Michigan Law Review

Volume 54 | Issue 2

1955

Real Property - The Effect of Zoning Ordinances on the Law of Nuisance

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REAL PROPERTY—THE EFFECT OF ZONING ORDINANCES ON THE LAW OF NUISANCE—One of the most interesting and least explored questions in the law of property is the effect of zoning ordinances on the law of nuisance. Particularly interesting is the extent to which statutory authorization by zoning can legalize a use of land which, in the absence of a zoning ordinance, would constitute a nuisance.[1] In order to understand this problem fully it is necessary to begin with a general analysis of the law of nuisance and the various classifications into which it has been divided by the courts.

I. *The Concept of Nuisance*

A. *Generally.* The concept of nuisance can safely be said to be almost incapable of concrete definition.[2] In its widest sense, nuisance includes any act or omission which annoys, injures, or endangers the comfort, health, safety or repose of others, or in any way renders other persons insecure in life or the use of property.[3] For purposes of this comment, however, discussion will be limited to interferences with the use and enjoyment of land.[4]

Supp. 475, 520. If they do not acquiesce, the Teamsters may induce their employees to force them to do so by threat of strike. Chairman Farmer's decision gives considerable relief to those employers who have already granted "hot cargo" clauses. They can refuse to acquiesce in this secondary action and thus possibly avoid a damage action for violation of their common law and statutory duties as common carriers.

1 An equally interesting and related problem, beyond the scope of this comment, is the effect upon the law of nuisance of prohibition of a certain use of land in a given zone. See generally in this connection, Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143 (1915); Grundy Center v. Marion, 231 Iowa 425, 1 N.W. (2d) 677 (1942); Smith v. Collison, 119 Cal. App. 180, 6 P. (2d) 277 (1931); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 S. 613 (1929), cert. den. 280 U.S. 556, 50 S.Ct. 16 (1929). See also Noel, "Retroactive Zoning and Nuisances," 41 COL. L. REV. 457 (1941); 166 A.L.R. 659 (1947).

2 "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" PROSSER, TORTS 549 (1941).

3 Summers v. Acme Flour Mills Co., (Okla. 1953) 263 P. (2d) 515. See generally 33 MARQUETTE L. REV. 240 (1950). Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P. (2d) 847 (1948), divided nuisances into four categories: (1) harm to human comfort, safety or health because of the defendant's maintaining on his land a dangerous instrumentality causing damage to the plaintiff in respect to legally protected interests of the plaintiff in his land; (2) illegal or immoral practices; (3) obstruction to streets and other public ways; (4) damage to the land itself, as through flooding. Statutes have more or less codified the common law meaning of nuisance in many states. These statutes are of two general types. One type, common among the southern states, defines a nuisance as ". . . anything that worketh hurt, inconvenience, or damage to another. . . ." See Ala. Code (1940) tit. 7, §1081; Ga. Code Ann. (1935) tit. 72, §101. The other type, more common in the western states, defines a nuisance as "anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property. . . ." See Cal. Civ. Code (Deering, 1949) §3479; Mont. Rev. Code (1947) §57-101; Minn. Stat. (1953) §561.01.

4 4 TORTS RESTATEMENT 216 (1939) points out that the term "nuisance" is used to describe both the conduct giving rise to an injury and the injury itself. As this comment is restricted to cases where the use made by one person of his land interferes with the enjoyment of the land of another, "nuisance" will be used in both of these senses.

In determining whether a given use of property constitutes a nuisance, a number of different considerations are examined by the courts, including such factors as the following: the character of the neighborhood,[5] the nature of the thing complained of,[6] its proximity to those alleging damage,[7] the frequency and continuity of its operation,[8] the nature and extent of the injury caused,[9] whether or not there are any means of preventing the damage,[10] whether or not the defendant is conducting its operations in the only locality feasible to its success,[11] the importance of the defendant's business to the community,[12] the amount of the defendant's investment,[13] and the length of time that the offending business has existed.[14] It is frequently said that the question in every case is whether, considering all the facts and circumstances,[15] the defendant is making a "reasonable" use of his premises.[16]

Since the effect of zoning on the law of nuisance depends to a large extent on the particular type of nuisance involved, it is important to distinguish between the various classifications of nuisance made by the courts.

