

T H E C O N C E P T O F N U I S A N C E

I N

E N G L I S H L A W

A STUDY OF THE ORIGINS AND HISTORICAL DEVELOPMENT OF
THE CONCEPT OF NUISANCE FROM ITS EARLIEST BEGINNINGS
TO THE END OF THE NINETEENTH CENTURY .

By

JOHN ROBERT LANDREY MILTON

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University of Natal, Pietermaritzburg.

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WHAT WE CALL PROGRESS IS THE

EXCHANGE OF ONE NUISANCE FOR

ANOTHER NUISANCE

HENDRY HAVELOCK ELLIS (1859-1939)

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PREFACE

The law of nuisance is notoriously one of the most confused branches of English Common Law. This study was conceived as a contribution to the task of unravelling this confusion. That distinguished jurist Oliver Wendell Holmes Jnr wrote that to understand what the law is, we must know what it was. In obedience to this prescription I have attempted to trace and describe the historical evolution of the concept of nuisance in English law from its earliest beginnings to the end of the nineteenth century in an attempt to provide a framework for a critical evaluation of the modern law of nuisance.

This study then is not an analysis of the modern law of nuisance. Its object is more modest, being that of essaying a narrative account of the way in which the foundations of the modern law were laid out and built upon.

The end of the nineteenth century seemed a convenient point to end the narrative since by then the main outlines of what would become the modern law of nuisance had been sketched in. I have however appended a postscript which attempts to round off the narrative by providing an overview of trends in nuisance law in the present century.

The materials upon which this study has been based are the reported cases listed above and the materials noted in the bibliography. To a large extent the cases represent the primary sources of this work since there is no great corpus of literature on the history of nuisance law. Sir William Holdsworth's monumental History of English Law treats of the topic only incidentally as does the classic work of Pollock and Maitland. The authors of the later general accounts of the history of English law perforce tend to deal only briefly with the subject.⁽¹⁾ The first substantive attempt to trace the history of nuisance law was MacRae's

(1) Particularly useful are Baker An Introduction to English Legal History Chap 19 and Potter's Historical Introduction to English Law 420-5 in the edition prepared by Professor Kiralfy.

article 'The development of Nuisance in the Early Common Law', (1948) a useful if cryptic account of the early stages of the evolution of nuisance law which is over-shadowed by C H S Fifoot's learned and graceful chapters on nuisance in his History and Sources of the Common Law (1949). By far the most substantial and detailed examination of this early period is however Dr Janet S Loengard's doctoral dissertation Free Tenements and Bad Neighbours (1970) to which I am much indebted. Professor A K Kiralfy's study of The Action on the Case (1951) contributes much useful information about a somewhat later period in the history of nuisance, while Joel F Brenner's article 'Nuisance Law and the Industrial Revolution' (1973) completes the short list of specialist studies of the history of the English law of nuisance.

Given the extended time-scale of this study I cannot pretend to have produced a complete history of nuisance law, nor can it be said that I have covered all its ramifications. However I hope that I have been able to show how it was that nuisance law came to be in the state which caused William Prosser to characterize it as an 'impenetrable jungle' and to have made some contribution to the task of taming the jungle.

CHAPTER ONE

ORIGINS (c.1166 - 1300 AD)

A. INTRODUCTION : SOCIAL AND ECONOMIC BACKGROUND

The roots of nuisance go deep into English Common Law and in our search for them we are led into the dark places of English legal history.

The only clue we have as to the exact origin of what would become the concept and law of nuisance is etymological. The word 'nuisance' is derived from the Latin root nocumentum⁽¹⁾ and our earliest glimpse of 'nuisance' lies in the records of judicial proceedings for the redress of a set of wrongs identified as 'nocumenta'.

'Nocumentum' first appears as a legal term of art in the records of the twelfth century. So scanty is our knowledge of the origins of the concept that we cannot say how or why men came to use so spacious a word to identify a particular type of wrongdoing. All we know is that in the year 1166 and after it was the practice and convention to designate the harm done by or to a collection of very and many utilitarian objects - ditches, dykes, hedges, walls, gates, houses, mills, mill-ponds, weirs, watercourses, paths, roads, orchards, ovens, markets, gallows - as nocumentum.

(1) From nocere 'to hurt, harm or injure'. Nocere in Old French became 'nuire', the past participle of which was 'nuisant' or nuisance'. In Middle English 'nuisance' became 'nusaunce' (Klein A Comprehensive Etymological Dictionary of the English Language (1967) sv nuisance) Nuisance only appears in the English language in the fifteenth century (Oxford English Dictionary sv nuisance) where it denoted 'hurt harm or injury'.

The word 'annoyance' is often found being used as a sort of synonym for 'nuisance'. The word in fact derived from the Latin root 'odium' = 'hatred, animosity, aversion'. In old French it became 'anoiance' or 'anuiance' and in English 'annoyance'. (Klein op cit sv Annoyance). The word connotes more an emotion than a state of affairs and is usually used in the sense of describing a response to a condition which is a nuisance. It can however also be used as a synonym for 'nuisance' (see Oxford English Dictionary sv Annoyance).

Social and Economic Background

The things to which the designation *nocumentum* came to be applied were common-place features of the social and economic physiognomy of medieval England as it emerges into full view after the Norman Conquest of the eleventh century. In seeking to understand something of the origins of the concept and law of nuisance we must begin by examining the background in which we first glimpse the *nocumenta*.

The landscape in which the *nocumenta* appear is that of a countryside long colonized but still largely forest, moor and marsh, pierced by the remnants of four great Roman roads. There is only one large town, London, and for the rest the inhabitants dwell in scattered village communities, on the edge of the forests and moors or clustered about some fortified stronghold.⁽²⁾

Politically the country is a feudal kingdom. The land surface is parcelled out in large estates, the superior ownership of which is vested in the Crown from whom all other title to the land is derived.⁽³⁾ Some of these estates are held by the King himself, a private domain of the Crown from which it derives its income and sustenance. Some of the land - the foreshore, the highways, the navigable waters - is held by the Crown in behalf of the people for their advantage and convenience.⁽⁴⁾

Lands not held by the king were parcelled out to feudal dignitaries in the form of manors. The manor is a defined

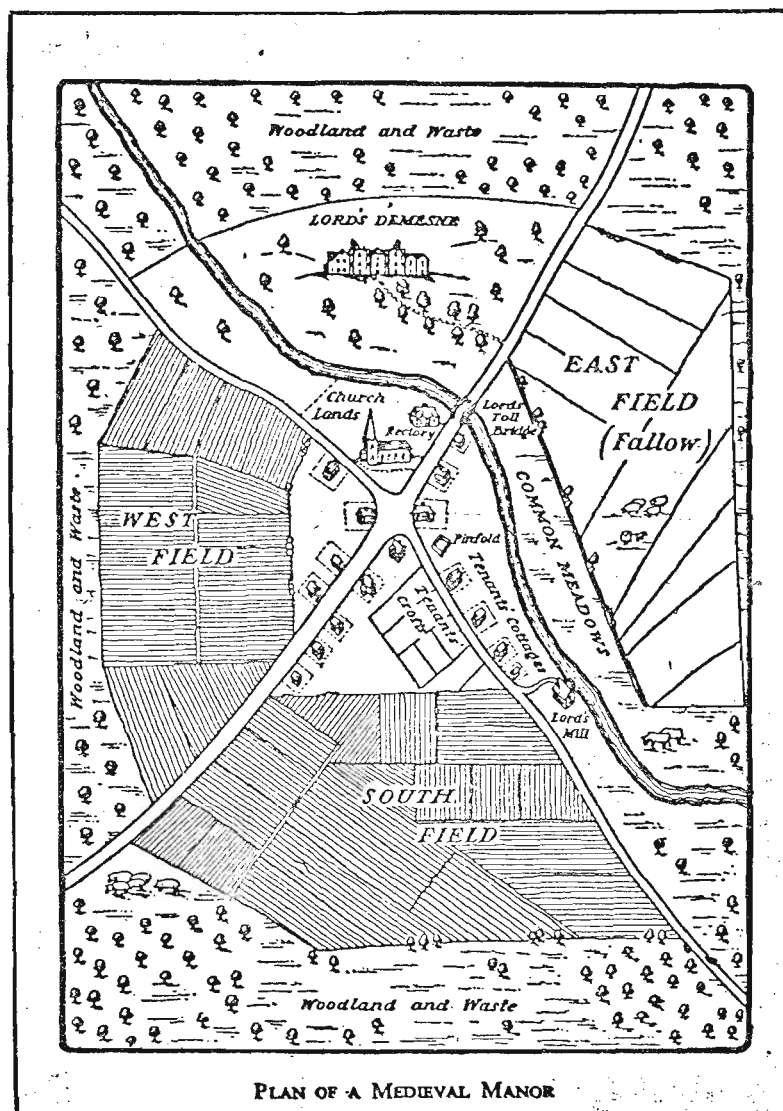
(2) The historical evolution of the English landscape is traced in W G Hoskings The Making of the English Landscape.

(3) Pollock & Maitland History (i) 232ff.

(4) The two types of land were not clearly distinguished in the medieval law. As Pollock & Maitland put it '[t]he king's lands are the king's lands...: there is no more to be said' (History (i) 518). Nevertheless we can make the distinction since it was implicit in the scheme of things and, as we will see (below 24ff) had a significant influence upon the evolution of the nuisance concept.

district held by a lord 'of' the king. In relation to the king the lord of the manor is a tenant, his tenement being the manor. In relation to the resident community of the manor, the lord of the manor is the 'owner' of the manor and all rights in and to its lands are derived from him. The residents are thus the tenants of the land, their tenements being smaller parcels of land within the manor assigned to them by the lord. (5)

Physically a manor comprised the manor house, the residence of the lord; certain 'demesne' lands held by the lord for his own use, certain lands held by the lord's tenants in free-hold, and an area of 'waste' - forest, moor and swamp which supplied the lord and his tenants with a variety of necessities. (6)



(5) Generally on the manor see Pollock & Maitland History (i) 594ff; Maitland Domesday Book and Beyond 140ff; Vinogradoff Growth of the Manor passim.

(6) Pollock and Maitland History (i) 362-3, 597-600.

Superimposed on this physical entity are a number of legal powers and economic privileges. The lord of the manor is entitled to maintain a court - the Court Baron - with jurisdiction over the affairs of the manor and its resident community.⁽⁷⁾ In addition to the services due to the lord by his tenants, he enjoys other privileges of an economic nature. Some of these, such as the right to have the demesne land fertilized by the livestock in the manor,⁽⁸⁾ the right that the inhabitants of the manor shall bring their grain to be ground in the lord's mill⁽⁹⁾ and their bread to be baked in the lord's ovens,⁽¹⁰⁾ are inherent in the lord. In addition the lord enjoys certain exclusive privileges such as the right to maintain a dove-cot⁽¹¹⁾ or to hunt⁽¹²⁾ and fish⁽¹³⁾ in the manorial wastes. Further the lord in the theory of feudal land law 'owned' the manorial waste and was thus entitled to licence persons to enclose and cultivate ('assart') portions of it.⁽¹⁴⁾

-
- (7) The court was a private jurisdiction, an inevitable incident of every manor, having as its object the maintenance of the rights of the lord against his tenants and the privileges of the tenants against the lord as well as the organisation of the affairs of the manorial community. See generally S & B Webb Manor and Borough 13ff; Pollock & Maitland History (i) 586-594.
- (8) The jus faldae. See H S Bennett Life on the English Manor 77; Maitland Domesday Book and Beyond 106.
- (9) Bennett 129ff. Manorial tenants owed suit to the mill. The lord enforced this obligation by a writ Secta ad Molendinum see Fifoot History and Sources 6 ad n 19.
- (10) Bennett op cit 135-6.
- (11) Doves were a great delicacy and the lord's monopoly was designed to protect them. The doves fed on the tenants' fields and thus constituted a constant source of annoyance. No tenant was allowed to kill the birds or to maintain a dove-cot: Bennett op cit 93-4.
- (12) Bennett op cit 94
- (13) Bennett op cit 94-5
- (14) As will be seen below (7-8) the inhabitants of the manor enjoyed certain customary rights to the common use of the waste. The lord's right to license assarting thus cut across these ancient rights and was a constant source of friction between lord and tenant. The Statute of Merton (1236) sought to resolve this dispute by recognising both the rights of common and the lord's right to licence assarts (see note 31 below).

In addition the lord of the manor might enjoy certain franchises - such as the right to hold a 'leet' court,⁽¹⁵⁾ the right to establish a market or fair and receive tolls and fees therefrom - by grant from the Crown.⁽¹⁶⁾

Finally it should be noted that there rested upon the lord of the manor certain obligations of a public nature. It was an ancient and elementary principle that whenever lands were granted by the king to some man the land was burdened by the trinodas necessitas, the obligation to render military service (expeditio) and to repair bridges and fortresses (pontis arcisve constructio). The lord of the manor thus became responsible especially for the repair and maintenance of the bridges within his manor,⁽¹⁷⁾ an obligation which seems to have been extended to include the repair of roads.⁽¹⁸⁾ The lord tended to discharge this obligation by visiting the duties of repair upon the residents of his manor.⁽¹⁹⁾

(15) On leet courts see below. 69ff.

(16) These 'franchises' were aspects of the royal prerogative vested by the king as incidents of his royal office. In principle he might dispose of the privileges to his subjects (usually in return for a fee) in which event they became franchises or liberties enjoyed by the subject. See generally Pollock & Maitland History (i) 571ff.

(17) In Anglo-Saxon times the trinodas necessitas was a personal burden imposed upon free-men. Later the obligation to repair bridges seems to have become a territorial burden (see W S McKechnie Magna Carta 300). See also C T Flower Public Works in Medieval Law (32 Selden Socy) xxiiiiff. Cap 23 of Magna Carta (1215) sought to limit the obligation, providing that neither 'village nor individual shall be compelled to make bridges ... except those who from old were legally bound to do so.' See McKechnie op cit 299ff.

(18) There is no clear evidence. J J Josserand English Wayfaring Life 37 states that the 'keeping of ... roads in repair ... was part of the trinodas necessitas...'

(19) See S & B Webb The Story of the King's Highway 7

The residents of manors typically lived in villages, each manor in fact including one or more villages.⁽²⁰⁾ Like the manor, the village was a social and economic unit organised according to a distinct scheme of things.⁽²¹⁾

The most characteristic⁽²²⁾ type of village was that which was organised according to what is called the open field system of agriculture.⁽²³⁾ This system contemplated the village as an integrated agrarian unit of dwellings, land and workers. Physically the village consisted in a collection of small houses standing upon small plots of ground ('tofts') adjoining an enclosed or enclosable 'croft' where the villager cultivated vegetables and fruits.

Two or even three large unenclosed fields surrounded the village. These were the arable lands of the villagers and were cultivated by the villagers according to principles dictated by custom. The fields were divided into large compartments (furlongs) each compartment being further divided into long demarcated strips (selions) of an acre or half-acre in extent. At the head of each compartment, running at right angles to the strips, was an unploughed 'head land' through which access was gained to the strips.

The fields, furlongs and selions were not enclosed by walls, hedges or fences. They are the famous 'open fields' cultivated by the villagers in rotation, one always lying fallow. The crops raised and the order of ploughing, sowing and harvesting are matters decided upon by the village community according to their ancient customs and by communal decision reached in open meeting.

(20) See generally Pollock & Maitland History (i) 605ff.

(21) See generally Pollock & Maitland History (i) 560ff.

(22) Not all English villages were organised according to the system to be described.

(23) See generally Vinogradoff Villainage in England ;
The Growth of the Manor; Corwin & Corwin The Open Fields
 Homans English Villagers of the Thirteenth Century;
 Joan Thirsk 'The Common Fields' (1964) 29 Past and Present 3 et seqq.

Each villager is assigned a determinate number of acres in the common fields, the acreage consisting not in a separate block of land but rather a number of selions more or less randomly scattered about the fields and intermingled with those of the other villagers. The villager cultivates his strips and reaps their harvest. After harvesting the field becomes a common pasture for all the cattle in the village who are turned into it to browse upon the stubble.

Adjoining the fields were the village meadows.⁽²⁴⁾ These lands, usually situate on the banks of a water-course, like the fields were divided into selions. Here hay was grown. During the growing season temporary enclosures in the form of hedges (hayae, sepes) or low stone walls (fossata) were erected about the strips. After the hay was cut these enclosures were removed and the village cattle were pastured on the meadows.

Surrounding the village, its meadows and fields, was an area of wild uncultivated waste land of forest,⁽²⁵⁾ moor or swamp. This waste was the common land of the village and constituted an important resource from which the villagers obtained turf, bracken, brush-wood, thatching grass, timber, sand, clay, food-stuffs.⁽²⁶⁾ It was also a summer pasture for the live stock of the village.

(24) See D M Stenton English Society in the Early Middle Ages 126-7; H S Bennett Life on the English Manor 55-6.

(25) Under feudal law a forest might be the peculiar personal property of the king. This happened if the king declared a tract of land to be a royal forest. The effect of doing so was to diminish the rights of the owner of the land to hunt thereon or to cut the timber, disturb the coverts, or to pasture animals upon it or otherwise exploit it. The forest fell under forest law enforced and upheld by the king's officers. See D M Stenton English Society in the Early Middle Ages 100-122. The leading treatise on forest law is J Manwood A Treatise of the Lawes of the Forest (1615). See also G J Turner's introduction to Select Pleas of the Forest (13 Selden Socy)

(26) See H S Bennett Life on an English Manor 59-60.

The waste was common land. The villagers enjoyed it in undivided shares, ancient custom prescribing the manner and extent of their enjoyment.⁽²⁷⁾

The open field system of agriculture can be seen to be a highly complex method of distributing land resources. Under it the villager shares the land and its resources in a way that precludes any individual from obtaining the exclusive use or control of any particular resource. Rather all men share equally in the land, the scattering of the selions ensuring that men share both good and poor soil, the common rights in the common waste providing equal access to the totality of resources to be found there.

However underlying this scheme of things is a conception of individual ownership of lands. In the theory of feudal law the villager who is a 'free-holder'⁽²⁸⁾ has a separate and exclusive title to his land.

His holding is a tenement and a tenement is a complex of things corporeal and incorporeal.⁽²⁹⁾ The corporeal part of a tenement is the villager's toft and croft and his acres in the fields. The incorporeal part of a tenement are the

(27) Thus custom prescribed that they might only pasture beasts 'levant et couchant' there, a rule which excluded some types of animals such as goats: see Vinogradoff Villainage in England 262. In time the various interests which custom afforded the villager would be separately identified under the generic rubric 'rights of common': common turbary (the right to dig turf) common of piscary (right to fish) common of pannage (right to send pigs onto the waste to feed) common of estovers (right to take wood) and the all-important common of pasture (right to turn out beasts levant et couchant). See generally Digby Real Property 191ff.

(28) In medieval society men were either free or unfree. The unfree were in the nature of slaves, being bound to the lord of the manor and labouring upon his desmesne lands. They did not thus come within the scheme of things described above which applied exclusively to those who were free men and thus entitled to occupy those village lands which were not part of the lord's demesne. The free men obtained their land by grant from the lord of the manor by a process known as livery of seisin (see Digby Real Property 146ff) and they held it in return for certain services due to the lord, these services being of a different type according to the particular degree of freeholding involved. See Digby Real Property 49, 136ff; Pollock and Maitland History (i) 356ff.

(29) See Pollock and Maitland History (ii) 148 who wrote that

villager's interests in the common waste of the village and his easements.⁽³⁰⁾ The villager thus has legal rights which entitle him to exclude others from his toft and croft or his acres in the field and meadows and which entitle him to demand that he be allowed access to the common and to take from it whatever the law or ancient custom regards as the incidents of the rights in the common waste.⁽³¹⁾ In the

(29) (Continued)

the word 'tenement' 'first came into use for the purpose of comprising meadows, pastures, woods and wastes, for at an early time the word terra will hardly cover more than arable land. But tenementum will also comprise any incorporeal thing which can be holden by one man of another'.

(30) Easements were the common law analogue of the Roman praedial servitude. The concept was known in the twelfth century though only vaguely. As Maitland put it, the common law 'is as yet vaguely liberal about these matters. It does not make any exhaustive list of the only 'praedial servitudes' there can be. Men are very free to strike what bargains they please....' (Pollock and Maitland History (ii) 145). Except for rights of way and rights to water 'medieval law did not have much experience of easements' (Simpson Land Law 101) the focus being mainly on rights of common. For the medieval learning on 'servitudes' see Bracton f220 (in Digby Real Property 185ff). An easement is however an incorporeal right of property and attaches to a tenement as such Pollock & Maitland op cit ibid.

