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Anti-Social Exercise of Rights

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One of the most important characteristics of the new stage of socialization of the law, which has definitely begun in England and into which we are somewhat tardily and hesitatingly entering in this country, is the development of prohibitions upon the anti-social exercise of legal rights. The most conspicuous of the rights thus limited are connected with property, but the general conception is broader. The idea is that the law should not permit the exercise of any rights which it gives (whether or not these are property rights) in a manner which will not be conducive to the social benefit.

This development has a close parallelism to the basic ideas of the last stage of liberalism in our law—that of equity and natural law. In both stages the idea of limitation of the use of legal rights is prominent. But the limitation upon which courts of equity have insisted is a moral one, that is they restrained an unjust and unconscientious use of legal rights. At the present time the courts do not consider so much the morality of the defendant—if his action is deemed to be anti-social it may be restrained even though his morality may be beyond criticism.

But even this difference is one more of standpoint and method than of result. As will presently appear, many anti-social exercises of rights are the result of, or at least accompanied by, a spiteful motive on the part of the actor. And this shows that the action of the courts of equity in restraining unconscientious action was really based upon the motive of protecting society. The law has always been, and in the nature of things always must be, merely an agency of social control, and has its sole function in the effectuation of the social purposes. This fact has always had a certain recognition by those who have formed the law, though that recognition may sometimes have been almost unconscious.

That there may be such a thing as an anti-social exercise of a right given by the law is entirely obvious, but what is not so obvious is the proposition that the law, which has given the

right, may restrain its exercise. There is certainly a logical contradiction here, and perhaps it is even more than logical.

There is no doubt that the civil law recognizes liability for improper—basically, anti-social—exercise of legal rights. The French are accustomed to call this "The Abuse of a Right." The theoretical justification which civilian writers give for this result is, therefore, of interest to us.

In Germany, the legislative body has cut the Gordian knot by enacting that:

> "The exertion of a right is not permissible if it can have no other purpose than to damage another." [1]

Accordingly, it has not been necessary for the German writers to give much attention to justifying this result in theory. The very existence of this statute is, however, a strong practical justification of the rule that liability should be imposed for intentionally injurious and perhaps other anti-social exercises of a right, since, at least in this one case, the practical sense of the legislators was that the law should interfere.

In France, the same result has been reached by the courts without the aid of any specific provision in the Code. So it is not surprizing to find much consideration of the matter by the French jurists.

Perhaps the most complete consideration of this matter of "L'Abus de Droit" is in a doctoral thesis with that title, written by Porcherot.[2] The learned author considers the matter at length and not only reaches the conclusion that the principle of liability for the abuse of a right is well settled in the French law, but points out that liability has been enforced in several different classes of cases, as follows: (1) where the abuse resulted from an intention to injure; (2) where it resulted from a lack of proper interest; (3) where it resulted from the absence of a legitimate motive; and (4) where it was outside the social and economic end of the right exercised. It may be that these

[1] German Civil Code of 1896, sec. 226 (Loewy's translation).
[2] University of Dijon (1901).

classes are, to some extent, overlapping, but it is clear that they go farther than merely imposing liability for an act from an improper motive. Indeed, if Porcherot's analysis is correct, it seems clear that the French law goes to the extent of imposing liability for practically any exercise of a right where the consequences are clearly anti-social.

A thesis published two years later at the University of Paris by Salanson takes a somewhat narrower view. It is there suggested that where the defendant acts in accordance with his legal rights no liability can be imposed unless the injury was intentional. Even this is not quite the same as confining the liability to cases where the motive of the defendant was spiteful, but perhaps it comes to much the same thing. At any rate, Salanson concedes that a somewhat larger scope for this principle of liability is socially desirable, but maintains that it would be better to have these situations specifically defined by statute. Even if he is right, his suggestion of the statutory method of defining the situation has not so much force in common law countries.

A vigorous attack upon this whole conception of the abuse of a right is made by Professor Planiol (of the University of Paris).[3] Part of his difficulty, as is quite frequently the case with French writers on the subject, comes from the ambiguity of the word "droit," which means both "right" and "law." From this verbal ambiguity we who use the English language are largely free, though this has unfortunately not prevented many of our jurists from falling into the same confusion of thought, and thus failing to distinguish rules of law from the rights which the rules are intended to effectuate.