B. *Public and Private Nuisances.* Nuisances are either public or private.[17] A public nuisance affects all who come within its sphere of operation, and thus is often referred to as a "common"

5 "What would be a substantial interference with enjoyment of life in a residential area might very well be perfectly normal and inescapable in an industrial section." Jedneak v. Minneapolis General Electric Co., 212 Minn. 226 at 230, 4 N.W. (2d) 326 (1942). See also Walker v. Wearb, 6 N.Y.S. (2d) 548 (1938); Schott v. Appleton Brewery Co., (Mo. App. 1947) 205 S.W. (2d) 917; Gardner v. International Shoe Co., 386 Ill. 418, 54 N.E. (2d) 482 (1944).

6 Hofstetter v. Myers, Inc., 170 Kan. 564, 228 P. (2d) 522 (1951).

7 Ibid; Hasslinger v. Village of Hartland, 234 Wis. 201, 290 N.W. 647 (1940).

8 Hofstetter v. Myers, Inc., 170 Kan. 564, 228 P. (2d) 522 (1951).

9 Schott v. Appleton Brewery Co., (Mo. App. 1947) 205 S.W. (2d) 917; 4 TORTS RESTATEMENT §827 (1939).

10 Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E. (2d) 303 (1943); 4 TORTS RESTATEMENT §828 (c) (1939).

11 Robinson v. Westman, 224 Minn. 105, 29 N.W. (2d) 1 (1947); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919); Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W. (2d) 615 (1950).

12 Canfield v. Quayle, 170 Misc. 621, 10 N.Y.S. (2d) 781 (1939); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 66 N.E. (2d) 334 (1946); Powell v. Superior Portland Cement, Inc., 15 Wash. (2d) 14, 129 P. (2d) 536 (1942).

13 San Antonio v. Camp Warnecke, (Tex. 1954) 267 S.W. (2d) 468; Strachan v. Beacon Oil Co., 251 Mass. 479, 146 N.E. 787 (1925).

14 Woschak v. Moffat, 173 Pa. Super. 209, 96 A. (2d) 163 (1953).

15 The list of factors in the text is not exclusive. For an excellent treatment of the various circumstances considered by the courts in deciding whether a nuisance exists, see 4 TORTS RESTATEMENT §§826-831 (1939).

16 Woschak v. Moffat, 173 Pa. Super. 209, 96 A. (2d) 163 (1953); Heppenstall Co. v. Berkshire Chemical Co., 130 Conn. 485, 35 A. (2d) 845 (1944).

17 1 WOOD, NUISANCE, 3d ed., §14 (1893); Ga. Code Ann. (1935) tit. 72, §102.

nuisance.[18] In order to fall within this category, the injury must be to the public as such, but the mere fact that a large number of people are injured will not necessarily make a nuisance public. The crucial factors are the character of the injury and the nature of the right affected.[19] Abatement in the name of the state is the usual remedy for a public nuisance.[20] A private individual does not have a right of action unless he can show special damage to himself of a character different in kind from that suffered by the general public.[21]

A private nuisance arises from an injury to the use and enjoyment of land[22] that is essentially private in character[23] and that affects a limited number of persons.[24] The fact that a business is otherwise lawful does not prevent it from being a private nuisance.[25] It is also possible to have a nuisance that is both public and private in character. This is known as a mixed or united nuisance.[26]

C. *Nuisances per se and in Fact.* Nuisances may also be divided into nuisances per se and per accidens (in fact). The best definition of a nuisance per se would classify it as an act, occupation or structure which is a nuisance in a given area regardless of its manner of operation, a use of land that cannot be so conducted in its present location as to be allowed to exist.[27] A lawfully authorized business cannot be a nuisance per se.[28]

18 39 AM. JUR., Nuisance §8 (1942). There are many types of public nuisance that do not involve the use of land. See 1 WOOD, NUISANCE, 3d ed., §§17-75 (1893).

