Volume 44 | Issue 1 Article 8

December 1937

Modern Tendency toward the Protection of the Aesthetic

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urge that the public should be protected from acts of children. It is as reasonable to assert that children, less capable of exercising care, ought to be protected from the carelessness of individual members of the public. This seems to be one basis at least for the recognized presumption that small children have not been negligent, even where the presumption is not conclusive. Most of the courts which deny a conclusive presumption admit a rebuttable one.[16] It should be kept in mind that, at any event, the negligence of a defendant must be established before there may be a recovery. There is no question involved of burdening an innocent public with the careless acts of small children.

The decisions in few states are sufficiently numerous to indicate where particular courts draw the line. Massachusetts holds that a child of three years and one month is incapable of contributory negligence.[17] But, of a child of four years, the same court asserts that, while a child of that age is too young to possess much prudence, it can not be said, as a matter of law, that such a child is incapable of exercising any care.[18] A few courts might conceivably go this far. Perhaps these courts feel, as the West Virginia court suggests in *Prunty v. Traction Co.*, that, at any event, no reasonable jury is likely to find a child of very tender years guilty of contributory negligence sufficient to bar recovery against an adult wrongdoer. By way of dictum, at least, the West Virginia court now seems to adopt the view of this supposed reasonable jury.

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THE MODERN TENDENCY TOWARD THE PROTECTION OF THE AESTHETIC

While recognizing as nuisances those things which are unduly offensive to the senses of smell or hearing,[1] equity has generally refused to recognize as nuisances those things which are offensive to the eye or aesthetic tastes,[2] even when the presence of the thing

16 Boykin v. Coast Line R. Co., 211 N. C. 113, 189 S. E. 177 (1936).
17 Rondeau v. Kay, 282 Mass. 452, 184 N. E. 926 (1933).
18 McDonough v. Vazzela, 247 Mass. 552, 142 N. E. 831 (1924).

1 CLARK, EQUITY (1924) § 203; WOOD, LAW OF NUISANCES (2d ed. 1883) § 3.
2 WOOD, LAW OF NUISANCES §§ 3, 7; Ross v. Butler, 19 N. J. Eq. 294, 303, 97 Am. Dec. 654 (1868); Lane v. City of Concord, 70 N. H. 485, 49 Atl. 687 (1900); Whitmore v. Brown, 102 Me. 47, 65 Atl. 516 (1906); Woodstock Burial Ground Ass'n v. Hager, 68 Vt. 488, 35 Atl. 431 (1896); Houston Gas & Fuel Co. v. Harlow, 297 S. W. 570 (Tex. Civ. App. 1927).

complained of lessens the value of surrounding property.[3] The explanation of this attitude seems to lie largely in the fact that the courts are hesitant to recognize an individual interest which is incapable of being measured by an objective standard.[4] The practical difficulty of determining, to say nothing of proving, what causes an actionable injury to the aesthetic sensibilities of an individual is obvious.[5] In addition to this consideration, there is a reluctance on the part of the courts to place further restrictions on the legally recognized incidents of the ownership of property in order to protect the mental comfort of the individual.[6]

Nothwithstanding the legal soundness of the above considerations, there is apparent a growing modern tendency toward legal recognition of "aesthetic considerations". The trend of the courts toward the protection of mental comfort is illustrated by those cases involving injunctions against the establishment of undertaking parlors in residential sections. These cases, while not involving what may properly be termed "aesthetic considerations," do present the closely analogous problem of protection against "mental depression"[7] occasioned by the constant reminder of death. A clear majority of such cases[8] recognize in this purely subjective mental condition an individual interest entitled to legal

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[3] WOOD, LAW OF NUISANCES § 3; Ross v. Butler; Woodstock Burial Ground Ass'n v. Hager; Houston Gas & Fuel Co. v. Harlow, all *supra* n. 2.

[4] Pound, *Interests of Personality* (1915) 38 HARV L. REV. 343, 359-363. While Dean Pound's article discusses mental comfort in connection with tort law, what he says would seem to be equally applicable to mental comfort in connection with the law of nuisances. See also Parkersburg Builders Material Co. v. Barrack, 191 S. E. 368, 369 (W. Va. 1937).

[5] Pound, *supra* n. 4.

[6] Carter v. Harper, 182 Wis. 148, 196 N. W. 451, 455 (1923), 33 A. L. R. 269 (1924); Parkersburg Builders Material Co. v. Barrack, 191 S. E. 368, 371 (W. Va. 1937).

[7] The term "aesthetic considerations" imports elements of beauty or sightliness. The "mental depression" referred to in the funeral home cases does not necessarily — nor ordinarily — involve any considerations of beauty.