But Planiol's attack upon the conception of the abuse of a right goes much deeper than this, and is put upon grounds where a satisfactory, or at least logical answer seems difficult. If I have a right, he says, I cannot abuse it, or at least I cannot be held liable for exercising it to the limit. He is even prepared to carry this argument to the logical conclusion that a person should not be held even when he acted from a bad motive, but he admits

[3] Traite elementaire du droit civil, secs. 870-872.

that the German Code and some French decisions do impose such liability. In fact the German Code goes rather farther, and so apparently do several French decisions.

But the theoretical justification of the rule imposing liability for an abuse of a right is not left entirely to students. It has professorial support from Charmont, a member of the faculty of the University of Montpellier, in an article in the Revue trimestrielle du droit.[4] This article is a review of the thesis of Porcherot and also of a thesis by one of the author's pupils at Montpellier on the same subject. Charmont admits that the doctrine of abuse of a right seems logically a contradiction in terms. But he points out that the phase has had a large and growing use (which proves that the idea it expresses possesses real utility in the law) and that this reflects the fact that the law is following more closely on morals. This is very much in line with Dean Roscoe Pound's contention that the attack, based upon logical grounds, on the idea of liability for an abuse of a right, is really an afterthought. The restriction is concededly accomplished to some extent, and all that is shown by the argument is that the reasons given for this result are logically insufficient. The analytical jurist may insist (and no doubt his insistence is conducive to clearness of thought) that there is no abuse of a right but rather that the right itself is being cut down from the broad scope in terms of which it was previously expressed. The result—that the law will not generally permit anti-social action—is clear, no matter how it may be expressed.

Charmont seems to favor a subjective test, that is, a consideration of the defendant's motives. He admits, however, the practical difficulty in applying this test, since the defendant is not likely to state that he acts solely from malevolent motives. Recourse must then be had to a consideration of the objective facts, which may show pretty clearly that the defendant could have no possible motive other than spitefulness. It will be noted that this is the precise test laid down in the German Code.[5]

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[4] Vol. 1, p. 113.

[5] *Supra*, note 1.

Another discussion of this matter is the article by Professor Walton of McGill University, Montreal, Canada.[6] He demonstrates quite conclusively that the law of France and of the Province of Quebec imposes liability for the abuse of a right, particularly for malevolent action. He also points out that the liability is not confined to matters connected with the use of property, but includes such things as the control of one's family, the bringing of suits, etc.

Professor Walton also considers the situation with respect to this liability in the common law. He admits that it is constantly stated by the English and American courts that the motive of the defendant is wholly immaterial and will not of itself impose any liability. But on this point the author is somewhat doubtful and cites an article by Dean Ames [7] as proving that our law does in fact sometimes impose liability with respect to an act otherwise legal because of the spiteful or malevolent motive of the actor.

Dean Ames' article is concerned with the question as stated in its title, "How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor." He insists that liability is sometimes imposed by our law merely because of the defendant's malevolence. This will generally not be so if the plaintiff is suffering from the consequences of his own breach of duty, and of course there is no liability where there is "absolute privilege." In the case of use of the defendant's land solely to injure the plaintiff, the weight of authority is against liability, but there is a growing tendency to enforce it, and there are a number of statutes to this effect. Both of these tendencies have grown stronger since Dean Ames wrote. But even then he was able to cite malicious prosecution cases, cases of qualified privilege, and cases of injury to third persons by pressure on an employer or his employees, as indubitable examples of situations where the law reaches a different result according to the motives of the defendant.

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[6] 22 Harv. L. R. 501.
[7] 18 Harv. L. R. 411.

Even as respects property, liability is not entirely confined to spiteful and malevolent injury to others. For example, it is well settled, at least in America, that only reasonable use of percolating waters will be allowed.[8] It seems clear that a purely malicious use cannot be reasonable, although a reasonable and so legally defensible use made be made although the defendant has malevolent motives. But though the defendant's motives were unexceptionable, he will be held liable for a use on his own land of percolating waters which is found to be unreasonable. So again the ultimate test is whether or not the defendant's act is socially desirable, although in determining this question his motives are a very important consideration.[9]