19 Biber v. O'Brien, 138 Cal. App. 353, 32 P. (2d) 425 (1934); JOYCE, NUISANCES §14 (1906). But see Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922).

20 Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922).

21 Ward v. Oakley Co., 125 Cal. App. (2d) 840, 271 P. (2d) 536 (1954); Michelsen v. Dwyer, 158 Neb. 427, 63 N.W. (2d) 513 (1954).

22 Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E. (2d) 682 (1953). In conjunction with this limitation it is required that in order to have standing to abate a private nuisance a person must have a property right or privilege in the land. Daurizio v. Merchants Despatch Transportation Co., 152 Misc. 716, 274 N.Y.S. 174 (1934); 4 TORTS RESTATEMENT §§822-823 (1939).

23 Sheinberg v. Churnin, 132 N.Y.S. (2d) 568 (1952); Biber v. O'Brien, 138 Cal. App. 353, 32 P. (2d) 425 (1934).

24 Adams v. Commissioners of Trappe, 204 Md. 165, 102 A. (2d) 830 (1954); JOYCE, NUISANCES §8 (1906). Statutes in some states limit a private nuisance to injuries to ". . . a few or determined number of persons." Ga. Code Ann. (1935) tit. 72, §102.

25 Benjamin v. Lietz, 116 Utah 476, 211 P. (2d) 449 (1949); Bickley v. Morgan Utilities Co., 173 Ark. 1038, 294 S.W. 38 (1927).

26 1 WOOD, NUISANCE, 3d ed., §16 (1893).

27 See Higgins v. Bloch, 213 Ala. 209, 104 S. 429 (1925); JOYCE, NUISANCES §12 (1906). A gas station has been held to be a nuisance per se in a residential neighborhood. Perrin's Appeal, 305 Pa. 42, 156 A. 305 (1931). See also Jones v. Trawick, (Fla. 1954) 75 S. (2d) 785, where the proposed construction of a cemetery in a residential district was enjoined.

A nuisance in fact is an act, occupation, or structure which is a nuisance only because of its location, surroundings, or manner of operation.[29] It is no defense that the particuar use of land is in connection with an otherwise lawful business.[30] The distinction between a nuisance per se and a nuisance in fact seems only a convenient way of saying that a nuisance per se is a nuisance as a matter of law, while whether a given use of land constitutes a nuisance per accidens depends upon a question of fact.[31] Nevertheless, characterizing a given use of land as either a nuisance per se or a nuisance in fact has important legal consequences,[32] and since the courts are prone to express themselves in terms of this distinction, it will be adopted here.

The public-private and the per se-in fact distinctions must not be confused. Although there may be a rough correlation between public and per se nuisances on the one hand, and private and in fact nuisances on the other, they are two separate classifications. It is entirely possible to have private nuisances per se and in fact,[33] just as it is to have a public nuisance per se[34] and a public nuisance in fact.[35]

II. *The Effect of Zoning on the Law of Nuisance*

A. *Nuisances per se and Public Nuisances.* At the outset it would be well to dismiss briefly the cases that involve the question of nuisance per se. In these cases it is unanimously held that authorization of a particular use by zoning prevents that use from

28 Burrows v. Texas & N.O.R. Co., (Tex. Civ. App. 1932) 54 S.W. (2d) 1090; JOYCE, NUISANCES §16 (1906).

29 Borgenmouth Realty Co. v. Gulf Soap Corp., 212 La. 57, 31 S. (2d) 488 (1947); 39 AM. JUR., Nuisance §11 (1942).

30 King v. Columbian Carbon Co., (5th Cir. 1945) 152 F. (2d) 636; British-American Oil Producing Co. v. McClain, 191 Okla. 40, 126 P. (2d) 530 (1942).

