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Nuisance Based on Aesthetic Considerations - Feldstein v. Kammauf

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Nuisance Based On Aesthetic Considerations

Feldstein v. Kammauf[1]

Residents of a suburb of Cumberland brought suit against Feldstein, asking that he be restrained from operating and maintaining a junk yard on premises owned by him and his sister. In 1939, the defendant had purchased prop-

[1] 209 Md. 479, 121 A. 2d 716 (1956).

erty, improved by a large warehouse, in a neighborhood containing other business and commercial properties and subject to neither use restriction nor zoning regulations. He immediately started storing scrap metal and junk and continued to use his land for this purpose. The original complainants purchased their property in 1947, at which time there was some junk stored on the defendant's land, but the complainants alleged that before 1954 this material was largely concealed by vegetation. The original complainants were joined by neighbors whose homes had been built between 1946 and 1954. In 1954, the defendant purchased a tract of land adjacent to his other property and began conducting junking operations on a large scale, hauling quantities of scrap by rail, smashing the unmanageable pieces with a large steel ball and burning wiring insulation. The yard contained an unsightly assortment of barrels, rails, wire, discs and tanks.

The chancellor decreed: (1) that the defendant reduce and conceal from the view of all the residents of nearby property the amount of scrap deposited on his property; (2) that he not handle any material on the property between the hours of 9 P.M. and 7 A.M.; (3) that he not burn anything which might cause offensive smoke, fumes or soot; (4) that he not block, or allow his customers to block, the county road leading to the property; (5) that he not allow rats or mice to congregate on the property; (6) that in the event he did not conceal the scrap and other materials, he should remove them from the premises. On appeal, the defendant contested only that part of the decree concerning the concealment of the scrap on the premises [(1) and (6)] which, he alleged, would compel him to discontinue his business on its present site. The only question which had to be considered, therefore, was whether the defendant should be required to abide by the contested part of the decree merely because of the unsightliness of his business. The complainants admitted that a junk yard is not a nuisance *per se*,[2] but they relied heavily on *Parkersburg Builders Material Co. v. Barrack*,[3] in which, although the court refused to enjoin the defendant from using his property as a storage yard for old automobiles because the area was clearly a residential community, it quoted with approval the following from *State v. Harper*[4]

[2] State v. Shapiro, 131 Md. 168, 101 A. 703 (1917); Landay v. Zoning Appeals Board, 173 Md. 460, 196 A. 293, 114 A. L. R. 984 (1938).
[3] 118 W. Va. 608, 191 S. E. 368, 370, 110 A. L. R. 1454 (1937).
[4] 182 Wis. 148, 196 N. W. 451, 455, 33 A. L. R. 269 (1923).

on the power of an equity court to enjoin the use of property on purely aesthetic grounds:

> "It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. 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."

The Court of Appeals reversed sections 1 and 6 of the decree and *held,* (Brune, C.J., dissenting) that since the neighborhood was not "clearly residential", since none of the property was subject to private use restriction or public zoning regulations, since complainants had bought with knowledge of the junk yard's existence, and since the decree would have the effect of putting defendant out of business, there was insufficient evidence of nuisance to require that the junk be hidden from view or removed, regardless of whether equity may enjoin for purely aesthetic considerations.

Although the sense of sight may perhaps be considered superior to that of hearing and smell for purposes of aesthetic perception, it has not traditionally been protected under the doctrine of nuisances. In explanation, an early English case stated that noises and odors manifestly may adversely affect repose and health, which, like light and air, are classed as necessities so that an action on the case lies for their protection.[5] This attitude of the early English law has been reflected in the United States with little exception.[6] Slowly, however, a change seems to be taking

[5] William Aldred's Case, 9 Co. Rep. 57b, 77 Eng. Rep. 816 (1587).

[6] Passaic v. Patterson Bill Posting, A. & S. P. Co., 72 N. J. L. 285, 62 A. 267, 268 (1905):

> "Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

place and matters of taste, which were judicially accounted as sentiment or luxury in the past, are now being considered among the necessities of a more sophisticated society.

Because of the judicial prejudice against any legal right predicated upon a "merely aesthetic" complaint, the courts have, at times, exercised devious reasoning in granting equitable relief. Where there have been eyesores so flagrant that their elimination became a necessity even from the standpoint of the "average man", they have been abated or brought under control through reasoning based upon established grounds rather than mere aesthetics.[7] An example of this circuitous reasoning is found in *Cochran v. Preston* where the validity of a Baltimore City statute regulating the height of a building in the Washington Mounment area was challenged as unconstitutional on the ground that the inspector of buildings was using the police power as a cloak to hide purely aesthetic purposes.[8] The Court categorically accepted the principle that in the exercise of the police power, property rights cannot be impaired by the legislative conception of artistic beauty. It was held, however, that the ordinance was enacted for a more substantial reason than an aesthetic one — that its purpose was to protect surrounding buildings from the ravages of fire. A long and eloquent account of the Baltimore fire of 1904 was included in the opinion in an attempt to justify the decision on the ground that tall buildings serve as large funnels, furnishing drafts for flames. It might be suggested that today the courts would be less critical of a legislative objective of preserving the architectural beauty of the particular locality.