The whole question of the effect of the defendant's motives upon his liability for an act injurious to the plaintiff was elaborately considered in *Dunshee* v. *Standard Oil Co.*[10] Here the plaintiff's assignor, the Crystal Oil Company, a retailer of oil in the city of Des Moines, had been accustomed to buy its supplies of oil from the defendant, a refiner and wholesaler. The Crystal Company supplied its customers with cards to be displayed when oil was wanted, in the manner usual in the distribution of ice, and in fact did distribute its oil from tank wagons in the method used by ice dealers. When the Crystal Company stopped buying from the defendant, the latter instituted a similar method of distributing its own oil but concealed from the customers of the Crystal Company that it was so doing and endeavored to cause them to believe that they were dealing with that company. In fact, the defendant's drivers were instructed to try to make all deliveries at places where the Crystal cards were displayed, and many of the cards were removed and destroyed by them. By this means the Crystal Company was driven out of business. This suit was brought for damages sustained through this action

[8] See "Percolating Waters: The Rule of Reasonable User," by E. W. Huffcutt, 13 Yale L. J. 222.

[9] See also, Wigmore, Cases on Torts, App. A, sec. 262, 271-272.

[10] 152 Ia. 618, 132 N. W. 371 (1911).

of the defendant, which, it may be noted, had withdrawn from the retail business as soon as the Crystal Company had been driven out.

A verdict for the plaintiff in the lower court was reversed by the state Supreme Court on a technicality, but most of the opinion was devoted to a discussion of the case on the merits. As to this, the court was strongly in favor of the plaintiff. The court insisted that the action of the defendant was not justified by competition, since the Crystal Company was a retailer, and the defendant was not. As to this the court said:

> "We may concede to the appellants the undoubted right to establish a retail oil business in Des Moines . . . ; but in so doing it was bound to conduct such business with reasonable regard and consideration for the equal right of the Crystal Company to continue its business and to continue supplying oil to such of its customers as desired to remain with it. If, however, there was no real purpose or desire to establish a competing business, but under the guise or pretense of competition, to accomplish a malicious purpose to ruin the Crystal Company or drive it out of business, intending themselves to retire therefrom when their end had been secured, then they can claim no immunity under the rules of law which recognize and protect competition between dealers in the same line of business seeking in good faith the patronage of the same people. And if, under such pretense of competition, defendants maliciously interfered with the business of the Crystal Oil Company in the manner charged, and injury to the latter was thereby inflicted, a right of action exists for the recovery of damages. It may be conceded that authorities are not wanting to sustain the position that, even though the Standard Oil Company had no intention of becoming a retail dealer in oil in Des Moines, but entered the business of selling oil in this manner temporarily, for the sole purpose of driving the Crystal Company out, it is a matter into which the courts will not inquire; but we think such precedents are out of harmony with fundamental principles of justice, . . . , as well as out of harmony with the later and better considered cases." [11]

[11] 152 Ia. 626.

The case is therefore a strong authority for the proposition that a purely malevolent motive may impose liability for acts otherwise justifiable. On the other hand, it may be seriously questoned whether the action of the defendant in this case was really purely spiteful in motive. It no doubt thought that it was acting to further its own business interests, since, though it did not care to engage permanently in the retail business in Des Moines, it wanted to compel all retailers of oil in that city to purchase their oil from it. But perhaps this criticism only strengthens the authority of the case for our present purposes, since we then have a case imposing liability for anti-social methods of carrying out such a well-protected legal right as that of competition. But the authority of the case on this point is certainly weakened by the fact that the deceptive methods of the defendant, particularly with reference to the cards, pretty clearly fell within the accepted category of unfair competition.

As has been said, the general tendency of the authorities is not to confine liability to malevolent acts, but undoubtedly these acts are the ones which are most often, or at least most clearly anti-social. Perhaps this may be best shown by looking at the situation from the point of view of the injured person. Any intentional injury to him is *prima facie* unjustifiable. But such injury may be justified because inflicted in pursuance of a legal right given because of a counter-vailing interest of society. The obvious example of this is competition, which is of such large benefit to society as a whole, that injury to individuals, though itself socially undesirable, may have to be borne in its behalf. But if the motive of the actor is purely spiteful, there is no justification. Society has no interest in permitting individuals to wreak their spite—or at least none which is in anywise comparable with the social interest in the physical and moral well-being of the injured individual. The cases denying liability for purely malevolent acts belong, therefore, to a past era of social thinking, appropriate only in a pioneer society.[12]

[12] See Stoner, "The Influence of Social and Economic Ideas on the Law of Malicious Torts," 8 Mich. L. R. 468.

The influence of the broader point of view of the law is not confined to restrictions on the use of property, but certain of these restrictions are of especial importance at the present time. Among these are billboard restrictions and zoning. There is still vigorous debate, particularly in America, as to the desirability and validity of such restrictions, so that some consideration of these matters is pertinent here.