(31) '... the free holder's right of common is his several right, as much his several right as is his tenancy of his house.... The individual free holder addresses his lord and his fellows:- 'True it is that the waste is superabundant; true that I am only entitled to turn out four oxen on it; true that were half of it enclosed I should be none the worse off ... nevertheless I defy you to enclose one square yard; I defy you severally; I defy you jointly; you may meet in your court; you may pass what resolutions you please; I shall contemn them; for I have a right to put my beasts on this land and every part of it; the law gives me this right and the king protects it': Pollock and Maitland History (i) 622-3. On the other hand the lord of the manor was the notional owner of the waste and claimed and exercised the right to enclose it or licence enclosures ('assarts'). The conflict between this right and the older concept described by Maitland in the passage cited above was resolved by the Statute of Merton ((1236) 20 Hen III c 4) which provided that the lord might 'approve' the waste provided he left sufficient common for his tenants and allowed them free ingress and egress. From this grew a distinction between the rights of common as against which the lord could approve and those against which he could not. The former were known as common appendant and were regarded as inseparable incidents of a free tenement. The

(continued on next page)

medieval law a man's incorporeal rights in his property were as much 'things' as were his house and acres and fell to be protected by the same real actions as lay in respect of land itself. (32)

It is from this social and economic milieu that the concept of *nocumentum* emerges late in the twelfth century. It is encountered in various contexts. Sometimes it is seen as a complaint that a free holder has been disturbed or impeded in the full enjoyment of the incidents of his free hold tenure: that, for instance, his passageway from his house to the fields or meadows or waste has been blocked, or impeded or diverted; or that his common right in the village waste has been diminished by enclosures erected thereon; or that his meadow lands have been drowned as a result of the damming up of the village stream or the construction of a pond.

Sometimes the term *nocumentum* is encountered in the context of complaints that a man has been deprived of or impeded in the full benefit of some *ius in re aliena*: that, for instance, he has been prevented from assarting in the waste as he was licensed to do; or that his neighbour who had granted him a right of way over his close had constructed a hedge or wall that made it impossible for his carts to use the way; or that the sheepfold upon his arable land had been interfered with.

(31) (Continued)

latter were known as common appurtenant and were regarded as artificial incidents of a free tenement to be acquired by grant or prescription. The distinction foreshadows that of 'natural' rights of property and *iura in re aliena*. See generally Holdsworth 3 HEL 143-151 and the authorities there cited; Pollock and Maitland op cit 621-2.

(32) See Simpson Land Law 99ff. As he points out the medieval lawyers held that an incorporeal right could be 'possessed' just as could land itself so that a man could complain that he had been dispossessed ('disseised') of his common of pasture or easements just as he could complain that he had been disseised of his arable or croft. As we will see (below 39) this resulted in nuisance remedies being available as much for interferences with incorporeal rights as for interferences with land itself. Indeed it is likely that the *nocumentum* concept evolved to describe disseisins of incorporeals in contradistinction to disseisins of corporeals (below 39).

Sometimes the complaint of *nocumentum* suffered is brought by the lord of the manor in relation to the franchisal rights which he enjoys: that he has suffered some disturbance in the full benefit which he ought to derive from his market, or gallows, or ferry.

In addition to complaints of *nocumenta* arising from the affairs of the manor community we encounter the term *nocumentum* also in the form of complaints that the king's highway has been encroached upon or blocked or diverted or damaged. Or that a bridge has not been maintained in a proper state of repair. The term is also found being used in the context of the law of the forest to express certain types of interferences or disturbances of the forest and the beasts of the forest.

And in the urban area which is London the term *nocumentum* is encountered as a description of infractions of the code of building laws.

This diversity in the connotations attached to the word *nocumentum* is linked to the fact that in the twelfth century *nocumenta* were redressed in different courts having different jurisdictions and functions. In order to obtain a closer insight into the basic nature of the medieval concept of nuisance it is thus helpful and indeed necessary to examine the various nuisance remedies afforded by the various courts enjoying jurisdiction over *nocumenta*.

B. THE NUISANCE REMEDIES

1. Introduction

The early beginnings of the nuisance concept are to be traced in the operations of two types of court: those of the king, the royal courts of justice originally established to administer the king's personal patrimony and royal interests and from which would ultimately develop the common law of England, and the courts of feudal magnates, courts of local jurisdiction applying local custom and local law.

2. Nocumentum in the Royal Courts

The royal courts of justice exercised both civil and criminal jurisdiction and an examination of their proceedings in the twelfth and thirteenth centuries reveals that nocumenta were the subject of proceedings in both of these jurisdictions.

2.1. The Courts of Civil Jurisdiction

2.1.1. The Writ System

The evolution of the common law of England in the royal courts having civil jurisdiction was through the famous 'forms of action' as established under the system of writs that was the foundation of the common law.

Writs were written instructions emanating from the Crown directed to some executive official instructing him to perform certain acts. In time they came to issue in response to some complaint by some suitor to the king. The writ so issued in essence sought to supply some redress to the plaintiff. Our first glimpses of the nuisance concept are provided by writs in which the local official is instructed to take action in respect of the nocumentum complained of and described in the writ.

The early evolution of remedies by way of writ procedures falls into two periods.⁽³³⁾ Between 1066 and 1154 writs issued ad hoc, usually as instances of royal interference in the work of the ordinary courts of local jurisdiction where all litigation not affecting the interests of the Crown was carried on.⁽³⁴⁾ One such type of interference was a form of writ addressed to the sheriff or some feudal lord commanding him to take jurisdiction in a certain matter and to do justice therein.⁽³⁵⁾ There is some reason to believe that during this

(33) F W Maitland The Forms of Action at Common Law 16.

(34) Ibid

(35) Plucknett A Concise History of the Common Law 92.

period most of the cases which involved nuisances were handled by this method under the so-called viscontial writ.⁽³⁶⁾

The second stage of development of the writ system occurs during the reign of Henry II especially in the years 1154-1189.⁽³⁷⁾ During this period a considerable apparatus of writs is developed which becomes available as a matter of course to litigants, each writ having a distinct form and initiating a distinct form of action. In this connection Henry II introduced a general principle that no litigation concerning freehold land could be instituted except under a royal writ.⁽³⁸⁾ This rule brought litigation concerning land within the control of the royal machinery for the administration of justice and, perhaps more important, brought all litigation concerning freehold land under the forms of action established by the writ apparatus.

Under the developed system of writs pertaining in the reign of Henry II and afterwards interests in freehold land were asserted under two main forms of action. First, and earliest, was a form of real action designed to vindicate title in the freehold estate. This so-called Writ of Right (identified by its operative word 'praecipe') was employed not only to protect title to the corporeal thing which was the freehold but also (through a variant form quod permittat) to vindicate such incorporeal interests as the rights of common and other servitudes appurtenant to the freehold.⁽³⁹⁾ Second, and an innovation of Henry II, was a form of possessory action (designated the Assize of Novel Disseisin) designed to effect the rapid restoration of lost possession ('seisin') without enquiry into the matter of title.⁽⁴⁰⁾ This form of action too allowed for the protection of seisin of incorporeal things such as right of common and servitudes.⁽⁴¹⁾

(36) See below 14.

(37) Maitland op cit 17.

(38) Maitland op cit id. Cf Digby Real Property 67-8, 70-76.

(39) See C H S Fifoot History and Sources 3-4.

(40) Generally on the Assize see Sutherland The Assize of Novel Disseisin passim; Loengard Free Tenements Part I.

(41) Sutherland op cit 11-12, 23-4; Fifoot op cit 4-5.

2.1.2. Viscontial Writ

The viscontial writ of nuisance took the form of an instruction to the sheriff of a county to hear a complaint concerning a *nocumentum* and to do justice to the parties.⁽⁴²⁾ It has been argued that at one time all civil proceedings involving *nocumenta* were handled by this procedure and thus that all cases of *nocumenta* were heard by the sheriff sitting in the court of the county.⁽⁴³⁾ However this may be it is clear that by the reign of Henry II the viscontial writ issued only in respect of certain *nocumenta*, namely those involving houses (*domus*) orchards (*virgultum*) mills (*molendium*) sheep-folds (*ovileque*) gates (*porta*) weirs (*gurgites*) ovens (*furna*).⁽⁴⁴⁾

In this connection we are provided with a valuable insight into the nature of the medieval conception of a nuisance. Proceedings under the viscontial writ required a 'count', an oral statement by the plaintiff of the nature of his complaint.⁽⁴⁵⁾ Specimen counts for complaints of *nocumenta* have been preserved⁽⁴⁶⁾ and from these we gain an insight into the circumstances which led men to complain of *nocumentum* caused and suffered.

(42) A thirteenth century specimen of such a writ reads as follows:

'To the sheriff greeting. A has complained to us that B unjustly and without judgment has made a certain house, wall or fishery in such a vill to the nuisance of his freehold in that same vill ... And so we command you that you hear that suit [*quod loquelam illam audias*] and afterwards give the said A a just deliverance therefrom. Lest we hear further complaint for default of justice, etc.'

E de Haas 'An Early Thirteenth Century Register of Writs' (1947) 7 Toronto LJ 196 (cited Fifoot History 17).

(43) G J Turner (ed) Brevia Placitata (66 Selden Socy) cxix. Cf Loengard Free Tenements 183-201 who traces in detail the origin of the viscontial writ of nuisance.

(44) For the source of this limitation of jurisdiction see 35.

(45) See Milsom Foundations 28-30; Pollock and Maitland History (ii) 604-5.

(46) See Milsom (ed) Novae Narrationes (80 Selden Socy).

From these we learn⁽⁴⁷⁾ that a mill might be the subject of a complaint as a nuisance because the defendant erected it near the meadow of the complainant John.

'by reason of which mill he has made a path across this meadow to go to and return from this mill where there never was a path before.'

Alternatively the complaint might be that

'people carrying their grain to be ground at the mill aforesaid with their pack-horses depasture the meadow ... and ... trample down the meadow aforesaid so that whereas he used to mow this meadow twice a year, by reason of this mill he can mow it only once a year, or not at all.

Alternatively the complaint might be that

'by the sluices of this mill the water is so held back, that by this damming the water inundates a great part of the meadow aforesaid so that he cannot have his profit from it as he used to do'

A writ charging a house to be a nuisance⁽⁴⁸⁾ might in fact involve a complaint that the defendant

'has erected a house ... which so overhangs the house of ... John that all the rain which falls on the house of the [defendant] ... runs down on the house of ... John, so that ... John cannot keep his house water-tight or it rots his beams;

or the complaint might be that

'whereas one roofing used to last without being mended for seven years, now by reason of this flooding he must repair it every year';

or the complaint might simply be that the house of the defendant was erected so close to that of the plaintiff

'that no light can enter through his windows'.

A writ complaining of a weir⁽⁴⁹⁾ might involve the charge that

(47) Novae Narrations C106 (80 Selden Socy 202).

(48) op cit C108.

(49) op cit C110.

'Whereas the water used to run strongly to his mill ... by reason of the weir [constructed] ... it flows more slowly than it used, so that whereas his mill ... used to grind during a day and a night forty quarters of wheat, now in a day and a night, because of the nuisance of this weir, it can barely grind five quarters of wheat'.

Or the complaint might be that the construction of the weir has interfered with the plaintiff's right of free fishery so that

'whereas [the plaintiff] ... used ... to make from it one hundred shillings a year, now by the construction of this weir the fish are so hindered from [getting there] that he can make ... only ten shillings a year'.

It is not clear exactly what procedure was followed under the viscontial writ in dealing with the matter complained of. The case was dealt with in the county court to which the free-men of the county owed suit. The wording of the writ could suggest that the sheriff rather than the suitors was to act as the judge in the matter.⁽⁵⁰⁾ On the other hand it might have been the case that the suitors did perform their normal function of adjudicating after an inquisition or recognition⁽⁵¹⁾ and that the sheriff did no more than ensure that they carried out their duty in respect of the matter referred to him by the king.⁽⁵²⁾

2.1.3. Writ of Right: Quod Permittat

A free holder evicted from his tenement could obtain a writ ordering the party in occupation to restore it to him. The seminal writ of right however did not lie where the estate from which the plaintiff was evicted was incorporeal in its nature. Instead of the ordinary writ of right a plaintiff

(50) Pluncknett Concise History 92. Fleta II 43 (72 Selden Socy 148) writing in the thirteenth century seems to support this version of the procedure: '... the sheriff when jurisdiction is delegated to him by writ ... he, and not the suitors of the county is ordered to cause justice to be done'. (148)

(51) Bracton *f* 233b seems to suggest this.

(52) See G J Turner (ed) Brevia Placitata (66 Selden Socy) xliv.

who complained that he had been evicted from his common of pasture or some servitude he enjoyed over another's land was awarded a variant writ of the praecipe type. The writ ordered the defendant that he permit (quod permittat) the plaintiff to have his pasture, or right of way.⁽⁵³⁾

The quod permittat writ might itself be varied so that where a plaintiff complained that he was deprived of his common of pasture or his servitude, as the result of some wall or fence or hedge or other obstacle which prevented the actual enjoyment of the right, the writ might order that the defendant permit the plaintiff to abate the obstruction (quod permittat prosternere murum).

Since, as we will see, wall, hedges and other things which interfered with incorporeal rights were designated as nuisances, the writ quod permittat in its variant forms amounted to an important species of nuisance remedy.⁽⁵⁴⁾

2.1.4. Writ of Nuisance

Undoubtedly the most significant of the original remedies for the redress of nocumenta was that provided by the writ for initiating the process known as the Assize of Nuisance.

The Assize of Nuisance⁽⁵⁵⁾ only emerged as a separate and distinct remedy for nuisance in the middle of the fourteenth century⁽⁵⁶⁾ (and then at a time when it was in the process of being supplanted by the remedy by way of the

(53) See the specimen writ given by Glanvil 12.14:

'The King to the sheriff greeting. I command you that without delay you command R that justly and without dealy he permit H to have his easements in the wood and pasture of such a vill which he ought to have; and that you do not permit the aforesaid R ... to do him in this regard molestation or injury'.

(54) See Fifoot History and Sources 4; Baker An Introduction to English Legal History 236.

(55) Strictly speaking the Assize is the procedure initiated by the writ. It is convenient however to speak of both the writ and the procedure under the compendious title Assize of Nuisance.

(56) See below 31-4.

Action on the Case for Nuisance).⁽⁵⁷⁾ Its origins however go back to the twelfth century and from that time it afforded a particular and special process for the redress of nocumenta.

What in the fourteenth century would be called the Assize of Nuisance had its origins in the possessory action introduced in the reign of Henry II under the name of the Assize of Novel Disseisin.⁽⁵⁸⁾ This remedy, in many ways analagous to the Canon Law Actio Spolii, was designed to achieve rapid and effective redress for free holders unlawfully despoiled of their possession (seisin) of their free hold tenement.⁽⁵⁹⁾

As such it would seem to have no necessary connection with nocumenta. However the first book on the common law of England - the book called Glanvil⁽⁶⁰⁾ - tells us that the writ for obtaining restitution of possession under the Assize of Nuisance is 'varied in diverse manner',⁽⁶¹⁾ and illustrates the point by citing a specimen writ in which the plaintiff complains not of a disseisin (dissaisina) but rather of a nuisance (nocumentum)⁽⁶²⁾

(57) See below 58.

(58) For discussions of the Assize of Novel Disseisin see the works cited above n 40.

(59) Cf Maitland The Forms of Action 22-3; Sutherland The Assize of Novel Disseisin 20-26.

(60) Tractatus de Legibus et Consuetudinibus regni Angliae (circa 1187) said to be the work of Ranulf Glanville justicar to Henry II. See Pollock and Maitland History (i) 162-3; Holdsworth 2 HEL 188-192.

(61) Bk 13 cap 34.

(62) op cit cap 35:

'Rex vicecomiti salutem. Questus est mihi N: quod R. iniuste et sine iudicio levavit quoddam fossatum, vel prostravit, in illa villa ad nocumentum liberi tenementi sui in eadem villa post ultimam transfretationem meam in Normaniam. Et ideo praecipio tibi quod si praefatus N. fecerit te securum de clamore suo prosequendo, tunc facias duodecim liberos, etc. videre fossatum illud et tenementum, et nomina eorum imbrevari facias. Et summane per bonos summonitores, etc., ut prius.'

'The King to the sheriff greeting. N. has complained to me that R. unjustly and without a judgment has set

It is not clear how this development came about.⁽⁶³⁾
 It seems likely however that the idea that men might seek redress from nocumenta via the procedure and process of the Assize of Novel Disseisin was contemplated by those who drafted the constitutio⁽⁶⁴⁾ which introduced the Assize of Novel Disseisin.⁽⁶⁵⁾

But be this as it may, it is clear that from 1166 there existed a version of the Assize of Novel Disseisin (which could be distinguished as the Assize of Novel Disseisin for Nocumenta) which entitled men to complain of wrongs which were designated as nocumenta and which were redressed by essentially the same process as was employed to redress disseisins.

(62) (continued)

up, or thrown down, a certain dyke in such a vill to the nuisance of his freehold in the same vill since my last crossing into Normandy. And so I command you that, if the aforesaid N. shall give you security for pursuing his claim, you shall then cause twelve free, etc. to view that dyke and freehold, and shall cause their names to be put in the writ. And summon by good summoners, etc., as above.

(63) The problem is discussed at length by Loengard Free Tenements 173-183.

(64) The actual origins of the Assize are obscure. Bracton said that it had been 'thought out and invented through many wakeful nights' (f 164b) and the evidence is that this occurred no later than 1166, the process being created by an enactment (constitutio) which is now lost to us. See Pollock and Maitland History (i) 145-6; R C van Caenegem Royal Writs in England from the Conquest to Glanvil (77 Selden Socy), Sutherland op cit 5-9.

(65) Loengard op cit 150 suggests 'that the offence later called nuisance was provided for specifically, although not by that name, in the Assize of Novel Disseisin'. She does not accept that the variant writ given by Glanvil was the result of judicial extension of the original offence of disseisin: See at 181-183. Cf Sutherland op cit 11 '... the assize was directed from the first against nuisances as well as disseisins.' He cites cases from 1166, 1167 and 1168 brought under the Assize which are all instances of what would later be regarded as nuisances : see at 11-12.

In this form the assize was a central feature in the development of the concept of nuisance during the late twelfth and the thirteenth centuries. The main development occurred both in the application of the procedures by which nocumenta were redressed and by a subsidiary process which began in the thirteenth century and involved the gradual differentiation of dissaiana and nocumenta ultimately leading to the recognition, in the mid-fourteenth century, of the Assisa de Nocumento as a remedy separate and distinct from the Assize of Novel Disseisin.⁽⁶⁶⁾

2.1.5. Other Writs

Towards the end of the twelfth century a new form of writ began to appear. It summoned the defendant to appear and show why ('ostensurus quare') he had done something. This form of writ was important since from it developed the concept of trespass and with it the whole branch of the common law of torts.⁽⁶⁷⁾ Originally the quare writs were very flexible and seem to have issued in a number of cases involving nocumenta. This practice may have arisen because for some reason or another the assize would not lie.⁽⁶⁸⁾ They are encountered also in respect of actions brought for nuisances done to franchisal rights⁽⁶⁹⁾ and in relation to actions for easements.⁽⁷⁰⁾

(66) These developments are traced in Chapter 2 below.

(67) See Plucknett Concise History 366. Cf Fifoot History and Sources 53-4; Milsom Foundations 211-12, 259. See also Milsom (1958) 74 LQR 195.

(68) Cf Woodbine 'Origins of the Action of Trespass' (1925) 34 Yale LJ 344-8. Cf Loengard Free Tenements 313 who notes the 'numerous cases found in the plea rolls which begin simply the "X has been summoned to show wherefore" he did a specified act to the nuisance of Y's free tenement. They are uncategorized quare writs, used for nuisance where an assize could not be - or perhaps simply was not - brought'.

(69) The earliest examples of the use of the writ for this purpose are from the thirteenth century: 'quare mutavit mercatum suum de Sidemue sine licentia domini regis ... et levavit illus ... ad nocumentum vicinorum mercatorum' (1220); 'quare levavit quandium feriam ... ad nocumentum burgi sui' (1228); 'quare levavit quoddam mercatum ... ad nocumentum mercati sui' (1233). See S F C Milsom Novae Narrationes (80 Selden Socy) c

(70) Loengard op cit 423ff.

2.2. Courts of Criminal Jurisdiction

More or less contemporaneously with the emergence of writs for the redress of *nocumenta* there sprang up a practice of pursuing certain *nocumenta* - mainly those involving the diversion obstruction or narrowing of ways - in the court of the sheriffs' tourn.

