

FENTRESS v. SICARD.

Opinion delivered March 3, 1930.

1. NUISANCE—UNDERTAKING ESTABLISHMENT.—A mortuary or undertaking establishment, though not a nuisance *per se*, may become a nuisance by reason of its location in a residential district or from the manner in which it is operated.
2. NUISANCE—UNDERTAKING ESTABLISHMENT IN RESIDENCE DISTRICT.—A mortuary or undertaking establishment in a district which is in a state of transition from an exclusively residential district to a business district is not a nuisance which should be prevented or suppressed by injunction, where it would not by its location depreciate the value of surrounding property or imperil or destroy the health or comfort of residents in the vicinity, though its presence would be a continual reminder of death, necessarily producing discomfort and depression of all residing within sight of it.

Appeal from Sebastian Chancery Court, Fort Smith District; *J. V. Bourland*, Chancellor; reversed.

STATEMENT BY THE COURT.

This appeal is prosecuted from a decree of the chancery court enjoining the location and operation of a mortuary, funeral parlor or funeral home on a certain site in the city of Fort Smith.

The testimony of the architect and appellant showed in detail the plan of the proposed structure, which is to be constructed upon two lots, 1 and 2, block 45, Fitzgerald's addition, fronting 140 feet on A street, from 18th to the alley eastward, and 100 feet northward on 18th street on the west, and on the alley on the east, at an estimated cost of \$30,000. Although the frontage would be on 18th street, the main or principal entrances are on the south, and on A street; a part of the building is to be two stories, the upstairs to be made into two apartments for residence

of people. The east end will be a large garage into which all vehicles and conveyances will enter in bringing either bodies of deceased persons or merchandise to be loaded or unloaded within the walls of the building. The south and east section of the lot around the entrances will be landscaped with lawns and flowers. The driveway will be concrete with ample parking space around the building, which will be of an attractive design, constructed of brick or stucco. There will be no building or home or other structure nearly so modern or sightly in the vicinity or any part of the surrounding territory. All traffic will be from the highway on the south into the enclosure, the cars parking inside around the building; and if cars were parked in the street they would not be closer than one-half block to the nearest of the plaintiffs or complainants, most of them at a greater distance. The front of Mr. Sicard's residence, one of the complainants, will be about 450 feet from this institution, facing in an opposite direction, and Mrs. Clarkson's house, another complainant, fronts east on 19th street, and is in the block east from the block in which the mortuary is to be located. There is a drug store and drinking fountain across the street from Mrs. Clarkson's, and heavy traffic along there. There are filling stations and ice delivery stations nearby, which would attract and cause more traffic every day than would likely be caused even on funeral days at the mortuary. The nearest protestant to the proposed mortuary will be 200 feet away. The building is to be set well back in the block and will be at least 200 feet distant from the nearest protestant, and from 200 to 1,000 feet from the others. The proof shows that there will be little, if any, noise from the ambulances and other vehicles used. No noise from funeral services will be heard without the building, and there will be no escape of odors or gases from the building, except through the roof to the open air. The district has long been a residential district, and fully developed, no new residences having been erected there for a long time. The testimony shows it is in a state of

transition from an exclusively residential district to a business district, many places of business—drug stores, filling stations, pressing parlors and grocery stores—having already been established. The great preponderance of the testimony shows that there will not likely be any depreciation in value of the residential property, and that the construction of the mortuary would more probably increase materially the value of the property as a business district. The chancellor's decree was based largely upon the common knowledge that the people residing in the vicinity would be affected in their feelings by the establishment of the mortuary, which would bring discomfort to all because of the constant reminder of death and that on that account largely the establishment and operation of the institution upon the proposed site would interfere with the proper enjoyment of the homes of the residents in the vicinity already long established there. There is no zoning ordinance in the city of Fort Smith, but the city commission granted a permit for the construction of the mortuary upon the site selected.

Hardin & Barton, for appellant.

Daily & Woods, for appellee.

KIRBY, J., (after stating the facts). The authorities are well nigh uniform in holding that a mortuary or undertaking establishment of the kind complained of here is not a nuisance *per se*. It may become a nuisance, however, by reason of its location in a residential district or from the manner in which it is operated. In 46 C. J., p. 726, it is said: "An undertaking establishment or funeral parlor is not a nuisance *per se*, but by reason of surrounding circumstances it may become a nuisance. It may constitute a nuisance by reason of its location, as, for instance, under particular circumstances, when it is located in a residential district, notwithstanding, it has been held, it does not directly affect the health or grossly offend the physical senses; but it is more frequently held that the mere location in a residential section is not sufficient to make such an establishment a nuisance." If the

district of the location was an exclusively residential one, its intrusion therein would ordinarily constitute a nuisance, and could be prevented by injunction. Change is the order of time however, that progress and development may not be hindered or obstructed, and the transition from a residential district into a business district is recognized and has been effected. The great preponderance of the testimony herein shows, that the establishment of the mortuary upon the site selected would enhance the value of the surrounding property as business property, and would not detract from its value for residential purposes, for which it had long since fallen into disuse, so far as new or further development is concerned. The chancellor did not find there would be any depreciation of value in the property because of the location of the mortuary, or that the health or comfort of the residents in the vicinity would be at all imperiled or likely destroyed by the operation of the mortuary there, but held only that its location could not but be a continuing reminder of death, (the dead being there), necessarily producing discomfort and depression of spirit of all people residing within the sight of it, without regard to its proper operation, and the appearance and setting of the modern structure. Its operation would be a necessary business, of course, and since the testimony shows the transition of the district from residential to business has so far progressed, that the property there will be rather enhanced in value because of its location than depreciated in any respect for residential purposes, it would not constitute a nuisance that should be prevented or suppressed by injunction.

The chancellor's finding otherwise is contrary to the preponderance of the testimony, and the decree must be reversed and the cause remanded with directions to dismiss the complaint for want of equity. It is so ordered.