In England the matter of billboard regulation is settled by a statute [13] permitting any local authorities to make by-laws,

> "For regulating, restricting, or preventing the exhibition of advertisements in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape."

Such a statute goes rather farther than those thus far made in this country, where billboard regulation has mostly been confined to cities—though many people are devoutly hoping for further restrictions of advertisements on highways. Unfortunately the English act cannot be cited as a complete justification for our even less radical (and therefore less adequate) billboard regulations, since they are not blessed with—or, if you will, hampered by—written constitutions. Nevertheless, it has not ordinarily been considered that the law of England is particularly remiss in the protection of individual rights, and so a restriction of such rights in that country is, *prima facie* at least, a justifiable one from the standpoint of society.

However, the constitutional question must be faced in America. Perhaps it is largely a fake question, as Professor Terry insists.[14] But even he admits that wholly unreasonable restrictions on the use of one's own property cannot be upheld. Is the restriction against billboards reasonable?

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[13] Advertisement Regulations Act (1907), VII Ed. 7, ch. 27.

[14] Constitutionality of Statutes Forbidding Advertising Signs on Property, 24 Yale L. J. 1.

There are not wanting authorities that answer this question in the negative.[15] These cases seem to be based principally on the reasoning that such restrictions are imposed purely on aesthetic grounds, and that such considerations alone furnish no justification for depriving a man of the use of his property.

It must be admitted that aesthetic grounds are one of the principal motives in such legislation.[16] Nevertheless most courts have found other reasons for upholding such restrictions. A rather full discussion of the matter will be found in *St. Louis Gunning Advertising Co.* v. *St. Louis,*[17] upholding a St. Louis billboard ordinance, which was also upheld by the United States Supreme Court.[18] The ordinance did not wholly prohibit billboards anywhere in the city but made rather drastic requirements as to their construction, especially that they should not be nearer than six feet to any building and not nearer the street line than fifteen feet.

The opinion of the Missouri court begins with rather broad language (with which, however, most persons except those in the billboard business would probably agree) as to the social undesirability of billboards, particularly from the aesthetic standpoint. But it is pointed out that there are other and even more fundamental justifications for frowning on billboards. They are menaces to the public safety, because of the danger of their falling down and also because of their highly inflammable nature; to the public health because the spaces behind them are apt to be used as privies and because much rubbish is blown by the wind and collected there; and to the public morals because furnishing a screen frequently availed of for immoral practices. The court meets the argument that non-advertising structures may possibly have all these dangers, by pointing out that they are not in fact so used to any considerable extent—a realistic point of view which is only too rare in the opinions of our courts.

[15] *Bill Posting Co. v. Atlantic City,* 71 N. J. L. 72, 58 Atl. 342 (1904); *Bryan v. City of Chester,* 212 Pa. 259, 61 Atl. 894 (1905).

[16] See Chicago City Club Bulletin, Vol. V, no. 24.

[17] 235 Mo. 99, 137 S. W. 929 (1911).

[18] *St. Louis Advertising Co. v. St. Louis,* 249 U. S. 269, 39 Sup. Ct. 274 (1919).

These reasons are certainly sufficient to uphold billboard restrictions under as narrow interpretations of the scope of the police power as has ever generally prevailed in this country, with all its worship of property rights. But it is rather difficult to contend that the aesthetic motive is not a strong and sometimes a decisive one in billboard legislation. This is especially clear in the Chicago ordinance upheld in *Thomas Cusack* v. *Chicago*.[19] The reasoning of the court is similar to that in the Missouri case, and it was held that billboards might be restricted or even prohibited as nuisances. The difficulty was that the ordinance forbade the erection of billboards in residence districts, but permitted them if consented to in writing by the owners of a majority of the frontage in the block. Now it can hardly be supposed that a majority of property owners can legalize a real nuisance; if the reason for the prohibition of billboards is because of their danger to safety, health, and morals, a single resident of the district is entitled to block them, though all the others desire them.

It must follow that all the cases sustaining billboard restrictions in this country—and they constitute the great weight of authority—are really authorities that the use of property may be restricted for aesthetic reasons. As will presently appear, this is important in connection with zoning, though it need not be discussed here, since the courts have managed to dodge the point in billboard cases.