While it is true that most cases have held that unsightly structures are not nuisances even though they adversely affect the value of adjoining property,[9] one noteworthy exception is *Yeager v. Traylor*.[10] There the Court held that the construction of a garage in a strictly residential area would be permitted if it conformed in architectural design to the general character of the community and that an effective screen be provided to hide the unsightly appear-

[7] Comment, *Billboard Regulation and the Aesthetic Viewpoint with Reference to California Highways*, 17 Cal. L. Rev. 120 (1929).

[8] 108 Md. 220, 70 A. 113 (1908).

[9] Northfield v. Board of Freeholders, 85 N. J. Eq. 47, 95 A. 745 (1915); Houston Gas & Fuel Co. v. Harlow, 297 S. W. 570 (Tex. Civ. App. 1927). See also Crossman v. City of Galveston, 112 Tex. 303, 247 S. W. 810 (1923), where it was held that the mere unsightliness of a building which is the usual and natural result of dilapidation, does not make it a nuisance and a city would have no authority to declare it a nuisance for that reason alone.

[10] 306 Pa. 530, 160 A. 108 (1932).

ance resulting from the proposed practice of parking cars on the roof of the building.

A new cognizance of aesthetic considerations has been taken by the courts in the "funeral parlor" cases. Most courts have held that although a funeral parlor is not a nuisance *per se*, it may be enjoined as a nuisance in fact when it is maintained in close proximity to residential property.[11] In an attempt to justify the use of the injunctive power under the concept of a nuisance, however, several courts have added that a funeral parlor causes depressed feelings to persons of normal sensibilities living in the neighborhood and weakens the powers of some to resist disease.[12]

If excessive noise[13] and foul smells[14] are treated as nuisances, why should there remain this invidious distinction against the sense of sight? Although it may be true that perhaps noise and stench are more objectionable to the average person and more difficult to avoid than unsightliness, it seems clear that a thing which is visually offensive may seriously affect the residents of a community in the reasonable enjoyment of their homes. Of course, equitable relief should not be granted merely to protect fastidiousness of taste of a complainant, but only where the injury is of such a character as to diminish materially the value of property as a dwelling or seriously interfere with the ordinary comfort and enjoyment of it.[15]

A similar protection to the eye would hardly seem to establish a new principle but would at most simply extend a recognized one to its logical conclusion.[16] The instant case gives little indication whether or not the Court of

[11] Smith v. Fairchild, 193 Miss. 536, 10 So. 2d 172 (1942); Clutter v. Blankenship, 346 Mo. 961, 144 S. W. 2d 119 (1940); Heimerle v. Village of Bronxville, 168 Misc. 783, 5 N. Y. S. 2d 1002 (1938).

[12] Fraser v. Fred Parker Funeral Home, 201 S. C. 88, 21 S. E. 2d 577 (1942); Jack Lewis, Inc. v. Baltimore, 164 Md. 146, 164 A. 220 (1933).

[13] Swimming Club v. Albert, 173 Md. 641, 197 A. 146 (1938).

[14] Fox v. Ewers, 195 Md. 650, 75 A. 2d 357 (1950); Fertilizer Co. v. Spangler, 86 Md. 562, 39 A. 270 (1898); Hendrickson v. Standard Oil Co., 126 Md. 577, 95 A. 153 (1915).

[15] Five Oaks Corp. v. Gathmann, 190 Md. 348, 58 A. 2d 656 (1948); Hamilton Corporation v. Julian, 130 Md. 587, 101 A. 558 (1917); Adams v. Michael, 38 Md. 123 (1873).

[16] Somewhat similarly, legislation to regulate the unsightly use of property, inspired solely by aesthetic motives, at one time met with great difficulty under the Federal Constitution. Comment, *Aesthetics and the Fourteenth Amendment*, 29 Harv. L. Rev. 860 (1916). But note the language of the Supreme Court in Berman v. Parker, 348 U. S. 26, 33 (1954):

> "The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled."

Appeals would be favorably disposed toward such a conclusion. The holding, apparently based on a balancing of the equities of the parties, sidesteps the issue.[17]

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[17] But note that a century ago, the Court of Appeals affirmed a decree enjoining maintenance of a bawdy house in the vicinity of the plaintiff's homes, saying:

> ". . . if, as the authorities show, the court may interfere where the physical senses are offended, the comfort of life destroyed, or health impaired, these alone being the basis of the jurisdiction, the present complainants, presenting as they do a case otherwise entitling them to relief, should not be disappointed merely because the effect of the process will be to protect their families from the moral taint of such an establishment as the appellant proposes to open in their immediate vicinity."
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> Hamilton v. Whitridge, 11 Md. 128, 147-148 (1857).