Remedies and Defenses

Robert J. Johnson
been equally unsuccessful in showing that a nuisance existed in either case. The conduct complained of fell within a "grey" area. It was not quite a nuisance but it did cause considerable discomfort and annoyance to the plaintiffs. Public authorities can often more effectively prevent uses of this nature through comprehensive zoning ordinances than by bringing nuisance actions. Tannery settling ponds, slaughterhouses and similar uses can be prohibited in areas where they would cause discomfort to nearby residents.

On the other hand, the Fritz case, in which the defendant operated a garbage dump, demonstrates the effectiveness of the nuisance remedy as opposed to zoning. The dump was located outside the corporate limits of the city. Its existence could not be eliminated by zoning, but Illinois Revised Statutes ch. 100 1/2, § 27 (1957), authorizes municipal authorities to abate such dumps within one mile of corporate boundaries. The nuisance approach proved most successful under the circumstances.

In control of land use and other areas of regulation, the public nuisance approach may appear cumbersome and obsolete when compared to comprehensive zoning and regulatory licensing. However, public authorities should recognize those situations where the nuisance approach may be the only available remedy.

PAUL KOMADA

REMEDIES AND DEFENSES

Having discussed the nature of public and private nuisances, it is appropriate now to examine the remedies available for both types of nuisance, and the defenses thereto. The presentation of this subject matter will be divided into remedies against a private nuisance, remedies against a public nuisance, and defenses to both classifications. It must be kept in mind, however, that it is difficult to give a case-by-case factual presentation in the above manner because in most instances the determination of whether an alleged nuisance is private or public is not made until the remedy has already been selected and the case is at trial.

PRIVATE NUISANCES

Action at law for damages. As defined in an earlier section of this symposium, to constitute a private nuisance to an individual landowner, the interference with the use of his land caused by the neighbor's use of his land must result in injury which differs in kind and not merely in degree from that suffered by the public at large. If this is the case, then the person suffering the injury can maintain an action at law for the damages suffered. Thus, the remedy available, to a large extent, is dependant upon the nature of the damage suffered by the aggrieved party.
In *Swain v. Chicago B. & Q.R.R.*, the plaintiff, a steamboat company, sued to recover damages for the obstruction by the defendant of the Illinois River by using, operating, and maintaining a railroad bridge across the river so as to prevent navigation of the river by the plaintiff's steamboat. The plaintiff was denied relief because of the fact that the nuisance was public and not private, and this determination was based on the fact that the plaintiff suffered damages of the same kind as the public at large, though they were admittedly greater in degree. The court stated that since the plaintiff had never before used the Illinois River in its business, its damage was purely speculative—the loss of profits which might be derived from the use of the river. Therefore, since it suffered only the obstruction of a navigable waterway, it suffered the same damage as the public.

Even though the landowner suffers damage which is different in kind than that suffered by the general public, the law will not give damages for every inconvenience to or interruption of the rights of another. In *Cooper v. Randall*, the Illinois Supreme Court adopted the lower court's instructions as to the nature of damages necessary to justify recovery. Therein, the plaintiff had sued for damages caused by the operation by the defendant of a flour mill on a lot near the plaintiff's premises which resulted in the throwing of dirt, dust, and chaff upon and in the plaintiff's house. The court stated that there are numerous annoyances which must inevitably arise and accrue to the property of individuals, legal liability for which cannot be fixed on any person. The law only gives damages for an injury which is sensible, tangible, and material, and not simply for injury which inconveniences the landowner or causes a trifling interruption.

In a more recent case, which dealt with the granting of equitable relief hereinafter to be discussed, it was evidently recognized that a landowner may recover nominal damages for the maintenance of a private nuisance by a neighboring landowner. The plaintiffs had previously recovered, in an action at law, a verdict of one dollar in damages for each year over a five year period, but the Supreme Court, characterizing the injury as inconsequential, refused to grant equitable relief.