Among the duties of the medieval sheriff was that of undertaking a bi-annual progress, or turn ('toun'), through the 'hundreds' of his county.⁽⁷¹⁾ Initially the purpose of the turn was to examine the workings of the police system known as the frankpledge⁽⁷²⁾ and to hear pleas of the crown.⁽⁷³⁾ When acting in this way the sheriff was the representative of the king and the court held during the turn was thus a royal court exercising the royal jurisdiction of the crown to preserve and enforce public peace and order.

The work of the tourn was carried out through a series of inquisitions. The men of the villages within each hundred were summoned to attend the court. There there was read to them a set of inquiries, the 'articles of the view', designed to establish whether the frankpledge was operating properly, and to elicit accusations against persons guilty of crimes and misdemeanours.⁽⁷⁴⁾ These accusations were made by a

(71) See generally Holdsworth 1 HEL 76-82.

(72) A police device involving a system of compulsory collective bail imposed upon groups of men ('tithings') to stand surety for the good behaviour of each other. All men were required to be enrolled in tithings and the original purpose of the tourn was to ensure that the system was working properly. See generally Holdsworth 1 HEL 13-15; Pollock & Maitland History (i) 568-571, 580-1.

(73) Pleas of the crown originally denoted royal business concerning the king's estates revenues and the administration of his justice. This work was assigned to the sheriff (or vice-comes). Later these powers were considerably reduced. (Cf cap 24 of Magna Carta and the commentary thereon by McKechnie Magna Carta at 304-321).

(74) For the workings of the tourn see the authorities cited in note 72 above.

jury comprising men of the district who were required upon their knowledge to 'present' to the sheriff such individuals who had transgressed against the code of conduct which was the articles of the view.⁽⁷⁵⁾

Individuals so presented were either remanded for trial before the king's justices (in the case of grave offences) or were summarily punished by the sheriff (in the case of lesser offences) by a fine or some other penalty (excluding imprisonment).⁽⁷⁶⁾ These proceedings if not criminal in the strictest sense, certainly were criminal in their nature and fell to be classified as such.

What is significant about this is that we discover among the articles of the view provisions calling for the presentment of conduct which we recognise as being substantially identical to conduct which is redressed in the civil courts by writs of nuisance. Thus the Statute of Wales (1284) which is a codification of the articles of the view,⁽⁷⁷⁾ includes among the matters requiring presentment

De cursu aquae diverso
De via obstructa vel restricta vel arcatata
De muris, domibus, portis, fossatis et marlebis
levatis
et factis juxta iter publicum ad nocumentum ipsius
itineris et in periculum transeuntium de predicta
levatibus et faciendis.⁽⁷⁸⁾

(75) The jury of presentment was an innovation of the reign of Henry II brought about by the Assize of Clarendon (1166) (for this enactment see Stephenson and Marcham 1 Sources of English Constitutional History (1972) 76). See Hurnard 'The Jury of Presentment and the Assize of Clarendon' (1941) 56 E H R 374.

(76) The penalty which the sheriff might impose was, in essence, a fine. Technically the fine was known as an 'amerciament' (ie that the person presented was in the king's mercy and thus that his movable property was forfeit to the Crown; the forfeiture could be avoided by the payment of a sum of money termed an 'amerciament' (see McKechnie Magna Carta 285-294)). The amount of the fine was fixed ('affeered') by the jury of presentment.

(77) See F J C Hearnshaw Leet Jurisdiction in England (1908) 23 for a discussion of this statute.

(78) Cf Britton 1.30.3 (circa 1290).

Of waters stopped or narrowed or turned from their
course;
Of roads stopped, narrowed or turned;
Of boundaries removed or wrongfully altered;

(continued on next page)

It is difficult to now trace in detail how it came about that these nocumenta came to be included in the articles of the view.⁽⁷⁹⁾ However we do have a clue which enables us to speculate with some confidence how this practice grew up. The clue lies in the medieval concept of the purpresture.

Purprestures

Purpresture is a word of French origin denoting an enclosure. Its earliest usage seems to have been to describe encroachments (assarts) upon the royal demsne lands. As such they constituted an invasion upon the royal patrimony and called for redress by officials of the Crown who either

(78) (continued)

Of walls, houses, gates, marl-pits, ditches or other nuisances [on autres destourbences] raised or made in any common way to the annoyance [a la nuisance] of the same way and to the danger of passengers; ...'

See too Fleta 2.52 (72 Selden Socy 176) (also circa 1290).

... concerning waters diverted from their courses or stopped. Also concerning dykes, walls, causeways, ponds and the like which are erected, knocked down or set up to the nuisance. Also concerning roads and paths wrongfully stopped or narrowed.

(79) Neither Glanvil (circa 1180) nor Bracton (circa 1250) make any mention of the articles of the view. On the other hand both Britton and Fleta (circa 1290) give lengthy accounts of the articuli de visu franciplegii (see above note 78). The earliest version of a statement of articuli dates from circa 1269 (see 'Articuli Intrandi' in F W Maitland (ed) The Court Baron (4 Selden Socy at 71). This seems to date the practice of drawing up articles of the view to the reign of Edward I. See Hearnshaw op cit 23ff.

caused them to be removed or who allowed them to remain upon payment of a fee.⁽⁸⁰⁾

But the royal domain included also such 'public'⁽⁸¹⁾ facilities as the great 'royal' highways,⁽⁸²⁾ navigable waters⁽⁸³⁾ and encroachments upon these were also classified

(80) The twelfth century Dialogus de Saccario explains the purpresture thus: 'It happens sometimes through the negligence of the sheriff or his officials and also through the prolongation of a time of war that those dwelling near estates known as crown lands encroach upon some portion of the latter and treat it as their own property. When therefore the itinerant justices acting upon the oath of lawful men, have siezed such lands, they are valued separately from the 'farm' of the county...; these we call 'purprestures' or encroachments. When such lands are siezed, they are taken as has been said, from those in possession, and thereupon fall to the Treasury. But if the same man from whom the purpresture is taken by the doer of the deed, then at the same time he shall be punished by a heavy fine, unless the king pardon him.'

In London encroachments upon the streets and highways were regarded as purprestures and suppressed or allowed to stand on payment of a fine to the king. Cf G A Williams Medieval London 200. The oldest record of this dates from 1244: See H M Chew and M Weinbaum (eds) The London Eyre of 1244 at ix and passim.

(81) Cf above 2..

(82) See note 87 below.

(83) The law on navigable waters at this time is obscure. Bracton f8 wrote: 'All rivers and ports are public ... The use of ... the river itself, is also public ... consequently everyone ... is free to navigate the river'. This seems to be more Roman law than English law and hardly reflects the state of the law at the time. See T E Lauer 'The Common Law Background of the Riparian Doctrine' (1963) 28 Missouri LR 60 at 66. The actual position seems to be that navigable waters were at the time much obstructed by objects and structures ('kyddels', weirs, fish-garths) placed for purposes of capturing fish. Magna Carta (1215) contained a chapter calling for the removal of obstructions from "Thames and Medway, and throughout all England" (see McKechnie Magna Carta 343-6). (Generally on the state of rivers in medieval times see Flower (ed) Public Works in Medieval Law (32 Selden Socy)(vol 1); 40 Selden Socy (vol 2). See also Leconfield v Lonsdale (1870) LR 5 CP 657 at 644ff. The machinery for keeping the rivers navigable seems to have been chiefly developed in the fourteenth century (1 Public Works xxviii and see Murphy 'English Water Law Doctrines Before 1400' (1957) 1 Am J Legal History 103 at 110) when the process of presentment by juries was most actively resorted to (Murphy op cit 133-118).

as purprestures. (84)

The fact that a purpresture was an interference with the regalia clearly brought it within the jurisdiction of the king's courts. (85) And in the case of the purpresture upon the king's highways, it seems that the appropriate court for dealing with such a purpresture was the court which entertained the pleas of the crown. The pleas of the crown were the source of what was to become the criminal law of England (86) and the reason why purprestures against the highways were assigned to these courts of criminal jurisdiction was because, in medieval eyes, they involved a breach of the king's peace. The notion of a purpresture as a breach of the king's peace flowed not from the quality of the act which made up the purpresture but rather from the fact that the king's highway was traditionally a place especially under the 'peace' of the king. (87)

(84) 'A purpresture ... is when any thing is unjustly encroached upon, as against the king; as in the royal desmesnes, or in obstructing public ways, or in turning public waters from their right course; or when anyone has built an edifice in a city upon the king's street'.

Glanvil 13.34

Encroachments in royal forests were also dealt as purprestures but under the special provisions of the forest law. See G J Turner (ed) Select Pleas of the Forest (13 Selden Socy lxxx).

(85) Glanvil loc cit: '... generally speaking ... the suit belongs to the king's crown'.

(86) Milsom Foundations 354.

(87) Stenton English Society in the Early Middle Ages 257: 'From early times English kings had been interested to protect those who used the roads along which royal authority ran. Four roads in particular, Watling Street, the Fosse Way, the Icknield Way, and Ermine Street were in the peace of the king This conception of the king's peace running on a high road had spread by the twelfth century to cover all the land, but highroads still retained some special flavour of majesty. Custom had laid it down that the highway should be so wide that two loaded carts could pass each other ... that 16 knights fully armed could ride abreast. Encroachment on the king's highway must be reported to his judges ... so that the land thus taken could be restored to the road.' See also C K Allen The Queen's Peace 14-15.

The point to all of this is that however purprestures were defined men tended to indentify them with nocumenta.⁽⁸⁸⁾ Indeed what was a purpresture when perpetrated against the king's desmesne land was a nocumentum when perpetrated against the lands of a free holder. Further, since the obstruction or diversion of a village path, lane or way was clearly a nocumentum for which assize or viscontial writ might lie there was no difficulty in conceiving the obstruction or diversion of a royal highway as being nothing other than a nocumentum.⁽⁸⁹⁾

In this way, it would seem, the articles of the view, no doubt originally intended to deal with purprestures on the royal highway, came to speak of nocumenta in the highway and thus to draw the civil wrong of nuisance within the ambit of the emergent criminal law.

It is clear however that these instances of nocumenta punished by criminal process were not originally seen as a form of 'public' nuisance. Nocumenta were punishable where they involved an encroachment upon royal interests in the highway. Where a nocumentum affected an entire community but did not impinge upon royal interests then the remedy was by way of the assize and not by way of any criminal prosecution.⁽⁹⁰⁾

(88) Thus Glanvil loc cit supra wrote: '... generally speaking whenever a nuisance is committed affecting the king's lands, or the king's highway, or a city, the suit belongs to the King's Crown'.

(89) Indeed the same act might simultaneously constitute a nocumentum and a purpresture. Thus a man who raised the level of his mill pond might not only flood his neighbour's meadows but might also flood the nearby king's highway. The Assize jurors were inclined to report that the defendant's actions had caused a nuisance to the freeholder and a purpresture 'on the lord king'. See Rolls of the Justices in Eyre ... (1221-1222) (59 Selden Socy) 181.

(90) See Loengard Free Tenements 240-244 who cites cases establishing that prosecutions brought for nocumenta done to highways would not lie if the highway was not the king's highway and that constructions which were not only ad nocumentum liberi tenemento but, as one jury expressed it (Loengard op cit 244-5)

'Similiter ad nocumentum omnium nominum manerii in eadam villa'

could not be redressed except by the Assize brought by one of the affected individuals.

3. Nocumentum in Courts of Local Jurisdiction

A survey of the judicial origins of nocumenta would be incomplete without some mention of its incidence in courts exercising a local or private jurisdiction.

3.1. Court Baron

The Court Baron was the court of the manor.⁽⁹¹⁾ It seems likely that at one time this court would have exercised a jurisdiction in respect of nocumenta or, at least, activities of the sort that would be designated as nocumenta in the royal courts. The evidence for this lies in the by-laws made for a village and enforced in the manor court,⁽⁹²⁾ which seem to have regulated and redressed the type of wrongs⁽⁹³⁾ which would be considered nocumenta in the royal courts.

3.2. Borough Courts

Certain towns and ports attained the special status of borough which among other things entitled them to hold their own courts.⁽⁹⁴⁾ The law applied in these courts was a form of local custom distinct and distinguishable from the common law of the royal courts.⁽⁹⁵⁾

What is significant about all this for a study of nuisance is that borough custom provided another, albeit subsidiary, source for the evolution of a nuisance concept. This

(91) See above 4.

(92) See W O Ault 'Some Early Village By-Laws' (1930) 45 EHR 208

(93) Thus one such by-law provides that 'No-one shall have egress from his close over another man's land; and if his egress be over his own land he shall save his neighbour harmless'. Another states 'No-one shall make paths to his neighbour's damage by walking or driving [beasts] or by carrying grain, be it by day or night or by other time'. Ault op cit 220-1.

(94) On the evolution of boroughs see Pollock & Maitland History (i) 643ff; Maitland Domesday Book and Beyond 213-263 Holdsworth 1 HEL 30-31, 138ff; Webb Manor & Borough 127ff and passim.

(95) See Holdsworth 3 HEL 269ff; M Bateson (ed) Borough Customs (18 Selden Socy (vol 1), 21 Selden Socy (vol 2)).

is of particular interest since it is in the boroughs and thus in borough customs there emerged a version of nuisance which reflected the circumstances and needs of urban existence and thus something rather different to the essentially agrarian concepts of nuisance emerging in the Assize and County.

The evidence of the existence of borough custom concerning nocumenta dates from about the turn of the twelfth century.⁽⁹⁶⁾ The custom of London⁽⁹⁷⁾ is derived from a set of regulations for settling disputes between neighbours concerning buildings and boundaries which, according to tradition, were first enacted in 1189. It is likely that this set of regulations preserves older custom but it is not possible to be certain about this.⁽⁹⁸⁾

The London Assize of Nuisance

It is not necessary for our purposes to explore in any detail the customs established in various boroughs for dealing with nocumenta. We may thus content ourselves with examining the Assize of Nuisance of London, probably the archetype of the custom of other places.

The London custom concerning nocumenta is based on a set of building by-laws, said to have been enacted in 1189.⁽⁹⁹⁾ These regulations were aimed at protecting the city from the

(96) See Bateson op cit vol 1 244ff.

(97) See H M Chew and W Kellaway (eds) London Assize of Nuisance.

(98) See below.

(99) The set of building regulations entitled the Assissa de Edificiis are said to have been enacted in 1189 (see Chew and Kellaway op cit ix-xi). About these regulations grew up a procedure for their enforcement which came to be known as an assize of nuisance. The London Assize of Nuisance would seem to post-date the creation of the Assize of Novel Disseisin (Chew and Kellaway suggest it to be at least as old as the late twelfth century (op cit xii)) and we may assume that it was modelled after the Assize process of the royal courts. The significant difference lies of course in the nocumenta redressed by this assize process. They were not the nocumenta of the Assize of Novel Disseisin for Nuisance but rather derivations from the Assissa de Edificiis as developed and elaborated under the customary law of the city. See further below 29-30.

scourge of fire and thus in large part were concerned with prescribing the materials from which structures should be built. The Assissa de Edificiis however also contained provisions to 'calm dissensions' and provide that 'whenever disputes arise between neighbours in the city concerning fences made or to be made between their lands, or the like, such disputes shall be settled according as was then provided and ordained.'

What had been provided and ordained was that a landholder with a complaint should bring it to the Husting. There a day would be set down (usually within the following week) for hearing the complaint. The hearing was by an assize of twelve aldermen, elected in Hustings, under the presidency of the mayor. On the appointed day this assize went to the site of the complaint and viewed it. The plaintiff would explain the ground of his complaint and the defendant (previously summoned) might defend himself. The assize might summon a jury of neighbours to advise it on the matters of dispute and, from the fourteenth century at least, there might be summoned professional 'viewers' - masons and carpenters - to give expert opinion on technical matters.

The assize pronounced a verdict. If the plaintiff failed he was liable to be amerced. If he succeeded the defendant was ordered, within forty days, to rectify the nuisance. Default might lead to amercement and the sheriff would be ordered to terminate the nuisance at the defendant's expense. (100)

The nocumenta which came within the scope of the Assize⁽¹⁰¹⁾ involved basically walls, gutters, windows, pits and paving. The Assisa de Edificiis contained lengthy and often elaborate instructions as to how and where walls, gutters, pits and so on were to be constructed, and many disputes involved an interpretation and application of these regulations. But men might also complain in more general way concerning these matters: that a wall encroached or overhung lands, or was ruinous and dangerous, or was being damaged

(100) See Chew and Kellaway op cit xii-xx.

(101) op cit xx-xxvi.

by things piled against it or by water discharged upon it. Complaints about gutters and the drainage of surface waters in a way which damaged houses and gardens were common, as were complaints of the drainage and injury caused by cess-pits, rubbish-pits and privies. Windows too were complained of if they allowed invasions of privacy or because refuse and wastes were thrown from them, or odours and stench escaped through them.

C H A P T E R T W O
DEVELOPMENT (1300-1600)

A. THE RISE AND DEMISE OF THE ASSIZE OF NUISANCE

I. The Assize of Nuisance

1. Introduction

For a period dating from 1166 until the seventeenth century the premier (though by no means only) remedy for the redress of nocumenta was the Assize of Nuisance.

The remedy has a central significance in a study of the history of the evolution of the law of nuisance. It was under the regime of the assize that a basic structure of the concept of nuisance was evolved. The main components of the concept were shaped by the writ by which the assize was set in motion, while a concurrent development, in the form of a movement by which the idea of nocumentum was separated and differentiated from that of disseisin sharpened and illuminated these basic structural elements.

2. The Rise of the Assize of Nuisance

We have seen that there existed from earliest time a form of the writ for an assize of novel disseisin by which the plaintiff could allege not that he had been disseised of his free tenement but rather that he had suffered a nocumentum to his free tenement.⁽¹⁾ But what the original point of distinction was, what it was that determined when a man would seek the nocumentum form of the writ rather than the disseisin form, or vice versa,⁽²⁾ cannot be established.⁽³⁾ It seems that nocumentum was regarded as being merely a form of disseisin⁽⁴⁾ though, paradoxically, the justices and jurors simultaneously treated them as distinct conceptions.⁽⁵⁾

(1) Above 18-19.

(2) The whole question is discussed at length by Loengard Free Tenements Part III.

(3) See Loengard op cit 330-6.

(4) 'Disseisin ... meant ejection from a tenement or troubling of possession; it meant preventing the use of a common right; it meant creating a nuisance': Loengard op cit 339.

(5) '... at no time was nuisance referred to simply as a disseisin....': Loengard op cit 340.

This meant that before the early decades of the thirteenth century the jurists did not think in terms of an assize 'of nuisance'; rather they thought of the assize of novel disseisin whose writs might vary in their terminology to fit the circumstances of the case.⁽⁶⁾

The first indications of a more discriminating approach and thus of the beginnings of a distinct concept of nuisance are to be found in a case of 1216⁽⁷⁾ where a plaintiff alleged that a ditch obstructing a way disseised him of his free tenement and was a nuisance to it. The jurors reported that the ditch did not work a disseisin but that it was ad nocumentum.

Although this case suggests no more than that a jury had refused to regard a nocumentum as being simply a disseisin by another name, it does mark the beginning of a process of separation and differentiation of nocumenta and disseisins.

That this process was fairly well advanced is suggested by a case in 1235.⁽⁸⁾ The plaintiff brought the Assize in the nocumentum form complaining of a ditch raised to the injury of her tenement. The jurors reported that the ditch 'occupied' the tenement of the plaintiff 'in one place about a foot and in another about two feet.' The justices dismissed the action advising the plaintiff to 'seek her writ of novel disseisin if she wishes'. What this means is that the Assize

(6) Cf Glanvil 13.34 who in introducing the writ for nocumenta (see above 18) wrote that the 'writs of Novel Disseisin are varied in diverse manner according to the diversity of the tenements on which the disseisins take place'. Cf Loengard op cit 349.

(7) The case is in 4 Curia Regis Rolls 358 and is cited and discussed by Loengard op cit 351-2.

(8) The case is cited by Loengard op cit 389 as follows:

The assize comes to say if Mathew de Legiber unjustly etc. raised a certain ditch in Lasseford to the nuisance of the free tenement of Eva who was the wife of William le Bretin in the same vill etc. And Mathew came and said nothing whereby the assize should stand over. The jurors said that the said Mathew had in fact raised the said ditch and occupied the land of the said Eva in one place about a foot and in another about two feet. Wherefore they said that he raised that ditch to the nuisance of the said Eva. For that reason it is considered that Eva take nothing by this assize and be in mercy for false claim and let her seek by a writ of novel disseisin if she wishes.

in the nuisance form failed because, as the jurors found, the ditch amounted to a disseisin. For this reason the justices suggested the plaintiff should seek relief by the Assize in its 'disseisin' form. The implication of this case is that the justices saw a very clear distinction between nocumentum and disseisin or, in other words, saw nocumentum as being something else than a species of disseisin.