31 Borgenmouth Realty Co. v. Gulf Soap Corp., 212 La. 57, 31 S. (2d) 488 (1947).

32 While the erection and potential operation of a nuisance per se may be enjoined, a potential use of land may not be declared a nuisance in fact until it has been given a chance to operate. Nesin v. Long Island Granite Co., 205 Misc. 765, 130 N.Y.S. (2d) 187 (1954); Dawson v. Laufersweiler, 241 Iowa 850, 43 N.W. (2d) 726 (1950). Furthermore, if a use of land is found to be a nuisance per se, it will be completely enjoined, whereas if it is merely a nuisance in fact it will be enjoined only to the extent that its methods of operation are unlawfully injurious. Morton v. Superior Court, 124 Cal. App. (2d) 576, 269 P. (2d) 81 (1954); State v. Stubblefield, 36 Wash. (2d) 664, 220 P. (2d) 305 (1950).

33 Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E. (2d) 682 (1953).

34 New Orleans v. Lafon, (La. App. 1952) 61 S. (2d) 270.

35 Fort Smith v. Western Hide & Fur Co., 153 Ark. 99, 239 S.W. 724 (1922). See generally JOYCE, NUISANCES §15 (1906).

constituting a nuisance per se.[36] Statutes in a number of states make this clear by providing that "nothing which is done or maintained under the express authority of a statute can be deemed a nuisance."[37] The rule preventing a nuisance per se from existing under zoning authority would seem to apply whether the nuisance be private or public in nature.

What effect a zoning ordinance has on public nuisances is a little less clear, but generally where a business is conducted in its proper zone, it cannot be a public nuisance.[38] When it is considered that a public nuisance traditionally has been thought of as an offense against the state,[39] in some cases a crime,[40] it is difficult to quarrel with this conclusion.[41]

B. *Private Nuisance.* In the field of private nuisance, the vast weight of authority is to the effect that zoning laws do not authorize a private nuisance. The fact that a business is operated in its proper zone is no defense to an action for a private nuisance in fact.[42] This seems to be based on the generally accepted doctrine that it is no defense to an action for abatement of a private nuisance that the business causing the injury is an otherwise lawful business,[43] or that the methods used are necessary for its successful

36 Kay v. Pearliris Realty Corp., 106 N.Y.S. (2d) 443 (1951). Fairfax Oil Co. v. Bolinger, 185 Okla. 20, 97 P. (2d) 574 (1939); Salvation Army v. Frankenstein, 22 Ohio App. 159, 153 N.E. 277 (1926).

37 Cal. Civ. Code (Deering, 1949) §3482; Idaho Code (1948) §52-108; Wash. Rev. Code (1953) 7.48.160. As to the effect of these statutes on other types of nuisances, see notes 41 and 43 infra.

38 Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P. (2d) 171 (1946); Shields v. Spokane School District No. 81, 31 Wash. (2d) 247, 196 P. (2d) 352 (1948). State v. Board of County Commissioners of Cuyahoga County, (Ohio Com. Pl. 1947) 79 N.E. (2d) 698, affd. 149 Ohio St. 583, 79 N.E. (2d) 911 (1948). *Contra,* Eaton v. Klimm, 217 Cal. 362, 18 P. (2d) 678 (1933).

39 39 AM. JUR., Nuisance §8 (1939).

40 CLARK AND MARSHALL, CRIMES, 5th ed., §462 (1952).

41 The statutes cited in note 37 supra would seem to apply to public nuisances. But see Eaton v. Klimm, 217 Cal. 362, 18 P. (2d) 678 (1933); Cal. Code Civ. Proc. (1950) §731a.

42 Bruskland v. Oak Theatre, 42 Wash. (2d) 346, 254 P. (2d) 1035 (1953); Williams v. Blue Bird Laundry Co., 85 Cal. App. 388, 259 P. 484 (1927). Scallet v. Stock, 363 Mo. 721, 253 S.W. (2d) 143 (1952); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 66 N.E. (2d) 339 (1946); Ellis v. Blanchard, (La. App. 1950) 45 S. (2d) 100.