We may now turn to the authorities on zoning. This goes much farther than the restriction of billboards, though it rests on very similar principles. Such a case as *People* v. *Oak Park* [20] is perhaps a good one to mark the transition, since it has elements of both billboard and zoning cases. Here a village ordinance prohibited the erection of a public garage on any site where two-thirds of the buildings within a radius of 500 feet were used for residences, without the written consent of the majority of the property owners (according to frontage) within this radius. The ordinance was sustained on principles analogous to those of billboard cases. There is a close resemblance in that the particular

[19] 242 U. S. 526, 37 Sup. Ct. 190 (1917).
[20] 266 Ill. 365, 107 N. E. 636 (1914).

type of structure was objectionable, but also a distinct difference in that a garage is not of itself a nuisance, nor is it likely to be used for improper purposes. The objections to it come from certain features, especially ugliness, noise, and danger to children, which are inseparable from its use. These are matters which touch on the fundamental principles of zoning, since no one would contend that a public garage is undesirable *per se;* in fact it is a necessary business. In a residence district it is still a good thing, but in the wrong place. And so perhaps, but much less clearly, is a billboard. On the whole, then, the basic principles are not very different.

But zoning goes much farther because the whole community is divided up, and from some of these divisions, not merely various kinds of lawful business but also some residential buildings—apartment houses, and sometimes even two-family houses—are excluded. This is certainly a very radical limitation upon the use of property, and the most socially-minded jurists would have to concede that such restrictions need pretty clear justification.

Nevertheless, the basic principle of zoning is now generally upheld in this country. That does not mean that any possible zoning arrangement will be upheld, for they must be reasonable, and the question of reasonableness is a judicial question under our bills of rights. But the basic principle of zoning is generally upheld, as not contravening the constitutional rights of property owners. Most important of all, it has been upheld under the federal Constitution in the leading case of *Euclid* v. *Ambler Realty Co.*[21]

This case, decided in 1926, probably furnished a surprise to most lawyers. That the court reached such an unexpectedly sensible result should, no doubt, protect it from a hyper-critical consideration of the grounds of its opinion; but one cannot forbear from pointing out that the opinion is based chiefly upon analogies of the law of nuisance; and for reasons that will presently appear, zoning cannot be adequately rested on this ground.

The social desirability of zoning can hardly be questioned. It is conducive to public safety by lessening traffic in residence,

[21] 272 U. S. 365, 47 Sup. Ct. 114 (1926).

and particularly one-family residence, districts. And it is conducive to public health and comfort by keeping from business districts the noise and other unpleasant features which cannot be avoided in carrying on many kinds of business, but which are not even objectionable in a factory district. But it cannot be denied that the most important purpose in most zoning is to improve the appearance of the residential districts. Hence, we must now face the question whether a restriction on the use of property, which restriction is dictated by aesthetic purposes, can be justified.

On theory, it seems that the question should be answered in the affirmative.[22] Property is a social institution and should not be permitted to be used for anti-social ends. With the advance of civilization, ugliness is just as bad as noise or malodorousness; it should therefore be restrained in the social interest, just as they are.

This argument, it will be noted, is directly in line with the present development of the law toward restraining the anti-social exercise of property and other rights. Some authorities go even farther, as, for instance, Jenks, who says:

> "It is probable that we shall eventually make provisions that the houses along certain residence streets shall conform to the artistic sense of the community as expressed by the building inspectors." [23]

It is hardly likely that the courts would as yet permit quite such vigorous restrictions, but we may come to them sometime. And why not? There is nothing uglier than a building of a bad or unsuitable type of architecture.

Even yet, most courts are unwilling to rest zoning upon aesthetic reasons alone. They manage to find other reasons, and at the most say that aesthetics may properly be considered along with these other things. On the other hand, those courts which still oppose the basic principles of zoning, usually do so under

[22] See note by T. P. Hardman, "The Social Interest in the Aesthetic and the Socialization of Law," 29 W. Va. L. Q. 195.

[23] Governmental Action for Social Welfare, p. 81.

the theory that zoning is for aesthetic reasons, and that such reasons alone do not justify the denial to a man of the right to use his property as he wishes.