These somewhat enigmatic decisions were leading to the adoption of a fairly precise point of distinction. In the years after 1235 there is evidence of a growing practice of distinguishing nocumenta and disseisins by reference to the locus of the thing which was the subject of the writ. If it was situate upon the land of the plaintiff the writ for disseisin was appropriate; if it was situate on the land of the defendant the writ for nocumentum was the proper mode of proceeding.⁽⁹⁾

This test was institutionalized by Bracton in the mid-thirteenth century when he wrote:

'... if the level of a pond or weir be raised or lowered so as to cause an injurious nuisance, it must be seen whether this is done wholly on the tenement of the complainant.... In this case there will be a disseisin of his freehold rather than an assize of nuisance. But if it be raised or lowered wholly on the defendant's tenement, then there will be an assize of nuisance rather than a disseisin of the freehold, since the act is done wholly on another's land.'⁽¹⁰⁾

(9) The emergence and growth of this practice in the cases is traced by Loengard op cit 381-394. Her conclusion is that 'by the 1230's there was a recognisable split between novel disseisin for free tenement and nuisance and that the distinction made between the two assizes frequently turned on the ownership of the land on which the offensive action took place. If one tore down a barrier on one's own land and allowed one's cows to eat a neighbour's grain, it was nuisance. If one tore down the barrier five feet away on the neighbour's land and sent the same cows over to pasture it was novel disseisin': op cit 395.

(10) f 234b (see Fifoot History and Sources 21)

The 'locus' test of course reflects an emerging concept of nuisance; that it is something other than a form of trespass upon another's land. It is rather another species of wrongful act characterized by a user of the defendant's land.⁽¹¹⁾ And it marks the emergence and recognition of a distinct form of remedy to be known in future as the 'Assize of Nuisance' rather than as the 'Assize of Novel Disseisin for nuisance'.⁽¹²⁾ This happened only gradually. Fifoot notes that it 'was with reluctance ... that Nuisance was divorced from the context of Disseisin'.⁽¹³⁾ He shows that although at the end of the thirteenth and the beginning of the fourteenth centuries lawyers 'spoke readily enough of 'Writs of Nuisance'' they were not always consistent in applying the test for differentiating the two types of Assize. It was only in the mid-fourteenth century that a clear and consistent policy of treating Nuisance as something distinct from Disseisin finally prevailed.⁽¹⁴⁾

3. The Assize Process

The assize process as developed in relation to recent disseisins was essentially a judicial device for restoring a freeholder to possession (seisin) of his free tenement. In its nocumentum form it operated to bring about the removal or abatement of some thing which caused 'nocumentum' to the free tenement.

(11) Cf Pollock & Maitland History (ii) 53: 'To meet that troubling of possession which is caused by nuisances as distinguished from trespasses, that is, by things that are erected, made, or done, not on the soil possessed by the complainant but on neighbouring soil, there has all along been an 'assize of nuisance'...'

(12) Cf Loengard op cit 355 who from an examination of cases concludes that by 1290 'there were two different assizes with not only two different writs but also two different functions, based on two different sets of jurisdictional requirements and not interchangeable. If a plaintiff was confused and brought the wrong writ, that was his hard luck'.

(13) History and Sources 10

(14) Fifoot op cit 10+11.

3.1. Scope of the Assize of Nuisance

The Assize (and indeed the other nuisance remedies) lay however only in respect of a closed list of specified things. In the thirteenth century the things which would be denominated as nocumenta and for which the nuisance remedies would lie were described in mnemonic verses which read as follows:

Stagno, fossato, sepe, viis, acqual diversa
 Hiis datur assisa. Mercatum, feria Banco
 Domus, virgultum, molendium, ovileque, porta
 Gurgites, et furna, vicomes placilet illa.⁽¹⁵⁾

This verse tells us two things. In the first place it defines the full range of objects which came within the medieval understanding of the idea of nuisance: mill-ponds, banks, hedges, ways (obstructed or narrowed) water courses diverted, markets and fairs, houses, orchards, mills, sheep-folds, gates, watering places, gallows and ovens. Secondly it tells us that the Assize of Nuisance lay only in respect of mill-ponds (stagno), banks (fossato), hedges (sepes), ways (viis), water courses (acquae cursu). The other things mentioned are dealt with either in the king's court at Westminster (in banco) or by the viscontial writ.

It is difficult to say why the scope of the Assize should have been restricted in this way⁽¹⁶⁾ and the point is not particularly important. It seems to rest on no distinction of principle;⁽¹⁷⁾ at one time the Assize lay for a wider range of objects than those mentioned in the verses⁽¹⁸⁾ and in the fourteenth century the limitation was effectively

(15) The verse quoted above dates from circa 1310 (it is cited by Sutherland The Assize of Novel Disseisin 217). Another version dating from circa 1384 (and cited by Loengard Free Tenements 273-4) reads as follows:

Foss [atum], stagnum, sepesque via, diversus curus
 aquarum
 Poscunt assisam; mercatum, feria Bancum
 Fabrica, furca, porta, domus, virgultum, gurges,
 molendium, murus, ovile
 Et pons, tradantur hec vicecomitibus.

See also the R J Whitwell 'Mnemoics on Nuisances' (1911) 57 LQR 272; Milsom 'Legal Introduction' xcvi; E de Haas (ed) Early Register of Writs (87 Selden Socy) 260.

(16) Cf G J Turner Brevia Placitata (66 Selden Socy) cxix.

(17) Turner op cit ibid.

(18) See Loengard op cit 272ff who carefully traces the early

abandoned when plaintiffs were given a right of election⁽¹⁹⁾ as to the forum in which they might proceed. The effect of this was probably to diminish the number of viscontial writs for nuisance⁽²⁰⁾ and for practical purposes to bring redress for all nocumenta under the assize procedure.⁽²¹⁾

This relaxation of the jurisdictional scope of the Assize did not however affect the nature of the medieval concept (such as it was) of a nuisance. From the point of view of the jurist of the thirteenth or fourteenth century a nuisance was not a generalized category of wrong : it was rather the closed list of specific objects for which the Register of Writs had an appropriate form of writ.⁽²²⁾

3.2. Procedure

The Assize process involved two more or less distinct stages. The first involved the obtaining of a writ by the plaintiff. The writ for initiating the assize was in the questus est nobis form. The writ recited certain basic allegations : that the defendant had unlawfully ('injuste et sine iudicio') erected ('levavit') or cast down ('prostravit') a wall or hedge or whatever or obstructed ('obstruxit') a way or watercourse to the nuisance of the plaintiff's free

(18) (continued)

scope of the Assize. She suggests that the limitation was imposed some time during the period 1195-1236, probably at the end of the reign of John.

(19) By 6 Ric II c 3 (1383):

All writs of nuisances commonly called viscontiel shall from henceforth be made at the election of the plaintiff, in the nature of the old times used, or else in the nature of the Assizes determinable before the king's justices ... or before justices of Assize.

(20) Loengard op cit 14.

(21) The distinction between viscontial writs of nuisance and the assize procedure certainly ceased to have any practical importance in the later law and is never heard of after the sixteenth century.

(22) Typically a thirteenth century register of writs would contain the following sort of rubrics: 'Breve de nova disseisina' 'De communa pasture' 'De cursu aque trans-tornate' 'De muro levato' 'De sepe levata' 'De fossato levato' 'De stagno exaltato' 'De via obstructa'. Cf Loengard op cit 359.

tenement in a certain vill. The writ instructed the sheriff (to whom it was directed) to summon a jury of recongition to view the tenements involved. The writ further directs that after viewing the tenements the jury should be produced to report to the justices of assize.⁽²³⁾ At the same time justices are commissioned to 'take' the assize and do justice in the matter.⁽²⁴⁾

The second stage of the process was the actual holding of the assize. The jurors, being empannelled, 'view' the tenements and reach a conclusion.⁽²⁵⁾ On the appointed day for holding the assize before the justices the defendant is

(23) For a sixteenth century version of the writ see Fitzherbert Natura Brevium 183 (K):

The king to the Sheriff, etc. A. hath complained unto us, that B. unjustly and without judgment hath raised a certain pool in C. in your county, to the nuisance of his freehold in L. in the county of H. after the first passage, etc. and therefore we command you, that if the aforesaid A. shall make you secure to prosecute his claim, then cause twelve free and lawful men of that neighbourhood to view that pool, and their names to be put in the writ, and summon them by good summoners, that they be before our beloved and faithful R. and F. and those whom we have officiated unto them, at a certain day and place in the confines of the county aforesaid, etc. ready, etc.

(24) Fitzherbert op cit ibid gives the following as the 'patent' to the justices:

The king to his beloved, etc. Know ye, that we have constituted you our justices to take the assize which B. hath arraigned before you by our writs against N. touching a certain pool raised in C. in the county of S. to the nuisance of his freehold in L. in the county of H. and therefore, etc. that at a certain day, etc. in the confines of the counties aforesaid which you shall appoint for this purpose, you take that assize, doing thereon what to justice belongs; for we have commanded our sheriffs in the counties aforesaid, that at a certain day and place in the confines of the said counties, whereof you shall give them notice, they cause the assize to come before you; in witness whereof we have caused these our letters to be made patent. Witness, etc.

(25) See Bracton f 234. Fleta 4.27 (89 Selden Socy 114) describes this part of the process as follows:

'... in this case the plaintiff is to let the jurors view what is harmful: what kind it is, or how much, or by what metes, so that a specific matter may be brought to trial and so that it may be known whether

(continued on the next page)

afforded the opportunity to take exceptions or raise defences.⁽²⁶⁾ The jury reports its findings to the justices and a judgment is pronounced. If it is for the plaintiff it is in the form of an order to the sheriff to cause the thing complained of to be abated.⁽²⁷⁾

4. The concept of nuisance under the assize

It cannot be said that in the thirteenth century there existed anything like a formal concept of nuisance. At the best there was only a shadowy outline, a set of elementary ideas, given some shape and substance by the writ by which the assize process was set in motion. We cannot say from whence these ideas emanated. They were the creation of some clerk who at some unknown time formulated and set down in some primordial writ a basic prescription for the redress of the complaint of some forgotten petitioner. All we can now say is that by the twelfth century there existed a standard form of writ containing a standard set of formal elements which came to be classified under the rubric 'de nocumento'.

The medieval idea of nuisance was that of a closed list of every-day objects which were seen to be the instruments of a certain type of harm and to the medieval mind it was the list of things rather than the harm that identified nuisance.

(25) (continued)

the plaintiff put too much or too little in his view or even nothing, and the jurors can certify the justices thereof when they are asked, and also whether the nuisance is rightful or wrongful, great or small, or no nuisance at all, even though hurtful, so that by these means it may be known whether or not a plaint is available to the plaintiff'.

(26) Fleta loc cit cap 28:

'At the coming of the justices many enquiries have to be made so that it can be known whether or not a right of action is available to the plaintiff ... [W]hen the plaintiff has made his declaration, he of whom complaint is made can except against the plaintiff's declaration in many ways'.

(27) On abatement see below 55.

Property Rights

The medieval inclination to describe a nuisance as being a wall, house, hedge, weir or whatever concealed the fact that the basic objection to such things was that they interfered with a property right. This fundamental principle was however implicit in the action itself:

'Even at its most restricted, the assize lay for hedges, ditches and mill dams raised or thrown down, for water courses turned and for ways obstructed or narrowed. Of these, the last almost invariably referred to an easement, the right of way across another's land. Cases involving hedges and ditches usually did, with the easement in question most often a right of way to pasture or another facility used in common. Only assizes concerned with mill dams and diversions of water habitually dealt with the invasion of natural rights flowing from ownership. A raised mill dam or a water course turned into a new bed could mean a flood in a neighbour's meadow or a dearth of water for his mill'.⁽²⁸⁾

It has been suggested that the *nocumenta* idea evolved originally to deal with interferences with incorporeal property rights and only later came to redress interferences with corporeal things such as the land itself.⁽²⁹⁾ Such an evolution would be consistent with the gradual separation of

(28) Loengard Free Tenements 412-3

(29) Kiralfy (ed) Potters Historical Introduction 420 writes:

'In Glanvil's time this remedy lay largely for loss of profit through the defendant's interference with incorporeal rights eg rights of way, water course or pasture, appurtenant to the plaintiff's land but exercised on other land. By Bracton's time we find it also used for interference with the enjoyment of the plaintiff's land by making that land unusable or uninhabitable'.

The viscontial writs allowed men to complain of such matters of domestic convenience as obstruction of light or odours emanating from a latrine. See Milsom 'Legal Introduction' to Novae Narrationes (80 Selden Socy) xcvi. Similar sorts of complaints were recognised under the London Assize of Nuisance (see above 30). Complaints of this sort came from the late thirteenth and the fourteenth centuries.

nocumentum from disseisin⁽³⁰⁾: since disseisin would basically contemplate eviction from land nocumentum might have originally developed to deal with 'disseisins' falling short of actual eviction or, in other words, disseisin from things which had no corporeal existence. Bracton's 'locus' test⁽³¹⁾ seems to tie in with this: a disseisin occurred when the thing complained of was situate upon the land of the plaintiff (ie actually trespassed upon his land); a nocumentum existed when the thing complained of was situate upon the land of the defendant (ie did not invade plaintiff's terra but rather affected the enjoyment of rights attached to his land). Later on the 'locus' test was abandoned,⁽³²⁾ a development which may coincide with the extension of the nuisance remedy to cover interferences with land itself.⁽³³⁾

Damage

Another conceptual feature of nuisance which can be gleaned from the Assize process is that a nuisance involves more than a mere invasion of a right: it is that which causes actual physical or economic harm or damage.

This idea is in a sense self evident; the very nomenclature involved implies the principle.⁽³⁴⁾ But, further,

(30) Above 31ff.

(31) Above 33.

(32) Fifoot History and Sources II. He cites Anon (1359) YB Lib Ass 32 Ed 3 pl 2 (see Fifoot op cit 23 for the case) as marking the abandonment of the test. The case involved the diversion of a watercourse by the construction of a ditch. It appeared that the ditch was made upon the plaintiff's land and the defendant argued that 'the proper remedy is by Assize of Novel Disseisin or by Writ of Trespass' but the court found for the plaintiff and ordered the nuisance abated.

(33) The abandonment of the locus test imports a recognition that the essence of a nuisance is the nature of the harm done and not whether the harm is to incorporeal or corporeal things.

(34) Cf Fifoot History and Sources 3: 'The very name - nocumentum - suggests the damage which he has suffered by conduct which nevertheless fell short of an actual dispossession'.

there is actual evidence for the proposition derived from the differentiation of the Assize for Novel Disseisin and the Assize for Nuisance. Where the assize is brought for novel disseisin it is not necessary that any proof of actual damage be forthcoming.⁽³⁵⁾ The invasion of the plaintiff's tenement being established reseisin automatically follows. But where the assize is brought in the nocumentum form the jurors must find that the plaintiff has suffered some actual damage before abatement will be ordered.⁽³⁶⁾ In short, Novel Disseisin lies for vindicating a right (seisin); Nocumentum lies for damage caused and suffered. The damage required was physical harm to corporeal property or loss or inconvenience arising from interference with an incorporeal thing.⁽³⁷⁾

(35) Loengard op cit 378.

(36) Loengard op cit 213-6. Cf Britton 2.30.2: '... it behoves every plaintiff in this case to show what damage is occasioned to him by the nuisance'.

(37) The counts in viscontial actions illuminate the point: The man who sued because his neighbour's house overhung his own complained that his light was diminished or that rain water spilled from the roof of his neighbour's house onto his own roof so that he 'cannot keep his house water-tight' or 'it rots his beams' or 'whereas one roofing used to last without being mended for seven years, now by reason of this flooding he must repair it every year'. The man who complained of a way blocked or narrowed said that as a result 'he must now go two leagues around'. The man who complained of a market established said that because it attracted away his custom he 'loses the profit of his market of T aforesaid'. The man who complains of a weir unlawfully erected says that it has caused the water reaching his mill to flow more slowly 'so that whereas his mill ... used to grind during a day ... forty quarters of wheat, now ... it can barely grind five quarters of wheat. See above 15-16. Cf Milsom 'Legal Introducton' xcvi. See too Loengard op cit 216.

Counting did not, it seems take place in actions under the assize. The reason was technical. Counting was not necessary where a plaintiff complained of a disseisin (see Loengard op cit 378) and this rule seems to have been carried over to the Assize of Nuisance. On the other hand the damage element in actions for nuisance must have made necessary some explanation of the plaintiff's cause of action (as the viscontial courts show) and it here must have been some sort of counting or pleading under the assize.

Unlawfulness

In one respect the medieval idea of nuisance showed a remarkable conceptual development. In order to be actionable the nuisance, or at least the damage caused by it, had to be of a type selected by the law for condemnation. In short the damage had to be unlawful.⁽³⁸⁾

This requirement was postulated by the writ when it alleged that the defendant had acted 'injuste and sine iudicio'.⁽³⁹⁾ The presence of this allegation, of course, enabled a defendant to except to the assize on the ground that he had not acted injuste.⁽⁴⁰⁾

In the Assize of Novel Disseisin the phrase 'injuste et sine iudicio' served to indicate that the assize lay for disseisins which had taken place unjustly and without process of law. 'Unjustly' here meant 'without right'.⁽⁴¹⁾ In the context of the Assize of Nuisance it came to infer interference with corporeal or incorporeal things that were unlawful. In a broad sense it distinguished the ways a man might use or exploit his land (by erecting walls, ponds, hedges or whatever) without becoming liable to an action from cases in which he might not do such things.⁽⁴²⁾

How it came about that jurors and justices construed 'injuste' in this sense cannot be said for certain. It is

(38) Cf Pollock & Maitland History (ii) 534: 'The nuisance (nocumentum) that is to be actionable must do both 'damage' and 'injury' We see here an incipient attempt to analyze the actionable wrong; few similar attempts will be made for many years to come'. In a footnote (loc cit n 2) they add that nuisance is '[o]ne of the few words descriptive of wrong that obtains a specific sense in the age which we are dealing....'

(39) The 'sine iudicio' part of the formula was meaningless in relation to nocumenta: there was never a judicial direction that a person should make a nuisance. Jurors and justices disregarded the words. See Loengard Free Tenements 210.

(40) Cf Britton 2.32.5:

'With regard to the word 'wrongfully' contained in the writ, care must be taken to see whether the nuisance be wrongful or not; for if it be not wrongful, an exception thereby accrues to the respondent.'

(41) Cf Pollock & Maitland History (ii) 52. Cf Van Caengen Royal Writs (77 Selden Socy) 261ff; Sutherland The Assize of Novel Disseisin passim.

(42) Cf Kiralfy Potter's Historical Introduction 420.

most likely that jurors⁽⁴³⁾ faced with the reality of having to order the abatement of some useful or economically significant thing⁽⁴⁴⁾ simply because it caused damage to another, refused to say that the thing was ad nocumentum. Such a finding in the fact of the fact that actual damage was being suffered would suggest a distinction between damnum and injuria.

This distinction was institutionalised by Bracton who discoursed on damnum and injuria⁽⁴⁵⁾ and applied the distinction specifically to the case of nuisance in the following terms:⁽⁴⁶⁾

'And it is to be known that of nuisances one is tortious and hurtful, and another hurtful but not tortious; hence when a complaint is made concerning a nuisance, it ought to be enquired to what hurt does anything lead, and it is to be seen whether it is hurtful and tortious, and then it is to be removed. But if it be not tortious, although hurtful, then it must be supported....'⁽⁴⁷⁾

(43) Loengard op cit 267 notes that in nuisance '[m]ore than in any other assizes, a jury's prejudices and emotions influenced the results'. She cites cases which show that juries reached decisions simply because they believed a man ought to have a right of way, or ought to be entitled to prostrate a wall on his own land even though damage accrued to his neighbour or that a man ought not to be allowed to enclose common lands. Leongard op cit 267-271.

(44) It is perhaps significant that Bracton in formulating his distinction between damnum and injuria (see below) chose to illustrate damnum sine injuria by the example of the establishment of a mill (f 220):

'as if any one erects a mill on his own land, and diverts from his neighbour his own custom and that of the neighbours, he thereby does his neighbour harm but not injury, since he is not forbidden either by law or by covenant to have or erect a mill....'

(45) See ff. 24b, 45b, 92b, 221.

(46) f 231b (see Fifoot History and Sources 18) Cf Britton 2.30.2:

'Of nuisances, however, some are both tortious and hurtful, other hurtful yet not tortious; therefore it behoves every plaintiff on this case to show what damage is occasioned to him by the nuisance. And if the nuisance be found to be both hurtful and tortious, then matters are to be entirely restored to their former condition. If not tortious, it must be tolerated however hurtful it may be'.

See also Fleta 4. 26 (89 Selden Socy 110).