43 See note 25 supra. It is clear that the statutes referred to in note 37 supra, and general statements such as that of the New York court in Matter of Goelet v. Moss, 248 App. Div. 499 at 500, 290 N.Y.S. 573 (1936), affd. 273 N.Y. 503, 6 N.E. (2d) 425 (1937), to the effect that ". . . the Zoning Law is the controlling authority as to what uses the owners may make of their property in a given district . . ." do not generally apply to private nuisances in fact. See Fendley v. City of Anaheim, 110 Cal. App. 731, 294 P. 769 (1930).

operation.[44] Some courts go so far as to say that a municipality cannot legalize a private nuisance,[45] occasionally placing this on the constitutional prohibition against taking private property without compensation.[46] Indeed, some zoning ordinances, while setting aside a given area for industrial use, specifically prohibit offensive or obnoxious methods of operation.[47]

While most courts will not allow a zoning ordinance to sanction a private nuisance, as a bare minimum it is agreed that the ordinance must be considered in deciding whether or not there is a nuisance.[48] The zoning law is treated as an expression of the will of the municipality, and must be considered as a factor in favor of the use made of the land.[49] Excluding evidence of the zoning laws in a case involving private nuisance has been held to be reversible error.[50]

In three leading cases, courts have given still greater effect to zoning ordinances than is prescribed by the general rule. In *Bove v. Donner-Hanna Coke Corp.*[51] the New York court refused to enjoin the operation of an around-the-clock coke oven located in an industrial zone despite the fact that its operation caused substantial injury to a private landowner in the immediate neighborhood. In *Jedneak v. Minnesota General Electric Co.*[52] the Minnesota court allowed a power plant to operate in an industrial zone despite the fact that injury to neighboring landowners was caused

44 Malm v. Dubrey, 325 Mass. 63, 88 N.E. (2d) 900 (1949); Brede v. Minnesota Crushed Stone Co., 143 Minn. 374, 173 N.W. 805 (1919).

45 Benton v. Kernan, 127 N.J. Eq. 434, 13 A. (2d) 825 (1940), mod. 130 N.J. Eq. 193, 21 A. (2d) 755 (1941).

46 State v. Board of County Commissioners of Cuyahoga County, (Ohio Com. Pl. 1947) 79 N.E. (2d) 698, affd. 149 Ohio St. 583, 79 N.E. (2d) 911 (1948). While generally this is limited to a taking of private property for public use, the Oklahoma Constitution includes a prohibition against taking private property for a private use with or without compensation. OKLA. CONST. (1907) art. 2, §23. See Fairfax Oil Co. v. Bolinger, 186 Okla. 20, 97 P. (2d) 574 (1939); Phillips Petroleum Co. v. Vandergriff, 190 Okla. 280, 122 P. (2d) 1020 (1942).

47 See Kosich v. Poultrymen's Service Corp., 136 N.J. Eq. 571, 43 A. (2d) 15 (1945); Beane v. H. K. Porter, Inc., 280 Mass. 538, 182 N.E. 823 (1932). Under this type of ordinance, the fact that the business is carefully operated is irrelevant.

48 Rockenbach v. Apostle, 330 Mich. 338, 47 N.W. (2d) 636 (1951); Weltshe v. Graf, 323 Mass. 498, 82 N.E. (2d) 795 (1948); White v. Old York Road Country Club, 322 Pa. 147, 185 A. 316 (1936).

49 Perrin's Appeal, 305 Pa. 42, 156 A. 305 (1931). Dawson v. Laufersweiler, 241 Iowa 650, 43 N.W. (2d) 226 (1950).

50 Walker v. Delaware Trust Co., 314 Pa. 257, 171 A. 458 (1934). But see Ellis v. Blanchard, (La. App. 1950) 45 S. (2d) 100.

51 236 App. Div. 37, 258 N.Y.S. 229 (1932).