[8] New Jersey: Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490 (1887); Kentucky: Pearson & Son v. Bonnie, 209 Ky. 307, 272 S. W. 375 (1925), 43 A. L. R. 1166 (1926); Oregon: Stoddard v. Snodgrass, 117 Ore. 262, 241 Pac. 73 (1925); and California: Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 Pac. 1015 (1921), are included in the minority of jurisdictions which definitely refuse to say that a funeral home in a residential district constitutes a nuisance merely by reason of its location in such a district.

protection,[9] even where such protection can be afforded only by sacrificing property rights. Also indicative of the trend toward legal recognition of the aesthetic, are the repeated legislative attempts to protect the beautiful by invoking the police power to sustain zoning and billboard laws.[10] It is true that the United States Supreme Court has said that the police power cannot be exercised solely for the protection of the aesthetic,[11] but the same court has tacitly approved such laws by engaging in some remarkable *tours de force* of legal reasoning to sustain them.[12] The state courts, in deciding similar cases, have frequently shown a recognition of and a sympathy with the tendency to protect the aesthetic sensibilities. In most of these cases, the courts have confined themselves to the use of language indicative of their attitude,[13] but in a few cases the relief granted,[14] or a holding has been based on the protection of aesthetic considerations.[15] In the latter category, probably the most outstanding decision is the recent case of *General Outdoor Advertising Co. v. Department of Public Works*,[16] in which the Massachusetts court held that considerations of taste and fitness were grounds sufficient to sustain a statute regulating outdoor advertising.

In West Virginia, *Fruth v. Board of Affairs of City of Charleston*[17] is apparently the only case which, prior to 1937, dealt with

[9] Some of the cases say that "mental depression" alone is a sufficient ground for an injunction: Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202 (1924); Street v. Marshall, 316 Mo. 698, 291 S. W. 494 (1927); Cunningham v. Miller, 178 Wis. 22, 189 N. W. 531 (1922). Other courts say that the "mental depression" causes ill health which constitutes a physical injury; Bragg v. Ives, 149 Va. 482, 140 S. E. 656 (1927); or that "mental depression" is merely one of several factors — danger to health, noxious odors — which together constitute a nuisance, Saier v. Joy, 198 Mich. 295, 164 S. W. 507, L. R. A. 1918A 825 (1917).

[10] See City of Passaic v. Patterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267 (1905) (city ordinance regulating billboards); Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926), 54 A. L. R. 1016 (1928) (zoning ordinance); Fruth v. Board of Affairs, 75 W. Va. 456, 84 S. E. 105 (1915) (city ordinance establishing a building line).

[11] City of Passaic v. Patterson Bill Posting Co., 72 N. J. L. 285, 62 Atl. 267 (1905); St. Louis Poster Advertising Co. v. City of St. Louis, 249 U. S. 269, 39 S. Ct. 274 (1919).

[12] Cusack Co. v. City of Chicago, 242 U. S. 526, 37 S. Ct. 190, L. R. A. 1918A 136, Ann. Cas. 1917C 594 (1917); Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114 (1926).

[13] Carter v. Harper, 182 Wis. 148, 196 N. W. 451 (1923); General Outdoor Advertising Co. v. City of Indianapolis, 202 Ind. 85, 172 N. E. 309 (1930).

[14] Yeager v. Traylor, 306 Pa. 530, 160 Atl. 108 (1932).

[15] Ware v. City of Wichita, 113 Kan. 153, 214 Pac. 99 (1923).

[16] 289 Mass. 149, 193 N. E. 799 (1935).

[17] 75 W. Va. 456, 84 S. E. 105 (1915).

the problem of protecting aesthetic considerations. That case, which involved a city ordinance establishing a building line, refused to permit the extension of the police power to protect the aesthetic. Nevertheless, the court there used language indicating that at some future time conditions might exist in West Virginia which would warrant a holding that aesthetic considerations were entitled to legal recognition. In the very recent case of *Parkersburg Builders Material Co. v. Barrack*,[18] the court apparently found the existence of such conditions, because the long and well considered dictum in that case expresses an unequivocal recognition of an individual interest in the protection of the aesthetic sensibilities. The question was presented to the court by a bill seeking to enjoin as a nuisance the maintenance of an allegedly unsightly car wrecking establishment in a residential section.

Unfortunately, the final decision of the case turned on the point that there was not a sufficient showing that the neighborhood was of such an essentially residential character as would warrant the issuance of the injunction under the allegations of the bill. Hence, the expressions of the court concerning protection of the aesthetic lack the dignity of a holding. Nevertheless, in view of the fact that a majority of the court assented to what was said in the dictum in the face of a vigorous dissent,[19] it would seem that in a case presenting the issue squarely, the West Virginia court would give full legal protection against those things which are unduly offensive to the eye or tastes.

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[18] 191 S. E. 368 (W. Va. 1937). An opinion concurring with the holding but dissenting from the dictum is reported in 192 S. E. 291 (W. Va. 1937).

[19] Parkersburg Builders Material Co. v. Barrack, 192 S. E. 291 (W. Va. 1937).