Typical of this line of cases is *Piper* v. *Ekern*,[24] holding unconstitutional a statute restricting the height of buildings around the square in Madison, Wisconsin, where the state capitol was built. The purpose of the statute was ostensibly to protect the state capitol from fire, but the court quite effectively exposed the speciousness of this reason by showing that none of the buildings were very near the capitol and also that the capitol was practically fireproof. The majority then seems right in its contention that the statute was passed for mainly aesthetic reasons. Not so sound is its contention that the statute was passed from purely selfish motives, and that "The state owns this property as any private citizen owns property." One wonders what the court would say to a statute providing for the use of the state capitol as a warehouse, or as an apartment house for the use of the members of the legislature. If we must talk in terms of selfish interests, this was a case of the selfish interest of all the people not merely of the community but of the whole state, as against the at least equally selfish interests of a few property owners—and the court decided in favor of the latter!

The dissenting opinion in this case admits that the statute must be sustained, if at all, on aesthetic grounds, but contends that these are sufficient. The following very suggestive language is used:

> "There is no reason why a judge should painfully bow his back over a lawn-mower to beautify his front yard, and then take pen in hand and deny the use and sense of the thing." [25]

This suggests a more realistic approach to the problem of aesthetics as justifying restrictions on the use of property. Let us admit, for the sake of argument, that there is no justification for restricting the use of property, except such as fall within

[24] 180 Wis. 586, 194 N. W. 159 (1923).
[25] 180 Wis. 604.

the rather ancient category of the police power. But this certainly includes the preservation of general values in the community. Then we are reduced to the rather simple question whether the appearance of the locality has anything to do with the value of property. It does not require a skilled realtor to answer this question; as is suggested in the above quotation, even a judge knows the answer perfectly well, when he does not intentionally blind himself to what he knows in his non-judicial capacity, as is an unfortunate habit of many of our jurists when writing opinions. In short, aesthetic reasons are sufficient to justify reasonable restrictions on the use of property, if for no other reason, because beauty is worth money.

If the courts are slow in recognizing this, yet most of them are coming to see that aesthetic considerations may properly be given some weight. A very able opinion to this effect is *Windsor* v. *Whitney*,[26] which upholds an ordinance of Windsor prohibiting the laying out of new streets without the approval of the town plan commission, which, as a condition of its approval, was to establish a set-back line for buildings. The court conceded that the purpose of this ordinance, and especially of the set-back line, was largely, though not exclusively, the beautification of the town, but found it none the worse on that account.[27]

But there are still several unsettled questions with respect to zoning, which may be briefly considered here. They have all one common factor, that they cannot be satisfactorily solved by treating the subject of zoning under the category of preventing nuisances.

The first of these questions is as to whether an owner of property the use of which is restricted by this arrangement is entitled to compensation for the consequent reduced value of his property. As already shown, the effect of proper zoning is to raise the value of property as a whole, but it may happen—in fact it always does happen where litigation is begun—that this

[26] 95 Conn. 357, 111 Atl. 354 (1920).

[27] See also, to the same effect, *Opinion of the Justices*, 234 Mass. 597, 127 N. E. 525 (1920), approving a statute which would authorize cities and towns to zone, and explicitly authorized them to take measures for the beautification of the community.

particular owner could make more money by a prohibited use of the property.

If this prohibited use constitutes a nuisance in the usual sense, there can of course be no compensation to the owner. And this looks reasonable, since this particular owner is generally seeking to profit at the expense of his neighbors, whose property will be depressed in value as much as his is increased. But to call an apartment house a nuisance is an obvious absurdity.

The matter was considered at length by the Supreme Court of Minnesota in *State* v. *Houghton*.[28] Unfortunately, the court unconsciously begged the real question, since it constantly assumed that if the zoning statute in question was valid, compensation must be given for the restriction of use—here that of apartment houses. The court expressed the question as whether this was condemnation for a public use, whereas the actual question was as to the basic soundness of zoning. On the first hearing the court invalidated the statute, which, it held, provided for condemnation for a private use; on rehearing, one judge changed his vote, and it was held that the statute was enforceable, but that compensation must be given. The opinion on rehearing is an excellent justification of zoning, but does not really consider the question of the necessity of paying compensation.

This question depends, of course, upon whether there is a sufficient taking of the property by the public as distinguished from a mere regulation of its use. This is the most usual method of expressing the matter by the courts, but it is of little help in drawing the line between these two very nebulous concepts. Perhaps it may help us to do this if we remember that zoning restrictions are not incumbrances on property, any more than are restrictions against actual nuisances.[29] It must follow that they are usually merely regulatory, and this is especially clear if they are somewhat general in operation, and not confined to the property of the individual asking compensation. This is usually the case, so it would seem that, as a general rule, prop-

[28] 144 Minn. 1, 174 N. W. 885, 176 N. W. 159 (1919, 1920).