Where the plaintiff bases his action on a negligence theory, he must show a substantial injury to his land or its use and enjoyment. In *Patterson v. Peabody Coal Co.*, the plaintiff sued to recover damages for the main-
tenance of a coal mining operation by the defendant which created large amounts of dust which was blowing over on the plaintiff's land and causing him discomfort. The trial court rendered a verdict for the plaintiff and a judgment in the amount of $5,000, but the Appellate Court reversed, holding that, since the plaintiff had based his action on a negligence theory, the consideration by the jury of damage which was not substantial and not intentional was improper, and that the plaintiff had failed to prove a lack of care on the defendant's part in the conduct of his business, the latter being essential to recovery on a negligence theory.⁷

**Injunctive relief.** A landowner suffering damage as a result of the maintenance of a private nuisance is not left to his remedy at law for damages, but may maintain an action in equity to enjoin the maintenance of the nuisance. The remedies are not exclusive, but are concurrent.⁸

It is not necessary in order to obtain injunctive relief that the existence of a nuisance first be tried at law. In *Minke v. Hopeman*,⁹ the plaintiff filed a bill in equity to enjoin the maintenance of a slaughterhouse adjacent to his property which created a nauseous stench to the discomfort of plaintiff's family. The court, in granting an injunction to the plaintiff, stated that where there was a danger of irreparable loss or a material injury being done before a trial at law could be had, equity may interfere by injunction. However, the existence of the nuisance must be free from substantial doubt before the equity court will intervene prior to an action at law.¹⁰

Whether equity will automatically grant relief once the existence of a nuisance has been established at law is a question which has caused some difficulty. In *City of Pana v. Central Washed Coal Co.*,¹¹ which dealt with a public nuisance also inflicting damage peculiar to the plaintiff, the trial court granted an injunction enjoining the defendant coal company from conducting its operations so as to be detrimental to the public health. In affirming the lower court's decree, the Illinois Supreme Court stated that while a court of equity has jurisdiction in these cases, it is, nevertheless, to be exercised sparingly unless the rights of the parties and the existence of

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⁷ *Ibid.* The court herein pointed out in accordance with § 822 of the Restatement of Torts that to recover damages for the maintenance of a nuisance, the invasion must be substantial, and the invasion must be either (a) intentional and unreasonable or (b) actionable under rules governing liability for negligence.

⁸ In *Barrington Hills Country Club v. Village of Barrington*, 357 Ill. 11, 191 N.E. 239 (1934), riparian landowners sought an injunction to prevent the defendant from discharging sewage into a creek above their premises. In answer to the defendant's claim that the plaintiffs were limited to an action at law for damages, the court said: "The law in Illinois is, and has long been settled. . . . A private nuisance may be enjoined by a suit in equity or the party suffering damage and injury may proceed at law, and the remedies are concurrent and not exclusive." *Id.* at 20, 191 N.E. at 243.

⁹ 87 Ill. 450 (1877).


¹¹ 260 Ill. 111, 102 N.E. 992 (1913).
the nuisance is determined in an action at law. The court thereby implied that once the existence of the nuisance was resolved in an action at law, equity would grant relief as a matter of course. However, in *Haack v. Lindsay Chemical Co.*, the plaintiffs, having previously recovered damages in an action at law for the maintenance of a private nuisance, sought to enjoin the defendant from continuing to operate its manufacturing plant in such a way as to emit certain gases and fumes. It was their contention, in reliance upon the statement in the *City of Pana* case, that the recovery of damages in the previous action at law established their right to equitable relief as a matter of course. The court rejected the statement in the *City of Pana* case as dicta, and stated that such a statement ran counter to the principles of equity since it is the duty of the equity courts to consider the equities of the case, the surrounding circumstances, and the interests of others involved. Thus, recovery at law does not conclusively establish an aggrieved party's right to equitable relief.

The fact that a statute provides a remedy by indictment does not bar one from obtaining equitable relief. In *Minke v. Hopeman,* the issuance of an injunction enjoining the operation of a slaughterhouse adjacent to the plaintiff's property was upheld even though the operation was declared a nuisance by statute, and the defendant had previously been indicted and acquitted. The court stated that the maintenance of the slaughterhouse, declared a public nuisance by statute, was also a private nuisance with respect to the plaintiff.

However, a well-established principle of equity is that the equity court will not enjoin the commission of a criminal offense if it has no jurisdiction over the matter for some other reason, and on this basis, the equity court has refused to enjoin a violation of a building ordinance or a public health ordinance on the mere allegation that the violation would result in a private nuisance to the complainant.

*Self-help.* Abatement of a nuisance without resort to the courts is largely an outmoded and impractical method of relief, and exposes an individual who attempts to utilize this remedy to the possibility of tort liability for his acts. While older cases suggest that where the circumstances are such as to require an immediate remedy and to preclude awaiting the slow progress of the ordinary forms of justice, a private individual may resort to abatement on his own so long as he does so without unnecessary damage. The very fact that there are so few cases on the propriety of this remedy is indicative of its infrequent utilization.

