

BURIAL GROUNDS, WHEN A NUISANCE.

per se is not a nuisance; i.e., that in order to become a nuisance "the graves or their contents must be such in their effect as naturally to interfere with the ordinary comfort physically of human existence, and the inconvenience must be something more than fancy, delicacy or fastidiousness." In this case the defendants had removed a family graveyard of theirs from one part of their property to another, the result being that the graves which in their original location could only be seen from the back rooms of the plaintiff's house, were in their new position plainly visible from the front windows and door, the nearest grave being about forty feet from and opposite to, the window of his sitting-room. The plaintiff, not unnaturally, objected to this unexpected addition to the landscape, and sought solace for his wounded susceptibilities in an action on the case for nuisance, the damage done him being in due course of law assessed by a jury at twenty-five dollars. This verdict has, however, been set aside by the Supreme Court, who held that there was no sufficient evidence of damage to the plaintiff's physical health, or his olfactories, or the water in his well, resulting from the alleged nuisance, and that the depreciation in the market value of his property, and the interference with the comfortable enjoyment of his dwelling-house, looked at from a mental point of view, were not sufficient grounds in law to sustain the verdict. The part of the judgment which deals with the latter branch of the case is interesting and clearly stated, and we therefore make no apology for reproducing it.

"Nor can the verdict be sustained upon the sole ground of the cemetery's proximity to the plaintiff's premises and the consequent depreciation of the market value of his property. For a repository of the bodies of the dead is as yet indispensable, and wherever located it must *ex necessitate* be in the vicinity of the private property of some one who might prove its market value injuriously affected thereby. *New Orleans v. Wardens, etc.*, 11 La. Ann. 244.

But assuming that the jury, in respect to

these matters, found in behalf of the defendants and concluded that there was no injury to the plaintiff's property, or to his physical health or comfort, and based their verdict solely on the ground that on account of its relative position with the plaintiff's house, the cemetery inevitably meets his immediate view whenever he looks from the north window of his sitting-room or steps from his door, and that thereby the comfortable enjoyment of his dwelling-house is interfered with—then the defendants contend that the verdict is against law—upon the ground that such discomfort is one purely mental, and is not a cause of action.

It cannot be doubted that the law recognizes that to be a nuisance which is naturally productive of sensible personal discomfort as well as that which causes injury to property. *St. Helen's Smelting Co v. Tipping*, 11 H. L. Cas. 642. But it must injuriously affect the senses or nerves. Thus sound, whether caused by a locomotive blowing off steam, the ringing of bells or the barking of dogs, whenever it becomes sufficient to injuriously affect residents in the neighborhood, is actionable. *First Baptist Church v. R. R. Co.*, 5 Barb. 79, and cases there cited. To become actionable, the effect of sound must be such as naturally to interfere with the ordinary comfort, physically, of human existence, and the inconvenience must be "something more than fancy, delicacy, or fastidiousness." *Cooley on Torts*, 600.

Cemeteries are not necessarily even shocking to the senses of ordinary persons. Many are rendered attractive by whatever appropriate art and skill can suggest, while to others of morbid or excited fancy or imagination they become unpleasant and induce mental disquietude from association, exaggerated by superstitious fears. The law protects against real wrong and injury combined, but not against either or both when merely fanciful.

The human contents of these graves cannot, as they lie buried there, offend the senses in a legal point of view. The memorial stones alone affect the senses, and the same would result to the superstitious, though nothing human lay beneath them. If this burial ground is under the circumstances a private nuisance, then it is also a public nuisance to every traveller who passes on that road, as well as every soldier's monument in the country. See