(47) See Loengard Free Tenements 217-8 who cites cases from 1202 which indicate an application of the principle by the jurors and justices.

Bracton even attempted to explain when it was that a user of land might be both 'tortious and hurtful' and hence a nuisance and when not. Land, he noted,⁽⁴⁸⁾ could be subject to various 'servitudes' which restrained the way in which the owner might use his land. Such a servitude, he said, might be imposed by grant or prescription or 'by law'

'for instance that no one should do on his own land anything by which damage or harm should result to his neighbour.... [I]f he be not forbidden by law to do the act, although he does harm and causes damage, yet the act will not be wrongful, for it is lawful for anyone to do upon his own land anything that will not cause wrongful damage to his neighbour, as if any one erects a mill on his own land and diverts from his neighbour his own custom and that of his neighbours, he thereby does his neighbour harm but not injury, since he is not forbidden either by law or covenant to have or erect a mill.'

So too, he goes on,⁽⁴⁹⁾

'there are servitudes which are imposed by law on neighbouring tenements, as for instance that a man should not raise the level of the water in his pool so high as to drown the land of his neighbour.'⁽⁵⁰⁾

Bracton thus seeks to explain a landowner's liability to be sued in nuisance for damage caused to a neighbour on the basis that the law imposes upon him a servitude not to injure his neighbour. The point is neat but superficial.⁽⁵¹⁾

(48) In folio 221b (see Digby Real Property 190).

(49) Ibid.

(50) Cf f 232 (Fifoot op cit 19):

'... if a servitude is imposed upon a man's land by the law ... whereby he is forbidden to do on his own ground what may harm his neighbour, as if he should raise the level of a pond on his own land or make a new pond whereby his neighbour is harmed, as for example if his neighbour's land is thus flooded, this will be to the injurious nuisance of his neighbour's freehold....'

(51) In effect Bracton has included under the head of 'servitude' what later generations of lawyers would call 'natural rights of property'. To the modern mind this is misleading since natural rights and servitudinal rights are distinct concepts. It was even misleading for Bracton's time since the distinction was then already appreciated: natural rights were things 'of common right' such as rights to the common wastes, incidents of a free tenement arising by operation of law rather than grant or prescription (see above 9 n 31. Cf Simpson

It does not explain when the law imposes such a servitude and when not, and nor does Bracton attempt to do so.⁽⁵²⁾

Developing the Concept: Nuisances to Markets and Fairs

The medieval approach to the principle that an interference with a franchise right constituted a nuisance⁽⁵³⁾ deserves special attention here since in it we find by far the most sophisticated formulation and application of the basic principles discussed above.⁽⁵⁴⁾

(51) (continued)

Land Law 101). But since the assize lay in respect of incorporeal rights generally (above 39) it would seem natural enough not to make a distinction between natural rights and easements.

(52) Indeed no one did so until the nineteenth century when the distinction between easements and 'natural' rights was made more explicit. See below 230 n 5.

(53) Interferences with franchise rights were redressed as nocumenta from early in the thirteenth century. Milsom (op cit xvii) has noted an action brought 'de furcis [gallows] injuste levatis' dating from 1200; there is a case of a market established 'ad nocumentum' from 1202 (cited by Fifoot History and Sources 15) and a case for a ferry established 'ad nocumentum passagii' from 1220 (see Loengard Free Tenements 319 n 124).

(54) It is not entirely clear whether nuisances to franchise rights were the subject of assize proceedings. The mnemonic cited above (35) indicates that nuisance actions in relation to markets were heard 'in banco', that is before the King's Bench at Westminster. The reason for assigning these cases to that court probably was their 'royal' character (Milsom 'Legal Introduction' to Novae Narrationes (80 Selden Socy) xcix). However it would seem that they were there dealt with by a process which Milsom (op cit ci) describes as being 'in the nature of an assize'. Bracton f235a-b and Britton 2.32.7,8 discuss nocumenta to markets in the context of the Assize as does Fitzherbert N B 184A (and see Hale's note (b)).

Technically a franchise was a portion of royal power in the hands of a subject.⁽⁵⁵⁾ The franchises of interest to us are those involving the grant of some fiscal right of the crown⁽⁵⁶⁾ such as the right of having a gallows,⁽⁵⁷⁾ a ferry⁽⁵⁸⁾ or a market or fair.⁽⁵⁹⁾ These privileges of course were valuable assets in that they entitled the holder to the fees, tolls, rents or other imposts payable in respect of the facility. These revenues were however diminished where another competing facility was established sufficiently nearby to attract away custom or trade.

The disturbance of the franchise of holding a market (wherein may be included fairs) was a matter which very early generated a relatively sophisticated body of legal rules. Bracton,⁽⁶⁰⁾ Fleta⁽⁶¹⁾ and Britton⁽⁶²⁾ all discuss the subject as involving a form of nocumentum and in terms which are largely conceptual. Market franchises were usually conferred under charter or grant, the award including the qualification ita ut non sit ad nocumentum vicinorum mercatorum.⁽⁶³⁾

(55) Pollock & Maitland History (i) 571.

(56) Cf Pollock & Maitland *op cit* 575.

(57) Furca and fossa (gallows and pit) was a privilege granted by the Crown, signifying the jurisdiction of punishing felons; men by hanging, women by drowning: Jacob's Law Dictionary s v 'furca'. See Pollock & Maitland History (i) 577, 582. Nuisance writs for gallows were fairly common. Milsom (*op cit* xcvi-xcviii) mentions that gallows 'belong with markets and fairs as franchise rights; and many early actions concerning them were indeed heard in royal courts and are found in the plea rolls....' Loengard Free Tenements 293 n 64 notes a case of an Assize of Nuisance brought for a gallows.

(58) The privilege of having a boat for passage upon a river to carry men and horses for a reasonable toll. Jacob's Law Dictionary s v Ferry.

(59) Markets and fairs were the main centres of medieval commercial activity and the privilege of being allowed to establish or hold these was undoubtedly the most valuable franchise a private citizen could obtain. See Lipson Economic History of England (1) 211.

(60) f 235b

(61) 4.28 (89 Selden Socy 117-8).

(62) 2.32.8.

(63) Cf 2 Co Inst 406; 2 Wm Saunders 174 n (2). The grant was usually preceded by an inquisition under a writ ad quod damnum to determine whether the grant would cause harm to any existing market (see Fitzherbert Natura

A complaint that a market was *ad nocumentum* an existing market, we learn from Bracton,⁽⁶⁴⁾ fell to be decided by the application of two rules of law, namely, whether the rival market was held on the same day and, secondly, whether it lay within a prescribed distance of the existing market.⁽⁶⁵⁾ A market satisfying these provisions was *ipso facto* a nuisance; if it fell without them then, even though causing harm, it was no nuisance being *damnum sine injuria*.⁽⁶⁶⁾

What is interesting and significant about these rules is that they make the question whether the rival market is a nuisance or not depend upon a priori rule of law rather than

(63) (continued)

Brevium 225). The holding of the inquisition did not debar the Crown from subsequently repealing the grant nor did it prevent an action on the ground that the new market was *ad nocumentum*.

(64) f 235b.

(65) The clearest exposition of the rules is that of Britton (2.32.8):

'In order to justify the removal of a market by this assise as a nuisance to another adjoining market, the plaintiff must assign the nuisance thus: that whereas he hath his market on a certain day of the week in such a town, he against whom the plaint is made has caused another market to be proclaimed and set up on the same day in the same town or in another town within six miles and a half and the third part of a mile from his market. For if the plaintiff say that he has set up a market on another day, or if he say that the markets do not adjoin by seven miles, he shall take nothing by his plaint'.

For an interpretation of the exact distance involved in the rule see J G Pearce 'Some Early Cases on Disturbance of Market' (1916) 32 LQR 199 at 204-5.

(66) Cf Bracton f 235b:

'When therefore a market has been obtained within such a limit, it will have to be levelled, since it is a hurtful and tortious nuisance, because it is so near. But if it be beyond that limit, although it may be hurtful, it will not be tortious, because it is remote and not neighbouring.'

upon the view and decision of an assize jury.⁽⁶⁷⁾ In other words the rival market is a nuisance by definition of law: it invades an established proprietary right and therefore is actionable whether or not it in fact causes damage.⁽⁶⁸⁾ The corollary to this is a principle which was to be central to nuisance law: a land owner could prevent another from using his land in a particular way (in casu by setting up a market) by invoking the precept sic utere tuo ut alienum non laedas.⁽⁶⁹⁾

It is in connection with market nuisances that we encounter also for the first time a principle that was to attain some significance in later nuisance law. Bracton observes that where the setting up of one market is to the nuisance of another, it must be seen which was set up first. That one, though, although causing a nuisance would not be injurious since it was established first ('ideo licet ad nocumenta, non tamen injuriosum quia primum'). This is the doctrine of 'prior occupation' in embryo which, as we will see, often served to render not unlawful what was otherwise a nuisance.

(67) See Clinton's case (1339) YB 12 & 13 Ed 3 (Rolls Series) 208. There the rival market was set up on the same day and within two miles. The defendant demanded a 'view' in order to establish whether his market was a nuisance, but the court denied the application, requiring him to plead. Pearse points out that the view was refused 'because there could be no issue of fact as to whether a market so set up [ie upon the same day and within six miles] was or was not a nuisance' (J G Pearse 'Some Early Cases on Disturbance of Market' (1916) 32 LQR 199 at 201). See also Weston's case (1409) YB 11 Hen 4 f 5 pl 13 where a rival market was set up on the same day as the existing market. The defendant could only plead that the plaintiff had no market on that day; there was no scope for an argument that his market did not in fact cause damage. The fact that it was held on the same day made it a nuisance per se and thus actionable. See Pearse op cit 201.

(68) Cf Kiralfy Potter's Historical Introduction 420 (text to n 88); Pearse op cit 200.

(69) Cf Pearse op cit 202.

5. The emerging principles of law.

In addition to giving shape to the underlying concept of nuisance the assize process developed certain substantive rules governing its availability and application. Some of these rules are worth noting since they shaped and influenced the later development of the common law of nuisance

(1) Misfeasance

The Assize, it seems, lay only for acts of misfeasance and was not available in respect of harm arising from non-feasance.

The point is somewhat controversial. The language of the writ seems to have contemplated only acts of misfeasance: it always alleged that the defendant has erected ('levavit') or cast down ('prostravit') some thing or that the thing had obstructed ('obstruxit') or diverted ('divertit') a way or watercourse, language which contemplated positive acts of commission rather than negative acts of omission.

This is not to say that the medieval law did not contemplate the possibility of a nuisance arising from acts of omission. Residents of a community were very often placed under a duty to effect repairs, particularly to such public facilities as bridges and roads.⁽⁷⁰⁾ It is probable also that this obligation extended to the repair and cleansing of water courses.⁽⁷¹⁾ Clearly the failure to perform such a duty in respect of some way, or bridge or water course could cause as much harm as the obstruction or diversion of these facilities.

It is clear that the failure to perform duties of repair could lead to presentment in the sheriff's tourn under the jurisdiction that court had for redress of nocumenta.⁽⁷²⁾ It

(70) Above 5.

(71) Cf C T Flower Introduction to the Curia Regis Rolls (62 Selden Socy (1943)) 327-8.

(72) See below 166.

is likely also that the manorial courts of civil jurisdiction enforce the duty where it rested upon the members of the manor community.⁽⁷³⁾ But it seems unlikely that a failure to repair could be the subject of a complaint under the Assize of Nuisance.

It is true that during the thirteenth century the Register of Writs began to include writs relating to the omissions to effect repairs under rubrics such as 'De reparatione pontium vel stagnorum dirutorum ad nocumentum liberi tenementi,⁽⁷⁴⁾ De Wallis vel Fossatis Reperenda,⁽⁷⁵⁾ De Domo Ruinosa.⁽⁷⁶⁾ However these were writs of a viscontial type and were not framed in the Questus est nobis form of the Assize writ.⁽⁷⁷⁾ The conclusion thus seems to be that the Assize of Nuisance did not lie in respect of acts of misfeasance.⁽⁷⁸⁾ On the other hand there is a passage in Bracton which points to the opposite point of view, but it

(73) See eg Maitland (ed) The Court Baron (4 Selden Socy (1890)) 122-135.

(74) For this writ see Loengard Free Tenements 260 n 114. The writ reads as follows:

Order A that he justly etc cause repairs to be made ... to a bridge or pool in such a vill which is destroyed to the nuisance of the free tenement of O in the same vill or another and which he ought and is accustomed to make.

(75) For this writ see Loengard op cit 260 n 115.

(76) For this writ see Loengard op cit 264; Kiralfy Action on the Case 64. The writ reads as follows (Loengard op cit 265-5):

De domo ruinosa. Praecipimus tibi quod justices A quod iuste etc reparari faciat quandam domum suam in P que muste [minatur] ruinam ad nocumentum liberi tenementi D in eadam villa sicut rationabiliter monstrare poterit quod lam reparari debeat'

(77) Loengard op cit 261-265.

(78) See Holdsworth 7 HEL 334; Kiralfy op cit 56; Loengard op cit *ibid*.

is difficult to say how accurate a reflection it is of the law of the time.⁽⁷⁹⁾

(ii) Liability of successors in title

The writ charged that the defendant had levied the wall or prostrated the hedge or obstructed the way. But what if the defendant could show that it was not he who had actually done these things? The rule was clear: the Assize would not lie.⁽⁸⁰⁾ And this applied even where the defendant was the heir or successor in title to him who had erected, prostrated or obstructed.⁽⁸¹⁾ (In this sort of case the plaintiff's remedy lay in the writ quod permittat brought against the defendant in occupation ordering him to permit the plaintiff to prostrate that erected ad nocumentum⁽⁸²⁾). However

(79) In f 232b the following appears:

'And as a person may cause a tortious nuisance in doing a thing, so he may in not doing it, in his own [land] or that of another, as if he is obliged by constitutio to obstruct and close, to clean and repair, and he does not do it, when he is obliged to do it.'

(The word constitutio is ambiguous: it may mean law or custom or even agreement: see Fifoot History and Sources 20 n 62). Loengard (op cit 259 ff) suggests that Bracton in this passage was expressing what he thought the law ought to be and not what it in fact was. Britton (2.30.7) follows Bracton:

... a person may commit a disseisin by negligence without doing anything; as where one is bound to fence or repair or cleanse or the like, and lets the matter be without doing anything, which omission is prejudicial to the free tenement of his neighbour; and this neglect is punishable by the Assize.

(80) Britton 2.32.1.:

'... he may say that he did not commit any nuisance or raise a wall, or heighten a pond, or throw down the ditch, but that another person who is not named in the writ did it; and if this is verified or not denied, the writ falls'.

(81) Bracton f 234:

'... the assize shall not proceed ... because heirs and successors are not liable for an offence of others....'

(82) Bracton hints at this remedy in vague terms:

'... they are liable to make restitution of the state of things, that a thing be replaced in its former

(continued on next page)

after 1285 some relief from the rule was afforded by the provisions of chapter 24 of the Statute of Westminster II⁽⁸³⁾ which held that the assize might lie against the occupier and the author of the nuisance⁽⁸⁴⁾ provided the latter was still alive.⁽⁸⁵⁾

(iii) Availability: Plaintiff as successor in title

Related to the rule just mentioned was the converse proposition that a plaintiff could not sue on the Assize if the hedge or wall or whatever which was a nuisance to his tenement had been erected or cast down before he had obtained

(82) (continued)

state ... not because they have done the tort, but because they hold the thing which is a nuisance.

Cf Milsom Legal Introduction ciii and see Fifoot History and Sources 10 n 33 for a specimen of the writ.

(83) 13 Ed 1 (1285). For this enactment see Fifoot History and Sources 78.

(84) The relevant provisions are as follows:

In cases in which a writ is granted in the Chancery concerning an act done by some person, the complainants shall not henceforth depart from the King's Court without remedy by reason of the fact that the tenement has been transferred from one person to another and no writ to meet that special case is to be found in the register of the Chancery. Thus, a writ is granted against him who builds a house or a wall or sets up a market; but if that house or wall or the like is transferred to another person the writ is denied. Henceforth, however, when a writ is granted in one case and in like case a corresponding remedy is needed [there shall be a writ]. Thus there is already this writ:

A. has complained to us that B. unjustly etc., built a house or wall or set up a market, etc., to the nuisance, etc.

Now if the things so built or set up shall be transferred to another person, there shall henceforth be this writ:

A. has complained to us that B. and C. have built etc.

(85) The death of the defendant in an assize action ipso facto terminated the assize (Pollock & Maitland History (ii) 64-5). Thus if the author of the nuisance was deceased the plaintiff could not bring the Assize even under the Statute of Westminster II but must rely upon the quod permittat: Britton 2.32.10; Milsom op cit ciii. Cf G D G Hall 'The Early History of Sur Disseisin' (1967-8) 42 Tulane LR 584.

seisin of the tenement. The rule applicable was stated by Bracton as follows:

'And ... (as it seems) if at the time of the nuisance being worked the complainant had not a tenement to which the nuisance could be done, and accordingly because no tort worked against him, and concerning a tort done to another no one ought to acquire anything for himself, nor can he have an action or a complaint.'⁽⁸⁶⁾

This rule seems to have been not affected by the provisions of the Statute of Westminster II.⁽⁸⁷⁾ Thus in 1348 there is a dictum⁽⁸⁸⁾ that a plaintiff

'could not have the Assize because, at the time that the way was granted, he had not the freehold to which the way belonged, and the later purchase of the freehold could not sustain the action'.

The effect of this rule is that a man who comes to an already established nuisance has no cause of action, a proposition which prevailed not only into the seventeenth century⁽⁸⁹⁾ but indeed continued to be asserted well into the nineteenth century.⁽⁹⁰⁾

(iv) Free Tenement

The Assize of Nuisance lay only in respect of the proprietary interests comprehended by the term 'free tenement'.⁽⁹¹⁾ This rule, derived from the Assize's primordial connection

(86) f 234. Cf Britton 2.32.1:

'or he may say that the plaintiff had not the tenement to which the nuisance was done, at the time when it was first done, but another then held it, and more ought to complain of a wrong done to any except himself'.

(87) Above 52 n 83.

(88) Cf Sharshulle J in Smeteborn v Holt (1348) YB Hil. 21 Ed III f 2 pl 5. The case is given by Fifoot History and Sources 22-3.

(89) Below 100.

(90) Below 345. The plaintiff's remedy lay in writ Quod Permittat; Milsom 'Legal Introduction' ciii. Cf above 51.

(91) See Bracton f 234 (cited Fifoot History and Sources 20)

with the Assize of Novel Disseisin, substantially limited the value of the Assize as a nuisance remedy.

The rule meant in the first place that the Assize was not available to one holding land rights in villeinage.⁽⁹²⁾ Nor was it available to one holding a tenement as a mortgagee⁽⁹³⁾ or by term of years,⁽⁹⁴⁾ since these forms of tenure did not constitute free tenement.

Insofar as a plaintiff was a free holder the rule involved a number of problems as to what exactly was included in the concept of free tenement. It seems that, for one thing, the Assize would only lie where the free holder held the land in demesne. Thus one who received rent for a tenement held by a tenant could not obtain the Assize.⁽⁹⁵⁾ Further there was some doubt as to which incorporeal incidents of a tenement fell within the protection of the Assize. For one thing it was not always clear whether rights of common fell within the concept of free tenement (and thus enjoyed the protection of the Assize) or not. Bracton said that where a man had a right of pasture in the common waste and his way there was obstructed the Assize of Nuisance would lie if the obstruction occurred outside the waste. But if it occurred on or in the waste the plaintiff had his remedy by way of an Assize of Novel Disseisin for common.⁽⁹⁶⁾ This would seem to suggest that rights of common could be included within the concept of free tenement.

(92) See Loengard Free Tenements 56-60. 223.

(93) Loengard op cit 60.

(94) Loengard op cit *ibid*.

(95) Loengard op cit 51.

(96) f 232b. The Assize for Common of Pasture seems to have been a supplementary species of assize of novel disseisin: see Pollock & Maitland History (i) 622. The relationship between the Assize of Nuisance and the Assize of Novel Disseisin for Common of Pasture is discussed by Loengard Free Tenements 425ff who sees the Assize for Common of Pasture as a sort of 'bridge action' between novel disseisin and nuisance.

The praedial servitudes (easements) which men might obtain too enjoyed the protection of the Assize.⁽⁹⁷⁾ Indeed Bracton regarded all incorporeal rights as servitudes⁽⁹⁸⁾ and held the Assize available for their protection.⁽⁹⁹⁾

6. Redress provided by the Assize

The successful plaintiff under an Assize of Nuisance was awarded redress in the form of an order for the abatement of that which had been adjudged to be the cause of the nuisance and in the form of an award of damages.