52 212 Minn. 226, 4 N.W. (2d) 326 (1942).

by its operation. And in *Patterson v. Peabody Coal Co.*,[53] since the defendant's coal washer and drier was operated in an area zoned for industry, the Illinois court refused to enjoin the operation although it admittedly caused injury to the plaintiff.[54] In these cases the courts emphasized the importance of industry to society and the fact that the business involved was being conducted in a zone set apart for it by the municipality. Stressing the fact that industry could not survive if every substantial invasion of private interests was grounds for an injunction, they refused to prevent the operation of the various industries involved unless, as was said in the *Patterson* case, the interference with the use of land was substantial and unreasonable, or unless the defendant was not operating the business as carefully as possible.[55]

Much the same result, in even stronger language, is achieved in California by means of a statute enacted in 1935. This statute reads:

> "Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California,[56] no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. . . ."[57]

The major significance of this legislation is that it prevents a commercial use from constituting a private nuisance whenever it is conducted in its proper zone without unnecessary and injurious methods of operation.[58] The fact that damage may be caused by

53 3 Ill. App. (2d) 311, 122 N.E. (2d) 48 (1954).

54 Beside the Bove, Jedneak, and Patterson cases, there is very little authority to the effect that a business conducted in its proper zone is not a private nuisance in fact where such business would have been a nuisance in the absence of the zoning ordinance. Such a position was taken, however, in Linsler v. Booth Undertaking Co., 120 Wash. 177, 206 P. 976 (1922). See also Kirk v. Mabis, 215 Iowa 769, 246 N.W. 759 (1933).

55 The latter exception was also recognized by the Minnesota court in the Jedneak case.

56 Note that this is a direct opposite of the usual result; zoning legalizes a private nuisance, but not a public nuisance.

57 Cal. Code Civ. Proc. (Deering, 1950) §731a.

58 By the technical wording of the statute, a distinction is drawn between the standard of operation required for a business to avoid being a nuisance, and to avoid being enjoined. Injurious methods of operation are all that are required in order to deem a commercial

this operation is irrelevant.[59] It has been seen that although there is some authority at common law for the position taken by this statute,[60] the general common law rule holds that the fact that a business is operated as carefully as possible does not prevent its injunction as a nuisance if sufficient interference with the use and enjoyment of land can be shown.[61] Thus, whereas the three principal factors at common law are the extent of the injury, the locality of the business, and its manner of operation, once the locality is established as a commercial zone the California legislation looks only to the manner of operation of the business.

There does not seem to have been any claim that this statute is unconstitutional, despite the fact that it denies to landowners a right to abate a nuisance which existed before its enactment. There should be little doubt that section 731a is constitutional, however.[62] In order to come within the statute, the land must be used for a "manufacturing or commercial" use,[63] but the actual business carried on need not be mentioned in the zoning ordinance

use a nuisance, but in order to enjoin that operation unreasonable methods must be shown. It would seem that there could be injurious methods of operation which are not unreasonable, and thus the statute may prevent the enjoining of certain uses even though they may be a nuisance.

59 See 9 So. CAL. L. REV. 365 (1936).

60 It has been held that the legalization of a use of land by a zoning ordinance prevents that use from being enjoined, but does not preclude an injured individual from suing for damages. Fairfax Oil Co. v. Bolinger, 186 Okla. 20, 97 P. (2d) 574 (1939). See also Robinson Brick Co. v. Luthi, 115 Colo. 106, 169 P. (2d) 171 (1946). This may be true in any case when there is only a minor inconvenience to individual rights and the policy in favor of allowing the business to continue is strong. Oliver v. Forney Cotton Oil and Ginning Co., (Tex. Civ. App. 1921) 226 S.W. 1094; Gilbert v. Showerman, 23 Mich. 448 (1871).

61 Malm v. Dubrey, 325 Mass. 63, 88 N.E. (2d) 900 (1949); Durfey v. Thalheimer, 85 Ark. 544, 109 S.W. 519 (1908). Marshall v. Holbrook, 276 Mass. 341, 177 N.E. 504 (1931). Section 731a clearly changed the common law rule in California. See Gelfand v. O'Haver, 33 Cal. (2d) 218, 200 P. (2d) 790 (1948); 9 So. CAL. L. REV. 365 (1936).

