Torts - Undertaking Establishments as a Nuisance

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aliens. Judicious application on the part of the law enforcement officials, however, has kept arrests within bounds and the statute today remains as a strong deterrent to aliens seeking to masquerade as United States citizens.

IRVING W. ZIRBEL

Torts — Undertaking Establishments as a Nuisance — Defendant, an undertaker, purchased three lots in the city of Fort Dodge, Iowa, and began excavation for a funeral home. Plaintiffs owned a large residence across the street from the defendant's property. The area contained some of the older and better residences of the city, but the business district had moved to within one block of the properties. Plaintiff sought an injunction restraining defendant from erecting the establishment on the grounds that it would have such a depressing effect upon the members of his family as to impair their comfort and enjoyment of their home and depreciate the value of their property.

Held: Injunction denied. Since the block in which the plaintiffs lived was not zoned and in a state of transition from residential use to commercial use, and was not restricted by ordinance to residential uses. The plaintiffs would not see caskets loaded or unloaded, or hear funeral services, and it did not clearly appear that a nuisance would necessarily result. Dawson v. Laufersweiler, 43 N.W. (2d) 726 (Iowa, 1950).

In considering the problem involved in the main case the courts distinguished between a funeral home being established in a residential district from one being established in a business district. In either case the undertaking business has generally been held not to be a nuisance per se. However, when established in a residential area the courts require a higher degree of proper conduct of the business and do consider the depressing effect on the neighbors.

In an earlier Iowa case the undertaking establishment was enjoined from continuing operation, but there the establishment was to be located in a purely residential district, and the driveway where the bodies were to be loaded and unloaded was only nineteen feet from that plaintiff's house, and the building was not to be soundproofed. In the principal case loading of bodies was to be done within the enclosure of the building on the far side of the establishment from the plaintiff's house, and the building was to be soundproofed. The Wisconsin Supreme Court has held that an undertaking establishment would be enjoined as a nuisance when located in a purely residential district when it operated

1 66 C.J.S. 820 (1950).
3 Cunningham v. Miller, 178 Wis. 22, 189 N.W. 531 (1922).
materially to decrease the market value of the adjoining property, and created a dread of contagious diseases and discomfort from sights, noises, and odors.

A nuisance is the wrongful use by an owner or possessor of land resulting in an unreasonable interference with the rights of enjoyment of the owner or possessor of neighboring land.\footnote{Walsh on Equity, 170 (1930).} Thus each landowner in a residential district is limited to that use of his land which will not disturb the peace and quiet of the neighborhood, arouse fear or disease, or cause the property value of the neighborhood to depreciate. Constant reminders of death, such as an undertaking establishment and the activities connected with it, give rise to, impair in a substantial way the comfort, repose, and enjoyment of the homes which are subjected to them.\footnote{Supra, Note 2.} While courts recognize that persons living in an organized community must suffer some damage, annoyance, and inconvenience from each other, the courts will protect them from any unnecessary damage or annoyance by his neighbor's unreasonable use of his property. The question of reasonable use is to be determined in view of the use of others, and it is a violation of the neighbor's right to enjoy his property which is the essence of the wrong in these cases.\footnote{Walsh on Equity, 189 (1930).}

In determining whether one is entitled to injunctive relief because of the depressing influence and discomfort caused by the proximity of an undertaking establishment, the depressing influence must be such as would be experienced by a normal man of average sensibilities.\footnote{Lewis v. Maryland, 164 Md. 146, 164 A. 220 (1933).} The objection to the business must be more than imaginary, or felt by one who is supersensitive, nor can the objection be merely the proximity of the establishment.\footnote{Bragg v. Ives, 149 Va. 482, 140 S.E. 656 (1927).}

When the undertaking establishment is to be located in a business district the courts do not seem to consider the depressing effect upon the neighbors, but seem to feel that it is a necessary business and will not enjoin the undertaking establishment unless it is clearly improperly conducted.\footnote{3 Cooley on Torts 180 (1932).} "If it is a nuisance at all, it must be because of the manner in which it is conducted or the situation in which it is placed."\footnote{Kirk v. Mabis, 215 Iowa 769, 246 N.W. 759, 87 A.L.R. 1055 (1933).} Thus there must be a showing that the undertaking establishment is clearly improperly conducted to enjoin it from doing business in a commercial district, and it is not enough to show a depressing effect on the neighbors exerted by the incidents of the business there conducted.\footnote{Ibid.}

In the main case the court applied the commercial rule and required the standard of conduct applicable to commercial districts. The
court reasoned that the district would become commercial in a short time, and that such location would enhance the value of the surrounding property as business property. This seems to be the better solution to the matter from a practical standpoint since the business is a necessary business and should not be required to locate in commercial districts where traffic is congested or in outlying districts where they will be difficult to reach.

LOUIS R. GILBERT

Taxation — The Statute of Limitations in Taxation — In 1931 taxpayers exchanged old stock for new in a corporate reorganization. In answer to taxpayers' request for a ruling on the transaction and having a full disclosure of all the facts, the Commissioner advised them that the 1931 transaction was a non-taxable corporate reorganization requiring a carry over of the basis of the old stock to the new stock. However, on sale of the new stock in 1941, 1942, and 1943 the taxpayers used the fair market value of the new stock in 1931 as the basis, contending that the 1931 transaction was not a tax-free reorganization. The Commissioner now concedes that the original transaction was taxable, but asks that the taxpayers should not be allowed, long after the statute of limitations bars deficiency assessment for the original transaction, to change their position. Held: Neither the doctrine of consistent dealing nor estoppel will be employed to compel the taxpayer to be consistent in treatment of a transaction if the taxpayer in good faith makes full disclosure of all relevant facts to the Commissioner even though the later inconsistent treatment results in a tax benefit to the taxpayer. Commissioner of Internal Revenue v. Mellon, Commissioner of Internal Revenue v. Scaife, 184 F. (2d) 157 (3d cir., 1950).

In this case the Commissioner is seeking to compel the taxpayers to perpetuate an error because he is barred by the statute of limitations from collecting the tax payable were the original transaction now treated correctly. He is in effect trying to circumvent the bar of the statute of limitations by compelling the taxpayer to carry over an incorrect basis, thus including in the tax gains which should have been taxed on the original transaction.

In the following special situations Congress has lifted the bar of the statute of limitations by legislative action:

a) Where there is fraud or no return at all, the statute does not start to run.\footnote{Frentiss v. Sicard, 181 Ark. 173, 25 S.W. (2d) 18 (1930).}

\footnote{IRC §276 (a).}