6.1. Abatement

The primary purpose of the Assize process was to effect an abatement of the instrumentality of the nocumentum. Indeed it seems fairly clear that abatement was the primordial method⁽¹⁰⁰⁾ for dealing with nocumenta. This is shown by the fact that the medieval law of nuisance admitted self-help as a permissible response to a nuisance.

(i) Self-Help

Bracton in his discussion of nocumentum observes⁽¹⁰¹⁾ that

'But if the owner of the land does something at the entrance whereby [a servitude holder] cannot enter at all or only less conveniently, as where the owner makes a wall, a ditch or a hedge, he commits an injurious nuisance. And what has thus been done, while

(97) For a discussion of early concepts of easements and the extent to which the Assize could lie for their protection see Loengard Free Tenements 412ff.

(98) See f 220, quoted, translated and commented upon in Digby Real Property 181ff.

(99) See f 231b: 'Nuisances are infinite ... and either they wholly impair servitudes or at least so impede them that they are less useful.'

(100) Self-help 'is the oldest kind of remedy, giving way only by degrees to litigation'. F H Lawson The Remedies of English Law 45. Cf C A Branston 'The Forcible Recaption of Chattels' (1912) 48 LQR 262.

(101) f 231b.

the injury is still recent and flagrant, can be removed and destroyed even without writ; but after a time not without a writ'.

Later he remarks that constructions which are to the injurious nuisance of another can

'by acting at once while the wrongdoing is still flagrant,⁽¹⁰²⁾ be demolished or repaired, if the complainant is able to do so. If not recourse must be had [to a writ]'.⁽¹⁰³⁾

Self-help was certainly a standard feature of medieval nuisance law⁽¹⁰⁴⁾ being commonly encountered as a defence to an action under the Assize, usually where the complaint was of a wall or whatever prostrated. The defendant excused his act by pleading that it had been done as an act of self-help.⁽¹⁰⁵⁾

(ii) Judicial Abatement

The outcome of the Assize process is described by Britton⁽¹⁰⁶⁾ in these words:

(102) Under the Assize of Novel Disseisin a man disseised was allowed four days within which to effect self-help. See Bracton f233, Cf f6. There is however nothing to suggest that this rule applied under the Assize of Nuisance.

(103) Cf Britton 2.30.8.

'And although nuisances may be redressed by the assize, yet it does not follow that they may not be set right by another remedy, as by removing the nuisance immediately upon the fact'

(104) And indeed of the later law. See below 103.

(105) See Loengard Free Tenements 247-253. Cf the case from 1293 in which the right seems to have been limited to diurnal action:

If Adam put a hedge where his neighbour has a right of way to his common of pasture, and the neighbour freshly on the placing thereof do abate it in the day time, he commits no tort; but it will be a tort if he abate it by night although it was wrongfully placed.

YB 21 Ed I (RS) 462, quoted McRae 'The Development of Nuisance in the Early Common Law' (1948) 1 U of Florida LR 27 at 33.

(106) Britton 2.32.3. Cf Bracton f234b.

'The parties having pleaded to the assize, let the assize be taken, and if it pass for the plaintiff, then let the sheriff be commanded to cause the nuisance to be removed, and the place restored to the condition in which it used to be, at the cost of the trespassor, whether water is to be brought back into its ancient course, or the course cleansed and turned, or opened, or a ditch filled up or abated, or a pond lowered, or a wall or hedge repaired, or way enlarged, or any other such nuisance set right according to its former condition!

6.2. Damages

The Assize of Novel Disseisin after 1198 provided for an award of damages to every successful plaintiff.⁽¹⁰⁷⁾ This principle was carried over into the Assize of Novel Disseisin for Nocumentum and so to the Assize of Nuisance proper.⁽¹⁰⁸⁾ In conception the idea that damages should be awarded merely supplemented the primary object of the Assize - the restoration of seisin or, in the case of nuisance, abatement of the thing causing harm.⁽¹⁰⁹⁾ However the incidence of this pecuniary redress no doubt enhanced the Assize as a form of redress for disseisin⁽¹¹⁰⁾ and the award of compensatory damages became a standard feature of the process.

It should perhaps be emphasised here that under the Assize of Nuisance the award of damages was not the primary purpose of the Assize. It was an action of a proprietary nature designed to remove that which interfered with rights

(107) Sutherland The Assize of Novel Disseisin 52. Cf G E Woodbine 'The Origins of the Action of Trespass' (1923-4) 33 Yale LJ 799 at 806-7.

(108) Loengard Free Tenements 210. Cf Flower Introduction to the Curia Regis Rolls 473-5.

(109) Under the original process for Novel Disseisin the sheriff was supposed to ensure that movable property taken from the premises by a disseisor was restored together with the seisin of the tenement. Since it was often difficult to recover such chattels the practice grew up of awarding the plaintiff a sum of money as solatium for lost chattels. In time the award of the solatium became automatic the amount to be paid being assessed by the assize (Fifoot History and Sources 45-50). From this grew what would become to be known as an award of damages (cf Pollock & Maitland History (ii) 522 where it is said that 'an action for damages was a novelty It makes its appearance ... in the popular assize of novel disseisin'.)

(110) Sutherland op cit 55.

in land by causing harm to the interests sustained by the right. It is only later, under the action upon the case, that the remedy for nuisance becomes more explicitly an action for damages and thus an action in tort rather than a real action.

II. The Demise of the Assize of Nuisance

1. Introduction

Notwithstanding modifications the Assize of Nuisance had serious limitations as a remedy for nocumenta. The most important were that the remedy was available only to freeholders and in respect of free tenements⁽¹¹¹⁾ and that it did not lie for injuries arising from acts of non-feasance.⁽¹¹²⁾ These lacunae were, in the event, not rectified by further modification to the Assize but rather by the emergence of a new form of action which instead of supplementing the Assize came to supplant it. The remedy was the Action on the Case.

2. The Action on the Case

The origins of the remedy by way of action on the case are obscure and the subject of controversy.⁽¹¹³⁾ At one time it was thought that the consimili casu provision of the Statute of Westminster II⁽¹¹⁴⁾ was the source of the action,⁽¹¹⁵⁾ but this is no longer accepted.⁽¹¹⁶⁾ The true origin is said

(111) See above 53.

(112) See above 49.

(113) The literature on the subject is collected and discussed by Fifoot History and Sources Chap 4. See too Milsom Foundations Chap 11 and generally Kiralfy The Action on the Case.

(114) For which see above 52.

(115) Cf Maitland The Forms of Action 53-4.

(116) See Plucknett 'Case and the Statute of Westminster II' (1931) 31 Columbia LR 778. Cf Kiralfy op cit 24ff.

to lie in the emergence of the action for trespass.⁽¹¹⁷⁾ Trespass - Maitland's 'fertile mother of actions' - is the source of the English law of torts. It thus began and evolved as a personal rather than a proprietary (real) action, being designed for the award of damages for a wrong suffered rather than for the assertion of some proprietary right.⁽¹¹⁸⁾ As such it was conceptually very different to actions such as the Assizes of Novel Disseisin and Nuisance which were concerned with vindicating seisin or interests in the nature of seisin.⁽¹¹⁹⁾

The Action for Trespass was initiated by a new type of writ in which the defendant was summoned to explain why (ostenturus quaere) he had caused damage to the plaintiff by his wrongdoing.⁽¹²⁰⁾ The types of wrongdoing for which the writ might be available were, theoretically, infinite and thus it was necessary for the writ to spell out the particular form that the wrongdoing had taken. In some cases a mere recitation of the facts was not sufficient since it might not appear *ex facie* these wherein lay the wrongfulness of the conduct. Thus there came about a particular feature of certain trespass writs that they contained a clause introduced by the word 'whereas' ('cum') explaining why the conduct of the defendant was wrongful. Trespass writs containing the cum clause were designated as 'special' writs of trespass, the matter contained in the cum clause constituting the special case made out by the plaintiff for relief. These writs thus gave rise to the expression 'on the case', reflecting the idea that the writ had been drawn up to fit the peculiar circumstances of the plaintiff's case.⁽¹²¹⁾

(117) Fifoot op cit *ibid*.

(118) Milsom op cit *ibid*.

(119) The link would appear to be the writs of quare by which certain nocumenta were redressed (see above 20) and which also provided the sources for the origin of the action for trespass.

(120) Milsom op cit esp 259ff. Cf above 20.

(121) Milsom op cit 260-1; Fifoot op cit 68.

There are two points of significance about the emergence of these actions on the case. The first is that they represent a break with the formalism of the older forms of action. The system of writs upon which the early common law was based meant that if a case fell within the scope of no writ, then in general there was no law by which a plaintiff could seek a remedy. The concept of the action on the case by allowing writs to be formed upon a particular case, broke this tradition and allowed for novel actions and the development of 'new' law.

The second point of significance is that the 'special action for trespass upon the case' contemplated and allowed actions brought on the ground that the wrongdoing involved a nocumentum. In this way there came into existence the action on the case for nuisance.

3. The Emergence of the Action on the Case for Nuisance

3.1. Introduction

Actions on the case for nocumenta were indeed among the earliest instances of the emergence of the concept of Case.⁽¹²²⁾ Although the action for trespass was personal rather than real, it emerged in a society where the land law was about all the law there was. The complaint of nocumenta suffered was very much an aspect of landholding and it is thus not surprising that when actions on the case came to be allowed they more often than not were based on cases involving nocumenta which, for one reason or another, could not be redressed by way of the Assize of Nuisance.

The details of this development are largely obscure for two reasons. One was that the whole institution of the action on the case developed in the interstices of the older forms of action, largely ignored by the writers who tended to discourse on the primordial real actions of the feudal common law with only scant reference to the interloping

(122) Kiralfy Action on the Case 55.

action on the case.⁽¹²³⁾ It is only in the late seventeenth century that this conspiracy of silence is broken and the action on the case is revealed in its full flower. The second cause of obscurity is that actions on the case for nuisance were couched in terms of 'transgressio' rather than 'nocumentum' and it is thus often difficult to know whether a particular example is one of nuisance or trespass. It was not until 1585 that the concept of an action on the case for nuisance received explicit recognition.⁽¹²⁴⁾

3.2. Origins

The idea of obtaining a special trespass writ for redress of a nocumentum evolved on the periphery of the existing law relating to nocumenta. One of the earliest instances of an action on the case dates from 1341⁽¹²⁵⁾ and involved what could be described as a species of nocumentum. The case involved damage caused by flooding of lands as a result of a defect in a sea-wall. Flooding of lands was something traditionally redressed by an Assize of Nuisance but in this case the Assize was not available since the defendant's act was one of nonfeasance in that he had failed to maintain the wall.⁽¹²⁶⁾ The general action of trespass was not available since the wall was upon the defendant's land rather than that of the plaintiff.⁽¹²⁷⁾ In the result the plaintiff obtained a special writ of trespass and, in the Court of first instance, succeeded in his action, damages being awarded.⁽¹²⁸⁾

(123) Kiralfy Action on the Case 1-2.

(124) Kiralfy op cit 55. He cites Aston's case (1585) Dyer 250b (for which see below 64) as marking the express recognition of an action on the case 'for nuisance'.

(125) Bernardestone v Heighlyng (1341). For this case see Kiralfy op cit 23 and 208-9 (where the pleadings are reproduced). See also Flower (ed) 1 Public Works in Medieval Law (32 Selden Socy) 309.

(126) Cf above 49.

(127) Cf above 33.

(128) Kiralfy op cit 36. Proceedings in error were adjourned indefinitely.

Kiralfy suggests that it was 'along this channel, that of wrongful default, that the actions of trespass on the case made its most important advances' ⁽¹²⁹⁾ and notes that in 'later years the forms of action for failure to maintain sea-walls and for failure to maintain fences and hedges were familiar forms of the action on the case'. ⁽¹³⁰⁾ Wall, fences and hedges are of course prototype nocumenta and this suggests then that from an early stage actions on the case were granted to plaintiffs whose remedy under the Assize of Nuisance was barred by the principle that the Assize did not lie for acts of non-feasance. ⁽¹³¹⁾ In this way we see the action on the case emerging as a supplement to the Assize of Nuisance, being employed to fill the remedial gaps created by the form of the writ for Assize action.

The other great limitation of the Assize action - that the Assize could lie only for wrongs to free holders and free tenements - also came to be filled by the action on the case. ⁽¹³²⁾

3.3. Case comes to supplant the Assize

During the fourteenth century the emerging action on the case for nuisance was regarded as complementary to the Assize of Nuisance. ⁽¹³³⁾ The rule which was applied was that an

(129) Action on the Case 36.

(130) op cit 37.

(131) See Kiralfy Action on the Case 59-61.

(132) Kiralfy (ed) Potter's Historical Introduction 422. Cf Baker English Legal History 238. Fifoot History and Sources 93. In Rickhill v Two Parsons of Bromaye (1400) YB 2 Hen 4 f 11 pl 48 (for which see Fifoot op cit 83) an action on the case was refused because the parties were free holders. This suggests an appreciation that Case might be brought by non-freeholders, or in respect of unfree tenements. Kiralfy loc cit seems to suggest that Case was first resorted to by lessees (who could not obtain an Assize (see above 54)), citing an anonymous case (1496) YB 9 Ed 4 f 35 pl 10. He adds that 'freeholders must have envied them this simpler remedy and this led to the supercession of the assize of nuisance by case....'

(133) Fifoot History and Sources 93-4; Baker op cit 238.

action on the case would not lie if the plaintiff could have his remedy by way of the Assize. Thus in 1400 'un briefe de Trespass' was not allowed on the ground that both of the parties were freeholders and thus their remedy was by way of the Assize.⁽¹³⁴⁾ This denial of concurrent remedies, Fifoot observes,⁽¹³⁵⁾ 'harmonized with medieval sentiment' and during the fourteenth and fifteenth centuries the courts consistently allowed actions on the case for nuisance only when the remedy of the Assize was not available.⁽¹³⁶⁾

To this general doctrine one minor exception was allowed. In 1455, it was laid down that if 'a man straitens my way, and does not stop it totally, no assise lies, but action upon the case'.⁽¹³⁷⁾ This is a curious decision since there is authority from Bracton's time that the Assize would lie for via arctata⁽¹³⁸⁾ and it is difficult to explain why this case now denied that an action under the Assize would lie. The rule was however followed in an anonymous case in 1522 involving obstruction of a water course.⁽¹³⁹⁾ Counsel argued that the Assize of Nuisance was the proper remedy. Pollard J however rejected this contention, saying⁽¹⁴⁰⁾

(134) Rickhill's case (cited above n 131).

(135) Ibid

(136) Fifoot op cit ibid; Baker op cit ibid. Cf Kiralfy Action on the Case 55-6. For the cases see Rolle Abr 'Nusans' (H).

(137) (1455) 33 Hen 6 pl 10 f26 (cited Rolle Abr 'Nusans' f142 pl 16. Fitzherbert N B 183 N (a) cites 14 Hen 4.31 as authority for a proposition that 'If a way be so stopped, that the party can pass but narrowly, an action on the case lies; but if it be wholly stopped, on an assize.'

(138) f233 where he speaks of the Assize lying for a road 'obstructed or narrowed'. Cf f231b where he speaks of the Assize for waters diverted 'in whole or in part'. See also the discussion in Loengard Free Tenements 375. The point taken seems to be that the Assize lay for a total deprivation of enjoyment of a right - case being then allowed for the (lesser) offence of partial deprivation. Cf Kiralfy Action on the Case 56; Fifoot History and Sources 94.

(139) Anon (1523) YB 14 Hen 8 f 31 pl 8 (for which see Fifoot History and Sources 97).

(140) Fifoot op cit 97.

'There is a difference where he stops all your way so that you cannot pass, for there you shall have an Assize of Nuisance and where he stops part only so that you can pass but narrowly, for there you shall have an accion sur votre cas; and so there is a difference where he withholds part [of the stream] and where he withholds all',

With this all the justices agreed.

Then in 1585 in Aston's case⁽¹⁴¹⁾ it was held by the King's Bench that the action on the case and not the Assize lay where a way was totally obstructed. And in the next year in Villet v Parkhurst,⁽¹⁴²⁾ also involving total obstruction of a way, the court rejected an argument that the Assize should have been brought rather than case, it being reported that, upon many precedents shown by the clerks, judgment 'was given that this action [upon the case] well lie, for it is at the election of the plaintiff to have either the one or the other'.

These decisions had a fatal significance for the Assize of Nuisance. Case was no longer supplementary to the Assize; it was complementary and a plaintiff could elect which of them he would employ. The Court of Common Pleas in 1596 sought to root out this heresy, proclaiming in Beswick v Cunden⁽¹⁴³⁾

'... a man shall never have an action on the case, where he may have any other remedy by any writ founded in the register; for this is only given where there wants such a remedy.'

But the Court of the King's Bench was committed to the new dispensation.⁽¹⁴⁴⁾ Already in 1591 in Leverett v Townsend⁽¹⁴⁵⁾

(141) (1586) 2 Dyer 250 n 88.

(142) (1587) 2 Dyer 250.

(143) (1596) Cro Eliz 520.

(144) Kiralfy Potter's Historical Introduction 423 says that the movement to allow Case to supplant the Assize began 'probably, because the King's Bench had no jurisdiction in the older actions and the judges were anxious to extend their jurisdiction in this direction'. He cites in support (1443) YB 22 Hen 6 f 15 pl 23 where the King's Bench, which it will be recalled had an original jurisdiction over nuisances to franchise rights (see above 45 n 54), held that 'If I have a fair or market and another holds a fair or market on the same day in a neighbouring town I have either assize or action on the case'.

(145) (1591) Cro Eliz 199.

it had rejected the old argument that a plaintiff who was a freeholder could not bring an action on the case being limited to the Assize. The Court, and Coke, who was counsel, held 'he might have one action or the other'. In the same year that Beswick v Cunden was decided, the Court of King's Bench in Alston v Pamphyn⁽¹⁴⁶⁾ reiterated its position that a plaintiff could elect which action to employ. And Popham C J said, 'he had seen it so in experience divers times'.

The difference between the two courts was resolved in 1601 by the Exchequer Chamber in the case of Cantrel v Church.⁽¹⁴⁷⁾

The case involved the stopping of a way totaliter. The plaintiff succeeded in the court below and the case was brought on a writ of error to the Exchequer Chamber consisting of all of the judges of England. The error assigned was that the plaintiff ought not to have had an action on the case but an Assize of Nuisance. The justices and Barons 'after divers motions and considerations had of the books of 8 Eliz Dyer 250b,⁽¹⁴⁸⁾ 11 Hen 4,⁽¹⁴⁹⁾ 2 Hen 4⁽¹⁵⁰⁾ and others' resolved⁽¹⁵¹⁾

'that the action was well brought, for he hath election to bring either the one or the other: for although ... where it is estopped but in part, and not totally, that there an action on the case lies, and not an assize; they conceived it not to be any difference, for he hath election to have either the one or the other action'.

(146) (1596) Cro Eliz 466.

(147) (1601) Cro Eliz 845.

(148) Aston's case (1585) (supra n 141).

(149) Cheddar v Dyer (1410) YB 11 Hen 4 f25 pl 48 (see Fifoot History and Sources 99 n 23).

(150) Rickhill's case (1400) YB 2 Hen 4 f 11 pl 48 (for which see Fifoot op cit 83). Cf above n 131.

(151) Baker Legal History 238 says there were two dissentients.

Strictly speaking Cantrel v Church perhaps decided no more than that where a nuisance was perpetrated by interference with a right of way the plaintiff could elect to bring either the Assize or an action on the case. But in practice it meant that for any type of nuisance a plaintiff could elect which action to bring. Thus in 1649 in Ayre v Pyncomb⁽¹⁵²⁾ we find an action on the case being brought for surcharging a common. The defendant argued that 'that an action of the case does not lie in this case, but an Assize'. Rolle C J however denied this contention and in so doing administered the quietus to the Assize of Nuisance:

'... the plaintiff may have an Assize or an action upon the case at his election, although here be a disturbance of the plaintiff's freehold, although that the ancient books say the contrary.'

In short freeholders were no longer restricted to an action under the Assize of Nuisance and now could bring the action on the case if they pleased. Most did, for the action on the case was so much more convenient than the Assize and the chance of losing a case because of a technicality⁽¹⁵³⁾ was so much less in actions on the case. After existing for four centuries the Assize of Nuisance was rendered defunct.

B. COMMON NUISANCE

1. Introduction

We have seen that the medieval concept of *nocumentum* developed out of certain types of interference with proprietary interests of men holding land in free tenure, and redressed by way of the action known as the Assize of Nuisance and later the action on the case for Nuisance. We have seen too how, almost accidentally, certain of the acts redressable by the Assize process came to be the subject of a form of criminal prosecution in the court of the Sheriff's Tourn.