62 In Sawyer v. Davis, 136 Mass. 239 (1884), the state had passed an act which legalized the ringing of bells by factories to give notice to their employees, and authorized the various municipalities to set the sizes and weights for their particular area. A city ordinance, passed under authority of this statute, which allowed bells to be rung at 5:00 A.M. was sustained, despite the fact that bell ringing earlier than 6:30 A.M. had previously been held to be a private nuisance. See also Dudding v. Automatic Gas Co., 145 Tex. 1, 193 S.W. (2d) 517 (1946). Warren Co. v. Dickson, 185 Ga. 481, 195 S.E. 568 (1938). However, if the legislature authorizes merely the business, and not the particular methods used, obnoxious methods of operation may be held to constitute a private nuisance. 25 TEX. L. REV. 96 (1946). Query if §731a would be held constitutional in Oklahoma, however. See note 46 supra.

63 This is interpreted broadly. See North Side Property Owners' Assn. v. Hillside Memorial Park, 70 Cal. App. (2d) 609, 161 P. (2d) 618 (1945), where a cemetery was held to be within §731a.

in order to be "expressly permitted."[64] It should also be noted that this statute provides a defense to nuisance actions only. A landowner may still recover damages[65] if a case in trespass can be established.[66]

When a business is located in its proper zone, and is operated in the best possible manner, there is much to be said for the result achieved by the California legislation. The typical zoning ordinance is hostile to industrial uses; a number of zones are created, successively less restricted, with industrial uses allowed in only the least restricted zone.[67] The more favored uses of land are allowed in all less restricted zones, so that while Zone One prohibits industry and allows only private residences, Zone Five allows industry but does not correspondingly exclude residential uses.[68] Thus a private residence may be located in an industrial zone, surrounded by factories, coke ovens, drop forges, etc., all of which necessarily emit smoke, noise, odors and other annoyances. Admittedly, the mere fact of injury to the private landowner alone would not necessarily predicate an injunction of these industries when the character of the neighborhood, importance of the business to the community, etc., are considered. Nevertheless, it seems appropriate to consider whether the fact that an area is zoned for industry should not have sufficient additional weight to preclude a business from ever constituting a nuisance when operated as carefully as possible within that area.

It has been seen that under the typical zoning ordinance, there is only a limited area in which industry may lawfully operate, whereas less offensive uses are free to locate themselves in many other, less restricted, zones. When an industry or business is con-

64 McNeill v. Redington, 67 Cal. App. (2d) 315, 154 P. (2d) 428 (1944). For an interesting comparison with Massachusetts law, see note 74 infra.

65 But not an injunction, unless unreasonable methods of operation can be shown. See note 58 supra.

66 McNeill v. Redington, 67 Cal. App. (2d) 315, 154 P. (2d) 428 (1944). The basic distinction between nuisance and trespass is that the former is an interference with the use and enjoyment of the land, while the latter is an interference with the exclusive possession of land. PROSSER, TORTS 578 (1941). The same conduct may often constitute both a nuisance and a trespass.

67 For a detailed analysis of the content of the typical zoning ordinance, see BAKER, THE LEGAL ASPECTS OF ZONING 60 et seq. (1927).

68 It should be noted that not all zoning ordinances are so framed. See BAKER, THE LEGAL ASPECTS OF ZONING 66 (1927); WILLIAMS, THE LAW OF CITY PLANNING AND ZONING 277 (1922). An ordinance excluding residential building from an industrial zone was held to be unconstitutional by the Connecticut court in a decision specifically limited to the particular circumstances involved. Corthouts v. Town of Newington, 140 Conn. 284, 99 A. (2d) 112 (1953).