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12 393 Ill. 367, 66 N.E.2d 391 (1946).
13 87 Ill. 450 (1877).
17 Buck v. McIntosh, 140 Ill. App. 9 (4th Dist. 1908).
In one Illinois case involving the seizure of liquor during the prohibition period, the liquor was declared by statute to be a nuisance per se. A summary abatement of this nuisance was permitted, though this remedy was said to be limited to those circumstances where the condition of the item is such that it is imminently dangerous to the safety or offensive to the morals of the community, and is incapable of being put to any lawful use by the owner.18

PUBLIC NUISANCES

Criminal indictment. Various activities are defined under Illinois statute as public nuisances, and the statute so defining the activity as a nuisance generally provides for criminal punishment of the individual maintaining the nuisance. This remedy is embodied principally in Chapter 100Y of the Illinois Revised Statutes. Section 26 enumerates a list of those activities considered public nuisance by statute (such list does not exclude common-law nuisances not enumerated), and Section 29 provides:

Whoever causes, erects or continues any such nuisance shall, for the first offense, be fined not exceeding $100, and for a subsequent offense shall be fined in a like amount, and confined to the county jail not exceeding 3 months. Every such nuisance, when a conviction therefor is had may, by order of the court before which the conviction is had, be abated by the sheriff or other proper officer, at the expense of the defendant, and it shall be no defense to any proceeding that the nuisance is erected or continued by virtue or permission of any law of this State.

Chapter 38, Section 13-3 of the Illinois Revised Statutes also provides that the maintenance of a public place of accommodation or amusement in which a violation of civil rights occurs is a public nuisance, and also imposes a criminal penalty on one who denies to another the full and equal enjoyment of the facilities and services of any public place of accommodation or amusement because of race, religion, color, or national ancestry. Section 13-3(a) states:

A person convicted of a violation of civil rights may be fined not to exceed $1000, or may be imprisoned not more than 6 months, or both.

Injunctive relief. Where a nuisance is maintained so that it is injurious to the public health or safety, a public nuisance exists, and equitable relief may be granted only upon application of the Attorney General who acts to abate the nuisance for the public benefit.19 However, it is not enough that the act complained of constitutes an indictable offense under

18 People v. Marquis, 291 Ill. 121, 125 N.E. 757 (1920).
the criminal law, for as stated earlier, equity will not act to enjoin the
commission of a criminal offense unless it has jurisdiction over the matter
on some other grounds—namely that the act complained of constitutes a
nuisance.'

Thus, in Sted v. Fortner,20 the defendant therein was maintaining
certain premises on which the sale of liquor was being conducted in viola-
tion of the local law. In a suit by the Attorney General and the States At-
torney, the defendant was enjoined from carrying on such activity, even
though it constituted an indictable offense and previous attempts to punish
the defendant by criminal process had failed. The court stated that the
act of selling did not constitute the nuisance, but rather it was the mainte-
nance of a place which the General Assembly had determined to be danger-
ous to the health, morals, safety, and welfare of the public. The court
further stated that there need be no pecuniary damage to a property right
in a public nuisance, but only an invasion of the rights of the public in
general.

However, where the Attorney General is merely acting in the discharge
of his duty in the enforcement of the laws, and the ordinary methods of
criminal prosecution would be effective for this purpose, equity will de-
cline jurisdiction.21 This reasoning sustained a reversal of a decree granting
a temporary injunction, on application of the Attorney General, enjoining
some 1400 defendants from open and notorious violations of the gambling
laws. The Illinois Appellate Court held that the complaint was defective
in that it sought only to enforce the criminal law by alleging conclusions
and not by alleging facts showing a nuisance.22

The Illinois Revised Statutes also provides that the States Attorney or
any citizen of the county in which the nuisance exists may maintain a com-
plaint in the name of the People of the State to enjoin the maintenance of
a nuisance, be it the maintenance of a house of prostitution,23 the mainte-
nance of any place for the unlawful sale or storage of narcotics drugs,24 or
any of the other enumerated statutory public nuisances.25 Injunctive relief
is also provided for in much the same manner as above for the enjoining
and abatement of a place of public accommodation or amusement wherein
a violation of civil rights occurs, the latter being declared a public nui-
sance.26

20 255 Ill. 468, 99 N.E. 680 (1912).
21 Ibid.
relating to maintaining a complaint in equity to enjoin and abate each of the respective
nuisances named.
DEFENSES

The great majority of defenses raised to actions based on the maintenance of nuisances, both public and private, arise where equitable relief is sought and the defendant raises equitable defenses, the most common of which is balancing of the hardships. Thus, where the defendant has expended great sums of money on the construction of a manufacturing plant, he claims that great injury would result to him were he prohibited from operating his facility in proportion to the damage suffered by the individual plaintiff.

