION—DISBURSEMENTS TO FRUSTRATE STATE AND MUNICIPAL LAWS—DEDUCTIONS AS BUSINESS EXPENSES NOT ALLOWED.—*P* owned and operated slot machines within the city of Wheeling in violation of W. VA. CODE c. 61, art. 10, § 1 (Michie 1949), and of § 32 of Ordinance 38 of the city of Wheeling. By agreement between *P* and city authorities *P* was permitted to operate the slot machines illegally. Periodically, after checks by the city police department as to the number of machines operated, fines of \$100.00 and costs were imposed by the judge of the police court upon the operation of each machine in the name of the proprietor of the establishment where the machines were located. These fines were paid by *P*. *P* deducted these fines from his taxable income as ordinary and necessary business expenses under Int. Rev. Code of 1939, § 23 (a) (1), 53 STAT. 12 (now INT. REV. CODE OF 1954, § 162). The Tax Court did not allow this deduction. Upon petition to the United States Court of Appeals for the 4th Circuit, *held*, that the money used in payment of fines, although a part of *P*'s income, was not deductible under the Internal Revenue Code, because it was incurred in violation of a state statute and a city ordinance; any such tax deduction would contravene the laws of the state. A second issue, not discussed in this comment, concerned the amount of depreciation allowable on *P*'s machines and was decided against *P* for insufficient evidence. Judgment affirmed. *Automatic Cigarette Sales Corp v. Commissioner*, 234 F.2d 825 (4th Cir. 1956).

The decision in the case expresses the majority view. *Lilly v. Commissioner*, 343 U.S. 90 (1952); *Commissioner v. Heininger*, 320 U.S. 467 (1943); *Commissioner v. Doyle*, 231 F.2d 635 (7th Cir. 1956); *Commissioner v. Longhorn Portland Cement Co.*, 148 F.2d 276 (5th Cir. 1945); *Clark v. Commissioner*, 19 T.C. 48 (1952); *Davenshire v. Commissioner*, 12 T.C. 958 (1949). These cases