ducting its operations in a reasonable manner so as not to cause unreasonable or unnecessary harm to others, it would seem that it is a proper function of zoning to assure that this business can operate free from nuisance actions brought by other users of land who are at liberty to locate themselves in other areas. The California legislation is significant in that it acknowledges this principle. It recognizes that zoning has a greater function than merely that of excluding use *A* from Zone One in order to protect the individuals in that zone. It clearly recognizes that zoning has the further function of affirmatively providing use *A* an area in Zone Five in which to operate in a reasonable manner, free of the limitations placed upon it by private nuisance rights of neighboring landowners. It was never doubted that the power of zoning to eliminate certain land uses from certain areas is not limited to the exclusion of those uses that constitute a common law nuisance,[69] and it has been said that one of the major reasons for the growth of zoning has been the inadequacy of nuisance law to handle the problem.[70] On the other hand, it is well settled that the legislature may legalize that which, in the absence of such authorization, would be a nuisance.[71] It should be a proper function of zoning to serve as specific statutory authorization for business and industry to operate reasonably and carefully within a limited area. One of the important purposes of zoning is to assure the maximum economic use of all land in a municipality.[72] This purpose is frustrated if private nuisance actions can deny to industry a place in the community in which to operate in a reasonable manner.[73]

[69] Jones v. Los Angeles, 211 Cal. 304, 295 P. 14 (1930); Beverly Oil Co. v. Los Angeles, 40 Cal. (2d) 552, 254 P. (2d) 865 (1953); Noel, "Retroactive Zoning and Nuisances," 41 COL. L. REV. 457 (1941).

[70] Bettman, "Constitutionality of Zoning," 37 HARV. L. REV. 834 (1924).

[71] "It is settled that, within constitutional limits not exactly determined, the Legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use of value of property." Holmes, J., in Commonwealth v. Parks, 155 Mass. 531 at 532, 30 N.E. 174 (1892). See also Murtha v. Lovewell, 166 Mass. 391, 44 N.E. 347 (1896); Elder v. City of Winder, 201 Ga. 511, 40 S.E. (2d) 659 (1946); Collegeville Borough v. Philadelphia Suburban Water Co., 377 Pa. 636, 105 A. (2d) 722 (1954) (public nuisance). See also note 62 supra.

[72] Landels, "Zoning: An Analysis of Its Purposes and Its Legal Sanctions," 17 A.B.A.J. 163 (1931).

[73] This point is made with great conviction in Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y.S. 229 (1932). The court concluded (at p. 43) by saying: "It is not for the court to . . . condemn as a nuisance a business which is being conducted in an approved and expert manner, at the very spot where the council said that it might be located."

Although it may be questioned whether most zoning ordinances have this specific intent,[74] a clearly drawn ordinance, supplemented if necessary by legislation similar to the California statute, would in all likelihood be upheld as a valid exercise of the police power.[75] Even in the absence of legislation there are strong reasons why courts should adopt a position similar to that taken by the *Bove, Patterson* and *Jedneak* cases, and deny individual landowners the right to abate as a nuisance businesses carried on in their proper zone. If an industry is conducted unreasonably so as to cause substantial injury to others, the unreasonable methods should be enjoined regardless of zoning laws. But where the industry is properly conducted in an industrial zone, the courts should give effect to zoning ordinances as a limitation on nuisance actions to enjoin the operation.[76]

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[74] There is some basis for concluding that the Massachusetts courts draw a distinction between an ordinance that expressly permits certain uses of land to be made in a certain zone, and an ordinance that merely prohibits certain uses from being made, implying negatively that unmentioned uses are allowed. See Marshall v. Holbrook, 276 Mass. 341, 177 N.E. 584 (1931); Beane v. H. K. Porter, Inc., 280 Mass. 538, 182 N.E. 823 (1932). Zoning ordinances are not treated as legislative licenses to maintain a private nuisance in Massachusetts, but the courts that make statements to this effect invariably rely on the Marshall and Porter cases, where the zoning ordinance was of the negative type. See Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Weltshe v. Graf, 323 Mass. 498, 82 N.E. (2d) 795 (1948). It is unfortunate that the opinions in the last two cases do not make clear which type of ordinance was involved.

[75] See Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114 (1926); Linsler v. Booth Undertaking Co., 120 Wash. 177, 200 P. 976 (1922).

[76] It is conceivable that in some instances the injury caused by even the most careful methods of operation might be sufficient to justify an action for damages by the individual aggrieved. In this connection see notes 58 and 60 supra.