The attitude of the courts when faced with this claim was exhibited in *Wente v. Commonwealth Fuel Co.* The court stated that if the existence of a private right and the violation of it are clear, it is no defense to show that a party has been put to great expense in preparing to violate that right. It was stated that the law does not undertake to estimate the difference between the loss that would be sustained by the party owning the thing complained of and the damage to the injured party, nor to grant or withhold relief on such a basis. The same attitude was expressed in *Barrington Hills Country Club v. Village of Barrington* wherein the court said:

Conveniences have never been balanced in this State and equities have never been weighed where a private right or private property was sought to be taken by other than due process of law and the party injured sought to enjoin such taking.

However, in *Haack v. Lindsay Chemical Co.*, a case discussed in an earlier part of this article, the court denied the plaintiff equitable relief even though the existence of the nuisance had been determined in a prior action at law, declaring that it was the duty of the equity courts to consider the equities of the case, and that the fact that the defendant was engaged in essential war work was a factor in denying the plaintiff equitable relief. This seems to indicate a departure from the strict view earlier taken by the courts on the balancing of the hardships claim.

In an action at law, the court will definitely not engage in any balancing of the hardships or conveniences. This was emphasized in a criminal prosecution for the maintenance of a rendering works, the operation of which was declared a public nuisance by statute. The defendant had claimed that his acts were justified by the immediate urgency for the disposition of dead animals out of regard for the public health and convenience. The court affirmed the lower court's conviction stating that it made no difference that the work was in the interests of society or necessary for the

27 232 Ill. 526 (1908).
28 357 Ill. 11, 191 N.E. 239 (1934).
29 *Id.* at 20, 191 N.E. at 243.
30 393 Ill. 367, 66 N.E.2d 391 (1946).
preservation of public health—so long as violation of a public right was clear.\textsuperscript{31}

Another defense commonly raised, though to no avail, is that the plaintiff acquired his property after the defendant was already operating the alleged nuisance and that this gave the plaintiff notice of any interference to which he might later be subjected and, therefore, bars him from relief. Both the equity and law courts have rejected this claim as immaterial and constituting no defense.\textsuperscript{32}

Clearly, the defendant’s ignorance of the fact that his operation was being conducted in an offensive manner with respect to the complaining property owners is no defense to an action to enjoin a private nuisance. This defense was raised in an action by property owners to enjoin the operation of a neighboring hospital by the defendants. The court rejected it saying that the defendants were responsible for the management of the institution, and that it was their duty to see that it was so conducted as to not infringe on the rights of others.\textsuperscript{33} However, a person who comes into possession of land as a grantee upon which a nuisance is being maintained is not liable for merely permitting it to remain until he has been notified or requested to remove it by the party injured by the nuisance.\textsuperscript{34}

Lastly, the fact that the land was conveyed to the defendant by the plaintiff does not later estop the grantor from complaining if the grantee uses the land in a manner which constitutes a nuisance.\textsuperscript{35}

\textbf{ROBERT J. JOHNSON}

\textsuperscript{31} Seacord v. People, 121 Ill. 623, 13 N.E. 194 (1887).
\textsuperscript{32} Huff v. Coats, 221 Ill. App. 543 (4th Dist. 1921); Oehler v. Levy, 234 Ill. 595, 85 N.E. 271 (1908). Both cases quoted the following statement from Weir’s Appeal, 74 Pa. St. 230: “Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood, to the occupant of which and travelers upon which it is a nuisance. As the city extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This public policy, as well as the health and comfort of the population of the city, demands.”
\textsuperscript{33} Deaconess Hospital v. Bontjes, 207 Ill. 553, 69 N.E. 748 (1904).
\textsuperscript{34} Loudon v. Mullins, 52 Ill. App. 410 (4th Dist. 1891).
\textsuperscript{35} Off v. Exposition Coaster, 336 Ill. 100, 167 N.E. 782 (1929).