(152) (1649) Style 164.

(153) See eg Anon (1657) 2 Sid 20.

This latter development thus created the phenomenon of certain types of nocumenta becoming the subject of complaint by public representations and being redressed at the hands of a court not exercising a civil jurisdiction. Strictly speaking this development reflects no more than the adoption of a special process for dealing with the special interests of a specific individual.⁽¹⁵⁴⁾ But at a superficial glance it seems to amount to the development of a principle that nocumenta may be the subject of public complaint and thus fall to be redressed by a process designed to vindicate the interests of the public at large.

The medieval response to this development was ambivalent. On the one hand there was an attitude that there was no such thing as a public action for nocumenta. Where the public at large was affected by a nocumentum perpetrated by an individual, the medieval lawyer's response was to say that each individual severally affected by the nuisance might have his action against the perpetrator. In other words there was no conception of a public interest which was affected by the nuisance.⁽¹⁵⁵⁾ The public was simply the aggregate of individuals who made it up, and thus the proper course of action was for each individual to sue in respect of the harm done to his individual interest.

On the other hand the medieval lawyer saw in the presentment in the sheriff's court of purprestures upon the royal highway an instance in which a nocumentum against the interests of the individuals using the highway for passage was vindicated without the several individuals severally instituting legal action against the offender.⁽¹⁵⁶⁾ Rather the users of

(154) That is to say, it is a process for dealing with the special problem of protecting the royal domaine against purprestures. It is in other words, the king's special action for dealing with nocumenta perpetrated upon his personal domaine and jurisdictions.

(155) See above 26. Cf however n 157 below.

(156) The judges, as we will see, siezed upon the fact that purprestures to the highway were presented in the tourn, to deny to individual passengers the right to bring action for the harm suffered by them as a result of an obstruction of the highway. See below 87-9.

the highway could rely upon the jury of presentment to initiate a complaint and obtain restoration of the full right of passage. This suggested an idea of a public interest which might be affected by the *nocumenta* perpetrated by individuals which could, and should, be redressed by a public official. (157)

However developments in this connection led to a rather different result. Instead of a principle emerging which entitled land owners to call upon some public official to take action to terminate a nuisance affecting them jointly, what happened was that there emerged a category of *nocumenta*, largely *sui generis* in nature, which were liable to redress *ex officio* rather than by action under the Assize or upon the Case.

This tangential development was the result of a change in the status and the function of the court of the sheriff's tourn.

(157) See Bracton (f 232b) who argued that in the case of the obstruction of the waters of a public stream in a manner which would not give rise to an action under the assize, 'on account of the public utility (which is preferred to the private) these things are to be restrained for the purpose of removing the public loss'. Elsewhere he mentions with approval the ability of the sheriff to clear an obstructed way 'for the common good lest travellers be impeded too long in going....' (f 233). See also Britton 2.30.8 who speaks of 'some nuisances which sheriffs are authorized to redress ... for the common benefit; as in the case of a way stopped, in order that passengers may not be too long deprived of their way, and in the case of several other nuisances'. Fleta 4.28 (89 Selden Socy 115-6) writes somewhat cryptically of a distinction between 'private' nuisances and those affecting the public:

'... a nuisance can be wrongful and damaging as regards one person or several private persons and [constitute] a private nuisance ['*priutam nocumentum*]. A nuisance can be against the public welfare, which always and in every case is to be given preference over private welfare'.

During the twelfth and thirteenth centuries the office of sheriff went into a decline. Coupled with this was the practice of the Crown, prevalent at that time, of granting franchisal rights to manorial lords to hold a court which performed the functions of the tourn. These franchisal courts were known as Courts Leet⁽¹⁵⁸⁾ and the grant of the franchise of holding such a court became a standard incident of a manor, its existence excluding the sheriff's power to hold his tourn within the manor.

The Court Leet was destined to play a pre-eminent role in the development of the institutions of local government and the administration of local affairs in England. In the course of time it was to emerge especially as the main instrument of borough government in which context is achieved its most elaborate development.⁽¹⁵⁹⁾

2. The Rise of the Leet

The sheriff's tourn was 'a valuable regality both in law enforcement and as a source of revenue'⁽¹⁶⁰⁾ and feudal lords, eager to obtain its powers and revenues, sought and obtained the privilege from the king of holding a court having the jurisdiction and power of the tourn. These private franchises to hold a view of the frankpledge became widespread in the twelfth and thirteenth centuries. Towards the end of the thirteenth century the word leet ('leta') became the common term for this type of private jurisdiction, although the name visus franciplegii remained its formal and correct title.⁽¹⁶¹⁾

(158) Generally on courts leet see Hearnshaw Leet Jurisdiction in England 11-17 and passim. See also 1 Holdsworth HEL 135 and below

(159) Its role in this connection is exhaustively examined in S & B Webb The Manor and The Borough.

(160) Allen The Queen's Peace 77.

(161) Pollock & Maitland History (i) 581.

The leet, then, was the tourn in disguise, and it was conducted in the same way: 'The lord who had this franchise claimed to swear in a body of jurors - often they were the chief pledges or heads of the tithings - and to put before them those same "articles of the view" which the sheriff employed in his "turn"'.⁽¹⁶²⁾

The leet though ostensibly a court of criminal jurisdiction came to perform legislative and executive functions. How this actually came about is obscure⁽¹⁶³⁾ but it is clear that leets 'without challenge from Crown or lord's officials ... assumed (or perhaps reasserted) a power to regulate their own affairs, by legislation which they themselves enforced'.⁽¹⁶⁴⁾ In the same way the leet appointed 'whatever staff of public officers to attend to the government of the locality that custom required'.⁽¹⁶⁵⁾ These included constables, ale-tasters, pound-keepers, dyke and wall reeves, 'burley-men' (bylawmen). In mercantile communities there might also be appointed officials for regulating weights and measures and the trading practices in the markets. In the larger towns there would be appointed the ubiquitous town-cryer, scavengers of the street, pavers, dog-muzzlers and the like.⁽¹⁶⁶⁾

(162) Pollock & Maitland History (i) 593:

'In manors where the franchise to hold a leet court existed, the jurisdiction was usually exercised contemporaneously with the seignorial jurisdiction known as the Court Baron, with the result that from an early stage there was considerable confusion of the two jurisdictions. Indeed it seems that in practice the courts 'leet' and 'baron' were held simultaneously with only the most elementary marks of distinction being observed'.

'... the leet entries appear under the general heading 'Entries del Courte Baron', the only thing which marks them off from the other entries being that they are collected together at the end, and are preceded by an inconspicuous sub-heading "xii pro rege"...':
Hearnshaw Leet Jurisdiction in England 35.
Cf Webb Manor and Borough 13 n 1.

(163) Webb Manor and Borough 27-8.

(164) Dawson Lay Judges 202.

(165) Webb op cit 28.

(166) Webb op cit 28-9.

Through these operations the Leet was able to set up a rudimentary machinery for the government of local affairs. But its chief role and function remained that of policing the conduct of residents. As Dawson puts it⁽¹⁶⁷⁾ 'regulation of conduct was carried much further in another way, without prior announcement of rules, through the court leet machinery of presenting jury. There is no discernible limit to the types of conduct that could be made the subject of a presentment'. The jurors inquired into and presented activities injurious to individual inhabitants - trespass to land, personal assaults, theft, even breach of contract. The juries dealt also with matters of more general concern - obstruction of pathways, watercourses, drainage ditches, surcharging of common pastures. So too they assumed the power to enquire into and present conduct which was a threat to the public peace and order or which was offensive to the moral convictions of the community.

The leet in this form and guise was not exclusively a feature of manorial communities. It existed also in those communities which enjoyed the various privileges and franchises that made up the institution of the borough. Indeed a court was as much a characteristic of a borough as of a manor⁽¹⁶⁸⁾ and most boroughs acquired the franchise of holding a court leet which often, given its nature, was 'developed into the governing body of the borough.'⁽¹⁶⁹⁾

3. Leets and the Concept of 'Common Nuisance'

3.1. Introduction

The courts leet, in coming to replace the court of the sheriff's tourn, took over the prosecution of the nascent

(167) op cit 203.

(168) Pollock and Maitland History (i) 627-9; Maitland Domesday Book and Beyond 210-227.

(169) Holdsworth 1 HEL 142-3.

public nuisance of obstruction of the king's highways.⁽¹⁷⁰⁾ The leets however instead of developing a principle that the conventional nocumentum, when it affected the public at large, might be pursued by an ex officio complaint, began rather to develop a separate and distinct category of nocumenta which came to be designated as 'common' nuisances.

3.2. The emerging concept

As an instrument of local government the leet however tended to adapt the jurisdiction over highway nocumenta to local needs.⁽¹⁷¹⁾ This was especially the case in the boroughs where the leet necessarily enjoyed jurisdiction in

(170) The scope of leet jurisdiction in this connection is indicated by 'court-keepers guides', the earliest of which date from the beginning of the fourteenth century (see Hearnshaw Leet Jurisdiction 373ff). One such guide, entitled 'Capitula que debent Inquiri' (circa 1307) requires the leet to inquire, inter alia, of the following (Hearnshaw op cit 374):

'If any encroachment ['purprestura'] shall have been made, as of ditch, wall [or] ploughed land upon the lord king or upon the lord of the court, or upon the neighbours.

If any wall shall have been wrongfully extended or diminished

If water shall have been diverted ...

Concerning roads and paths stopped or turned.'

(171) Cf 'Les Articles que Sount Opresenter' of the Court Baron (circa 1340) (Maitland (ed) The Court Baron (4 Selden Socy)) 93-4:

'Whether any purpresture has been made in the vill or fields, as for instance a dungheap placed in the high-street to the nuisance of the country ['a noyance de pars'] or a wall raised by a neighbour upon [the land of] another or on the king's highway ... watercourses ...

Whether paths to the church, the mill, the common spring be destroyed and by whom.'

At this time the jurisdiction of Leet and Court Baron was hardly kept separate (see n 162 above) and these articles are largely representative of the matters of concern to a manorial leet.

respect of all streets and thoroughfares. (172) The result was that the purpresture - nocumentum of the sheriff's tourn in the hands of the Courts Leet, began to acquire a new dimension as the borough leet began to grapple with the peculiar and particular problems of the maintenance and sanitary condition of urban thoroughfares.

Sanitary conditions in boroughs

The urban thoroughfares of the thirteenth and fourteenth centuries offered different problems to those encountered in the typical agrarian village.

The medieval city was a tighter more compact world. The streets and lanes - the communis strata - were more clearly defined as a result of the houses, shops and buildings situate one next to the other and strung out along the line of passage. City dwellers were thus less likely to find themselves entirely or even partially deprived of their right of passage as a result of a hedge or wall or gate placed across the street. It was more likely that they would be incommoded and annoyed by carts and waggons clogging the way and by heaps of refuse, domestic waste and animal ordure deposited on pavements and streets.

We have seen that in the medieval scheme of things the residents of a community were visited with a duty to maintain and repair roads and highways. (173) For the most part this

(172) 'The walls, ditches, streets and open spaces of the borough were not as yet [temp Ed I] conceived to be 'holden by' the community. They were still the king's, and he who encroached upon them committed a 'purpresture' against the king'. (Pollock & Maitland History (i) 653. Cf Glanvil 13.34 cited 25 n 84 above). Since all borough thoroughfares were 'royal' all encroachments upon them were purprestures and thus the leet, by its nominal jurisdiction over purprestures, effectively acquired a jurisdiction over all streets and thoroughfares.

(173) Above 5.

duty involved an obligation to remove obstructions or ensure that the way was not rendered dangerous or impassable.⁽¹⁷⁴⁾ The enforcement of these duties⁽¹⁷⁵⁾ was traditionally the function of the manorial courts - baron or leet.⁽¹⁷⁶⁾ The jurisdiction was exercised also in the borough courts where, however, the different conditions generated different approaches. To some extent the maintenance and repair of borough streets was regulated by by-laws enforced by the leet. These regulations in the form of by-laws, imposed upon householders the duty to maintain and repair the foot-ways and pavements before their dwellings⁽¹⁷⁷⁾ while the roads themselves were maintained out of tolls levied upon vehicles and horses,⁽¹⁷⁸⁾ and cleansed by rakers and scavengers appointed by the leet court.⁽¹⁷⁹⁾

- (174) Roads and highways consisted in rights of way, easements of passage, imposing upon the owner of the soil only the obligation to allow the public to pass and repass. The duty of repair involved then no more than the duty to ensure that the passage way remained open, implying the obligation to remove obstructions that might occur or the duty to maintain drains and ditches which prevented the flooding of the way. See generally Webb The Story of the King's Highway 5-7.
- (175) The customary duties were supplemented by legislative injunction. The Statute of Winchester (1285) (reproduced in Stephenson and Marcham Sources of English Constitutional History (i) 173) is the earliest example of English 'road' legislation.
- (176) Not always with success. Jackman The Development of Transportation in Modern England 4 writes:
 'Toward the end of the Middle Ages, we find in the Court Leet records of the manors a great many presentments of persons for offences in connexion with highways; and the almost wearisome repetition of these offences in all such court records would seem to indicate that conditions were much the same on most manors, and that non-compliance with the customary regulations for preservation of the highways was very common'.
- (177) Salusbury Street Life in Medieval England 16-17; Clifford History of Private Bill Legislation (ii) 234-5.
- (178) Termed 'pavage'. See Salusbury op cit 20-22.
- (179) Salusbury op cit 26ff. Clifford op cit 250.

For all this the leet remained active in presenting 'purprestures' upon the highways. In the boroughs though, the encroachments that the leet dealt with were often not so much the traditional walls, hedges, gates, fences and houses that were the subject of tourn presentments. Rather they were dungheaps, refuse, ashes, soil and the other detritus of urban domestic life.

3.3. Leet Jurisdiction expands the Nuisance concept.

Sanitary nuisances

What is often cited as the first piece of public health legislation in England - a statute of 1388⁽¹⁸⁰⁾ provides a good introduction to an account of the state of urban thoroughfares in the medieval English city. The preamble to the statute recites that

'Item, for that so much dung and filth of the garbage and entrails as well of beasts killed, as of other corruptions be cast and put in ditches, rivers and other waters, and also within many other places, within, about and nigh unto divers cities, boroughs and towns of the realm, and the suburbs of them that the air there is greatly corrupt and infect, and many maladies and other intolerable diseases do daily happen, as well to the inhabitants, and those that are conversant in the said cities, boroughs, towns and suburbs, as to other repairing and travelling thither, as to the great annoyance ['grant anusance'] damage and peril of the inhabitants, dwellers, repairers and travellers aforesaid....'

Dungheaps were a ubiquitous feature of the medieval city and complaints concerning them are recurrent. In 1298 the ministers of the king write complaining of the 'dung and dunghills and many other foul things placed in the streets and lanes [of Boutham, Yorks] ... to the nuisance of the king's ministers aforesaid and of others there dwelling and passing through.'⁽¹⁸¹⁾ In London 'great dungheaps thrown out from the stables and not infrequently encroaching on the right of way were an

(180) 12 Rich 2 c 13, Clifford op cit 279 n 1 says it is the first general Act, but is based on a local ordinance of 1362.

(181) Calendar Close Rolls 1296-1302 218 (reproduced 4 English Historical Documents 854). Cf Fitzherbert Natura Brevium 185 (D).

almost constant cause of protest,⁽¹⁸²⁾ and, Salusbury notes,⁽¹⁸³⁾ complaints 'against dungheaps in the streets and at the gates of towns continued into Tudor times'

The activities of butchers, poulterers, fishmongers were an equally common cause of complaint. These fouled the streets and pavements, public ditches and drains, by casting there the entrails, offal, horns, feathers of slaughtered animals as well as spilling into the streets blood and the foul liquids produced by scalding processes.⁽¹⁸⁴⁾

The ordinary citizen was no less guilty of insanitary practices. Excrement, urine and other domestic waste was flung from windows into the streets.⁽¹⁸⁵⁾ Dead cats, dogs, swine and even horses were thrown into the streets and ditches.⁽¹⁸⁶⁾ Livestock wandered the streets and alleys fouling the places and obstructing the passage. Perhaps no animal was more universally execrated than the pig. The ubiquitous swine, though it provided good service as the medieval scavenger of streets, by its own habits perpetrated as much inconvenience as anything. The ministers who complained in 1298 of dungheaps wrote of 'the pig-sties situate in the king's highways and the lanes of that town and ... [of] the swine feeding and frequently wandering about in the streets and lanes'⁽¹⁸⁷⁾ Efforts to suppress the practice of keeping swine in the cities were numerous and doomed⁽¹⁸⁸⁾ so that even well into modern times we still find city fathers wrestling with the intractable problem of the urban pig.

(182) E L Sabine 'City Cleaning in Medieval London' (1937) 12 Speculum 19 at 20.

(183) op cit 73.

(184) See E L Sabine 'Butchering in Medieval London' (1933) 8 Speculum 335 Salusbury op cit 73-6.

(185) See E L Sabine 'Latrines and Cesspools of Medieval London' (1934) 9 Speculum 303.

(186) Salusbury op cit 77-8.

(187) See n 181 above.

(188) Salusbury op cit 65-7. Cf Clifford op cit 234.

The cleansing of the streets of these various insanitary conditions was to some extent carried out under express legislative injunction.⁽¹⁸⁹⁾ More commonly however the task fell upon the jurors of the courts leet. They performed this task under the jurisdiction they enjoyed to present purpresures upon the king's highway. The dungheaps and other accumulations of garbage and waste were equated with the hedges, walls and fences which were the traditional purpresures⁽¹⁹⁰⁾ and presentments for causing nocumenta were brought against the citizens responsible for befouling the streets.⁽¹⁹¹⁾

This identification of nocumenta with insanitary conditions in the highways was to have an important consequence. Up until this point the leet nocumenta were essentially the traditional nocumenta of encroaching walls, hedges, houses and the like. The linking of the word nocumentum with conditions which by their insanitary nature were an annoyance to the public at large was to have the effect of adding a new dimension to the term nocumentum. By a sort of ellipsis men began to describe that which was insanitary or annoying as a nuisance, ignoring the primordial requirement that it should also involve an obstruction to the king's highway.

(189) See Sabine *op cit* (nn 182, 184, 185 above). Cf Clifford *op cit* 277-280.

(190) Cf Webb Statutory Authorities 317: 'If streets were not to become impassable, some way of dealing with these ... [heaps of soil, dung, dirt, ashes, garbage etc] had to be found. The first move was to treat the heaps as ordinary obstructions of the King's Highway, and to prohibit all citizens from casting, laying or leaving dirt, refuse or ashes on the surface of the street, exactly as they were forbidden to stand their carts or trade implements ... to the detriment of the free passage'.

(191) Cf the report of a 'Ward-moot' jury in London in 1422 (see Chambers and Daunt A Book of London English 1384-1425 121):

'First, that the Master of Ludgate often puts out dung in the street gutter ... to the great nuisance of all the folk passing there.... Also William Emery, horse dealer, often lays much dung in the high street ... to the great nuisance and annoyance of all folk passing and dwelling thereabouts Also the taverners of St Bride's parish set their empty tuns and pipes in the high street to the annoyance of all folk passing there.'

This development was gradual. It is mainly seen in the fifteenth century and after, in the emergence of new types⁽¹⁹²⁾ of civic misdemeanours liable to presentment by the leet. These though not involving obstructions to the highway were nevertheless charged as nocumenta. Thus we find, for instance, the leets coming to prohibit and prosecute as nocumenta such matters as 'the keeping of hogs in backyards, the washing of clothes in the streets, ... the fouling of wells, the throwing of fishy water into the market squares, and a dozen other odorous offences against his majesty's liege subjects'.⁽¹⁹³⁾ The most striking example of the manner in which the leets came to employ the term nocumentum to describe that which simply caused annoyance to others as opposed to that which involved obstruction or diversion of the highways, is to be found in the leet offences of scolding and eavesdropping.

Scolds and Eavesdroppers

This species of leet offence first appears in the fifteenth century.⁽¹⁹⁴⁾ In a court-keepers guide⁽¹⁹⁵⁾ of that

(192) The leets as we have seen were largely left free to develop and expand the list of items included in the articles of the view (see above 71) and it is a feature of the operations of leets in the fourteenth century and later that the range and subject matter of the articles of the view expanded and contracted, new offences being added, others being dropped 'so that the volume of individual personal activity dealt with was always varying'. Webb Manor and Borough 26-7.