[29] *Lincoln Trust Co. v. Williams Building Corporation*, 229 N. Y. 313, 128 N. E. 209 (1920).

erty owners are not entitled to compensation for any losses which they may sustain as a result of zoning restrictions. This result seems sound, as zoning is a movement in the public interest, and each property owner should in the same interest bear such slight private losses as may fall on him thereby.

Another question as yet not much mooted is the effect of zoning restrictions on existing buildings which do not comply with the zoning requirements. If these buildings are nuisances, they must be removed, as all nuisances must be abated without compensation. But it is questionable whether any court would permit such drastic action. It is true that in *People* v. *Oak Park*,[30] the court construed the ordinance there in question as referring to existing garages, and stated that as so construed the ordinance was unobjectionable. It was admitted, however, that no attempt had been made to enforce the ordinance against existing garages.

It is submitted that the owners of existing buildings cannot reasonably be compelled to tear them down—unless perhaps when the building was erected on the eve of the enactment of the ordinance, and with a fraudulent purpose. At any rate, practically all ordinances are so drawn as not to affect existing buildings. On the other hand, it is clear that existing buildings cannot be enlarged, and this notwithstanding the fact that the restriction may result in their becoming useless for the owner's business.[31] Difficult questions may thus arise as to partly completed buildings, and repairs to existing buildings, but perhaps help in the solution of these problems may be found from the authorities respecting existing wooden buildings in newly-established city fire limits.

Still another problem may arise as to the effect of permitting adjoining property owners to sanction what would otherwise be a violation of the zoning ordinance. It would seem that such a provision would be unobjectionable, since zoning restrictions are primarily for the benefit of the nearby owners. Yet if this

[30] *Supra*, note 20.

[31] *State v. Harper*, 182 Wis. 148, 196 N. W. 451 (1923); *American Wood Products Co. v. Minneapolis*, 35 F. (2d) 657 (1929).

is really a case of nuisance it would seem improper to allow it against the protest of a single person who would be injured. The United States Supreme Court has taken a rather peculiar position on this matter. After holding in the *Cusack* case,[32] that adjoining property owners could permit billboards although they are nuisances, it has lately held [33] that a provision permitting a deviation from zoning rules by written consent of the owners of two-thirds of the property within 400 feet, was itself invalid and invalidated the whole ordinance, because the violation of a zoning restriction is *not* a nuisance. While it is gratifying to have the court abandon its unsound nuisance conception of zoning restrictions, the result seems a rather curious inversion of the natural and sensible rules. There are many authorities that such permission cannot be given to adjoining owners, but they seem unsound. Furthermore, the position of the courts that such a provision invalidates the whole ordinance seems doubly unfortunate; why cannot it be stricken out, and the ordinance stand as a whole?

Still another difficulty in applying the nuisance theory to justify zoning is the fact of the constant changes which have to be made in districts. This is an unfortunate necessity because such changes are often the result of personal or political influence, and often unjustifiably injure persons who have bought property relying on the districts as originally established. Yet it would be still worse to have a rule that districts could not be changed, as changes of conditions may make zoning regulations not merely useless but positively harmful. But in this scheme, a conception of zoning regulations as preventing nuisances is absurd and unworkable. Zoning must be recognized as perhaps analogous to, but certainly having an enormously broader scope than the common law conception of restraining nuisances.

Restrictions on billboards and zoning regulations are in the broad view merely prominent examples of the increasing limitations on the use of property which are characteristic of our time. And these limitations on the use of property are them-

[32] *Supra*, note 19.

[33] *Washington v. Roberge*, 278 U. S. 116, 49 Sup. Ct. 50 (1928).

selves the most important phase of a more general movement to restrain the anti-social exercise of rights. Rights are given by the law to individuals for social purposes, because the law, being a social institution, acts, or should act, solely for the furtherance of the social welfare. If, then, a right given by the law is being used by its possessor consciously or unconsciously for anti-social ends, the very purpose for which it was given is defeated, and the law can and should interfere to prevent such a perversion of the right. Today there is a growing recognition of this duty, which is itself the result of an increasing understanding that the legal order must be further socialized. To the furtherance of this result, it is the duty of all persons concerned with the shaping of the legal order, whether as writers, teachers, advocates, or judges, to lend their best efforts.

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