(193) Hearnshaw Leet Jurisdiction in England 109. Cf the presentments at the Nottingham sessions in 1496 (see English Historical Documents 981) where a woman is presented for exposing for sale 'meat and pies unwholesome and corrupt for human food ... to the grievous nuisance of the said lieges....' while another is presented because she allowed 'servants' to 'keep disorderly conduct and make outcries, so that her neighbours and other lieges ... cannot sleep in their beds, to the grievous nuisance of the lieges....' In 1497 Henry Gorall is presented from throwing out 'a dead and putrid horse into the streets ... to the grievous nuisance of the lieges....'

(194) Cf Webb Manor and Borough 27.

(195) The words cited in the text came from a manuscript court-keeper's guide dated circa 1440 and reproduced in 4 English Historical Documents 548 at 552.

time there appears an item, placed quite separately from the list of traditional nocumenta to common ways, which instructs that the jury should enquire

'Also of all common chiders and brawlers to the nuisance of their neighbours, and eavesdroppers under mens walls and windows, by night or by day, to bear away tales or discover their counsel, to make debate and dissension among their neighbours, you shall let us know their names'.

Some clue as to the thinking which led to the creation of the offence of scolding and its designation as a nocumentum can be gathered from the indictment as a scold of the formidable Alice Shelton⁽¹⁹⁶⁾ before the mayor of London⁽¹⁹⁷⁾ in 1375:

'that all the neighbours, dwelling in the vicinity, by her malicious words and abuse were so greatly molested and annoyed; she sowing envy among them, discord and ill-will and repeatedly defaming, molesting and backbiting many of them, sparing neither rich nor poor; to the great damage of the persons and neighbours there dwelling and against the ordinances⁽¹⁹⁸⁾ of the city'.

Presentments of women as common scolds were a usual feature of leet jurisdiction in the fifteenth and sixteenth centuries⁽¹⁹⁹⁾ the charge being that she was communis garulatrix ad commune nocumentum.⁽²⁰⁰⁾

(195) (continued)

The various versions of the articles of the view dating from the fourteenth century contain no reference to eavesdroppers or scolds. Compare for example the so-called Statutum de visu Francipledgii (1325) said to be declaratory of the common law relating to leet jurisdiction. (On the 'statute' see Hearnshaw op cit 24).

(196) Riley Memorials of London and London Life 285-6.

(197) The Articuli de Wardemote of London may have been the origin of the practice of punishing common scolds. These contained an item instructing the ward jury to present bawds, strumpets, gossips and the like (Riley Liber Albus 337-8) though not using the term nocumentum to describe these ladies of ill-repute.

(198) Cf the borough ordinances of Leicester (1467) (see English Historical Documents 576)

Also that all manner of scolds that are dwelling within this town, man or woman, that are found defective by sworn men before the mayor, that then it shall be lawful to the same mayor to punish them on a duckings-tool.

(199) Webb Manor and Borough 27.

(200) See Holdsworth 2 HEL 383.

The designation of eavesdroppers as common nuisances was based on similar ideas. Thus we read of the presentment⁽²⁰¹⁾ in 1497 of John Clitherow, weaver, of Nottingham who

'... upon divers other days and nights, at Nottingham aforesaid, is a common listener at the windows and houses of his neighbours to sow strife and discord among his neighbours, to the nuisance of his neighbours ...'

4. The Concept of 'Common' Nuisance

From the earliest times the articles of the view required that the nocumenta that were to be presented there should be of a certain type. They had to be the walls, hedges, houses or whatever that were 'ad nocumentum ipsius iterineris et in periculum transeuntium'⁽²⁰²⁾ or which were upon 'chemin common a la nuisance de mesme le chemin et peril trespasauntz'⁽²⁰³⁾ or 'en nuisance del people'⁽²⁰⁴⁾ or 'a noyance de poi'.⁽²⁰⁵⁾

By the fifteenth century these words of qualification have tended to be reduced to the curt formula 'to common nuisance'⁽²⁰⁶⁾ and it is the standard practice of the leets when presenting the various offences housed under the expanded term nocumentum to charge that the scolding woman or

(201) See 5 English Historical Documents 982. Cf Dawson op cit 270 who sees the offence as arising from the need for 'more intensive control over conduct' as a result of the closer daily contact between urban dwellers. He cites an amusing case of an americiament of one Berchall 'for looking and herkinng at the window of William Dobson' and of William Dobson 'for a chamber pott emptied and thrown out of his window into ye backside of Geo. Berchall, to ye great annoyance of ye said George' (op cit 270 n 212).

(202) Statutum Wallaie (1284) (cited above 22).

(203) Britton (circa 1298) 1.30.3 (cited above 22 n 78).

(204) 'Videnda de visu Francipledgii' (ms court-keeper's guide of circa 1307 reproduced by Hearnshaw Leet Jurisdiction in England 373).

(205) 'Le Articles que sount a presenter' (circa 1340) (cited above 72 n 171).

(206) The fifteenth century court-keeper's guide (cited above 78 n 195) required the leet jurors to present
... all purprestures made on land or water or with blocks or stocks or any other thing in the highway, to common nuisance....'

eavesdropper or insanitary pavement is 'ad commune nocu-
mentum'. (207)

It seems clear that the appellation 'common' nuisance originally served to indicate nocumenta which affected the resident community which the court served. The court, whether town or leet, was after all a local⁽²⁰⁸⁾ police court and it would thus be logical for it to be concerned with nocumenta affecting the people within its jurisdiction.

Whether this also implied that common nuisances were conceived as nocumenta to be redressed by ex officio complaint brought on behalf of the public is not clear, certainly in the period preceding the sixteenth century.

In the sixteenth century however the principle began to emerge that 'common' nuisances though ostensibly wrongs against the king's own interests were in fact offences against the public and sued for by the king on behalf of the public.

This principle received its most elaborate expression in a line of constitutional cases concerned with the definition of the prerogative powers of the king and especially the power to pardon offences or 'dispense' with penal legislation.⁽²⁰⁹⁾ The principle evolved here was that the king might pardon or dispense with that which was malum in prohibita he could not do so in respect of that which was malum in se. Significantly the seminal decision⁽²¹⁰⁾ on the matter illustrated the principle in relation to that which was malum in se by observing that

'... if the king were to wish to allow a man ... to make a nuisance on the highway, a dispensation would be void.'

(207) See above n 200.

(208) Cf the remarks in Dewell v Sanders (1618) Cro Jac 491: '... the leet is to redress nuisances within the precinct thereof, and not to extend further...' (per Montague C J); '... they ought to enquire of public nuisances made within the precinct of their leet, and not of nuisances made in the country out of their jurisdiction...' (per Doderidge J).

(209) Generally on the dispensing power see Maitland The Constitutional History of England 302-306; Holdsworth 6 HEL 217ff.

(210) (1496) YB 11 Hen 7 pl 35 ff11,12 (cited Holdsworth op cit 218-9).

This instance of a restraint upon the king's dispensing power seems to be derived from a case in the reign of Edward the Third⁽²¹¹⁾ where it was held that the king could not excuse a person under a duty to repair a bridge from performing that duty. This decision was later construed⁽²¹²⁾ to have laid down a principle that

'... the reason of the common law ... allows many prerogatives to the king, yet it will never suffer them to hurt others. And therefore ... if a bridge is repairable by a subject, and it falls to decay, and the king pardons him from repairing it, yet this shall not excuse him, but he shall repair it notwithstanding, because others, viz all the subjects of the realm have an interest in it'.

Coke elaborated upon the principle in the Case of the Pardons (1609):⁽²¹³⁾

'Nota, the law so regards the public weal, that although in actions popular the King shall have the suit solely in his own name for the redress of it, yet by his pardon he cannot discharge the offender, for this, that it is not only in prejudice of the King but in damage of the subjects ... as if a man ought to repair a bridge, and for default of reparation it falls into decay : in this case the suit ought to be in the name of the King, and the King is the sole party to the suit, but for the benefit of his subjects'.

Since the failure to repair a bridge was liable to presentment in the leet as a common nuisance,⁽²¹⁴⁾ the principle here formulated applied to all common nuisances, a proposition enunciated in 1618 in Dewell v Sanders⁽²¹⁵⁾ and more fully

(211) Cited The Case of the Mines (1567) Plowden 319 at 334; The Case of the Pardons (1609) 12 Co Rep 30.

(212) Nichols v Nichols (1576) 2 Plowden 477 at 487.

(213) (1609) 12 Co Rep 30.

(214) A bridge being part and parcel of the king's highway.

(215) (1518) Cro Jac 490 at 491: '... a common nuisance is to the prejudice of all people, and it is a continuing offence, and cannot be dispensed with....'

by Vaughan C J in the leading case of Thomas v Sorrell⁽²¹⁶⁾

'The King cannot dispense with a nuisance to the highways by 11 H 7,⁽²¹⁷⁾ and consequently, as some think, with no other publique nuisance, by Sir Edward Coke. For all common nuisances, as not repairing bridges, high-ways etc. the suit is the Kings', but he cannot pardon or discharge the nuisance or the suit for the same, the highways being necessary to support such of his subjects as are occasioned to travel them....'

This developing idea that a common nuisance was a complaint by the king brought on behalf of the public was linked with a concurrent development involving the differentiation of the 'private' and 'public' interests affected by nocumenta. This came about as a result of attempts to differentiate the jurisdiction of the courts leet and the courts of common pleas wherein actions by way of the Assize of Nuisance or upon the Case were heard.

Leet jurisdiction

It is probable that at the early stages the jurors and lay judges of toun and leet would have dealt with cases in which an individual complained to the leet of harm caused to him by a common nuisance.⁽²¹⁸⁾ However by the reign of Henry IV the principle seems to have been established that the leet could not accept presentments of nocumenta which harmed only 'private interests'.⁽²¹⁹⁾ A case in 1411⁽²²⁰⁾ held that the laying of dung or ordure against a man's wall was not presentable 'because it concerns private interest'.

(216) (1674) Vaughan 330 at 339.

(217) Above n 210.

(218) See eg Leet Jurisdiction in Norwich (5 Selden Socy) 8 where there is an instance of a presentment by a leet of one who constructed a watercourse 'to the nuisance of his neighbour, the aforesaid William'.

(219) Nicholls in his translation of Britton reproduces (at 403) a note from the manuscript which reads as follows: 'It should be known that the sheriff ought not to redress any nuisance presented at his tourn, if it be not wrongful and injurious to the community [a commune des gentz]. For nuisance done to a single person shall be redressed by a single suit and not otherwise'.

(220) 2 Rolle Abr 83 pl 9.

So also it was held that nuisances committed against the common lands of a vill could not be presented at the leet since 'it is private, of which the Assize lies'.⁽²²¹⁾ A similar case is more fully reported from the year 1412.⁽²²²⁾ The abbot of Rievaulx was presented at the sheriff's tourn for allowing a water course to become so obstructed that the waters over-flowed 'ad commune nocumentum villatorum predictorum'. According to the report 'the present king [Henry IV] caused this presentment to come before him for determination'. It was held that since the presentment referred to the nuisance as caused 'to the townships', the proper remedy was an 'individual action by the said townships [which] is available by the law of the land against the abbot'. The matter was thus not one for the tourn since there 'the king does not take action except in the case of a common public nuisance [nocumento communi populari]' which was not what was charged by the juror's presentment.

The principle stated in these decisions was institutionalized in the sixteenth century in treatises dealing with the jurisdictions of the courts leet.⁽²²³⁾

Kitchin in expounding the jurisdiction of the courts leet repeated that presentments for the enclosure of common lands of the vill could not lie⁽²²⁴⁾ and also pointed out that while injuries made in the highway were presentable at the leet there could be no presentment of 'injuries in private

(221) 2 Rolle Abr 83 pl 8. Cf Mary's case (1612) 9 Co Rep 111b where the case is explained on the basis that there was here 'a private wrong to the particular inhabitants of this particular town, and no public common nuisance'.

(222) Select Cases in the Court of King's Bench (88 Selden Socy) 211.

(223) The first and most influential work in this connection was that of the 'methodically learned John Kitchin of 1 Grays Inn Esquire and Double reader'. His work appeared in 1580 under the title le Court Leet et Court Baron In 1605 it appeared in an English translation Jurisdictions, or the Lawful authority of the Court Leet, Courts Baron, Court of Marshalsey, Courts of Pyepowder and Ancient Desmesne. Altogether the book ran into some fourteen editions, the last appearing in 1675. See Webb Manor and Borough 10; Holdsworth 4 HEL 120 n 2.

(224) Jurisdictions 46.

ways; but the Party grieved shall have an Assize of Nuisance, or an action on the case....'(225) So too, if 'one sow may private way to my meadow, I shall have an Assize of Nuisance, and it is not presentable in Leet'.(226)

In 1588 it was argued in William Willoughby's case'(227) that there could be no presentment of one who had enclosed land in which others had a right of common 'because it concerneth only the interests of particular persons, and was no common nuisance to the Queen's people and it concerning a private commodity of certain persons, and not of the Queen or her people in general, the parties grieved are to have their action upon the case....' And in Evington v Brimston (1593)(228) it was held by the court that one who had been presented for leaving a gate open 'ad nocumentum inhabitum' could not be properly amerced since

'this is not a nuisance enquirable; for it is a private injury'.

So too in Dewell v Sanders (1618)(229) it was held that the nuisance caused by doves from a dove-cot erected by a landholder could not be presented at the leet

'for nothing is enquirable there and punishable, but that which is a common nuisance to all people; but this erecting a dove-house cannot be a nuisance but to those only whose corn they eat, and not to all persons; and therefore no common nuisance enquirable there'.

Underlying the insistence that the Leet exercised jurisdiction only in respect of common nuisances was the proposition insisted on especially by the treatise writers of the

(225) op cit 69.

(226) Ibid.

(227) (1588) Cro Eliz 90.

(228) (1593) Moo. KB 484.

(229) (1618) Cro Jac 490. See also R v Dickenson (1680) 1 Wm Saunders 135: '... the court leet can amerce for none but public nuisances, and not for a particular trespass ... for which an action lies ... to recover damages....'

sixteenth century,⁽²³⁰⁾ that the leet was part of the system of royal courts.⁽²³¹⁾

Thus Kitchin said,⁽²³²⁾ the stopping of the royal highway was enquireable at the leet

'for that is a common annoyance to all the subjects of the Queen'.

On the other hand nocumenta perpetrated against the common lands of the vill could not be presented in the leet and should be tried in the Court Baron because, Kitchin said⁽²³³⁾ there was 'no common annoyance'. Hearnshaw⁽²³⁴⁾ explains Kitchin's distinction thus: 'The court leet was regarded, not as the court of the community of the manor or borough, but as the king's court for the community of the manor or borough. Thus the offences over which it had jurisdiction were not those done to the community, qua community, but to the community as composed of the subjects of the king'.

In short the point made by Kitchin was that nocumenta were presentable in the leet only if they affected 'public' interests.⁽²³⁵⁾

The Common law judges agreed with this.⁽²³⁶⁾ In Hayward's case (1589)⁽²³⁷⁾ an indictment for obstructing the public highway 'ad nocumentum diversorum liegorum dominae regnae' was held bad 'because it was not "all the Queen's liege people"'.

(230) Cf Hearnshaw Leet Jurisdiction in England 37-8.

(231) A principle which followed from the fact that the leet was the successor to the sheriff's tourn and the tourn was ab initio one of the royal courts. See Hearnshaw op cit 37-8. Cf Holdsworth 4 HEL 130.

(232) Jurisdictions 45.

(233) Jurisdictions 46.

(234) op cit 111.

(235) '[D]id a matter concern the whole resiant community of the king's subjects, then it was a leet matter; did it merely concern some section, large or small, then it was not a leet matter, and a remedy must be sought elsewhere': Hearnshaw op cit 97.

(236) The common law courts had jurisdiction to review proceedings of the leet courts. See Dawson Lay Judges 257ff.

(237) (1589) Cro Eliz 148.

In Hughe's case (1618)⁽²³⁸⁾ an indictment that a nuisance was 'ad grave nocumentum' was quashed because it did not say 'omnium ligeorum domini regis'. In Pratt v Stearn⁽²³⁹⁾ (1614) a presentment was said to be bad because it

'doth not say in the presentment that it was ad nocumentum legiorum domini regis; which ought to be in every presentment : and although the party hath here averred that it was ad commune nocumentum, yet that is not sufficient....'

Assize Jurisdiction

The nature of the concept of common nuisance is further elucidated by the question whether an action could lie under the Assize (or the action on the Case) for a nuisance which was a 'common' nuisance.⁽²⁴⁰⁾

The early rule, as we have seen, was that such an action could lie.⁽²⁴¹⁾ This was so really because there was at that time no distinct idea that a nuisance might be common or public. Rather the attitude was that where a nuisance affected many each party so injured might severally bring an action.

The effect of this rule was however that a person perpetrating a common nuisance was likely to be exposed to a multiplicity of private actions for damages, the only limitation on his liability being the factual consideration that each plaintiff must be able to show that his freehold was injured or, in actions in case, that he had suffered damage.

(238) (1618) 2 Rolle Abr Indictment 83 pl 10.

(239) (1614) Cro Jac 382.

(240) For this purpose 'common' nuisances were usually only those involving purprestures upon public highways. There seems to be no case in which a party attempted to sue under the Assize for one of the common nuisances developed by the Leets as, for example, scolding or eavesdropping.

(241) Above 26. Cf Loengard Free Tenements 246. Kiralfy Action on the Case 69 cites a case of 1354 'which has the elements of a private action for public nuisance for dumping offal on a quay....' He notes too that 'in the time of Edward III and Richard II Registers of Writs gave an action for sinking a ship by a nuisance to navigation'.

This consideration seems to have led to the emergence, in the fifteenth century, of a rule that there could be no civil action for a nocumentum which was liable to presentment at the leet or tourn.⁽²⁴²⁾ The rule was stated by Heydon J in 1466⁽²⁴³⁾ in these terms:

'if there be a common way which is not repaired, so that I am damaged by the miring of my horse, I shall never have an action against him who ought to repair the way, but the complaint is concerning a matter which affects the public; and in such a case no man shall have his action for this, but the remedy is by way of presentment'.

This principle is found repeated in 1535 in Sowthall v Dagger⁽²⁴⁴⁾ by Baldwin CJ who explained the reason why an action on the case could not lie for a stoppage of the king's highway

'for the king has the punishment of that, and he [plaintiff] has his plaint in the leet and there his redress, because it is a common nuisance to all the king's lieges, and so there is no reason for a private particular person to have an action sur son cas, for if one person shall have an action for this by the same reason every person shall have an action, and so he will be punished a hundred times on the same case'.

The rule that a private individual could not sue in the Assize or by the action on the case for a nocumentum which was a 'common' nuisance became firmly established in the common law.⁽²⁴⁵⁾ The most comprehensive statement of the rule is found in Robert Mary's case⁽²⁴⁶⁾ (1612) where it was said:

(242) (1410) YB 11 Hen 4 pl 28; (1455) YB 33 Hen 6 f26 pl 10; (1463) 2 Ed 4 f9 pl 2.

(243) (1466) YB 5 Ed 4 pl 24 (cited Holdsworth 10 HEL 314).

(244) (1535) YB 27 Hen 8 pl 10 f27 (cited sub nom Anonymous Fifoot History and Sources 98; see also Holdsworth 10 HEL 424). Kiralfy Action on the Case 69 identifies the case and (at 210) reproduced the pleadings.

(245) 'A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance': William's case (1592) 5 Co Rep 72b. See also Fineux v Hovenden (1599) Cro Eliz 664; Cf Co Litt 56b.

(246) (1612) 9 Co Rep 111b.

'... for a nuisance in a highway without special damage,⁽²⁴⁷⁾ none shall have a private action, for it is not damnum privatum, but damnum commune, and therefore ought to be only punished and reformed at the King's suit; for a public nuisance shall not be reformed at the suit of a private party; but privatum damnum sive nocumentum shall be reformed by the action of the private party grieved, and commune nocumentum at the suit of the King who is the head of the whole commonwealth'.

Classification

By the end of the sixteenth century then there existed ample authority for a proposition that certain nocumenta were in their nature such as to affect the public at large and as such were properly redressed by an action brought in the court leet, such action being in the name of the Crown and on the public behalf.

The only attempt to establish a formal classification of nocumenta at this time was that of Coke who, in his Institutes,⁽²⁴⁸⁾ laid it down that

'Nocumentum est triplex; 1. publicum sive generale. 2. Commune. 3. Privatum sive speciale. Publicum, ad nocumentum totius regni; commune, ad commune nocumentum transeuntium; privatum, to a house, a mill etc.⁽²⁴⁹⁾

(247) Where a private person suffered special damage from the common nuisance he was allowed an action. This exception (discussed below 145-8) stems from Sowthall v Dagger (1535) (above n 244). It was much relied upon by Vaughan CJ in Thomas v Sorrell (1674) Vaughan 330 as the ratio for the doctrine that the crown could not dispense with a common nuisance: '... the reason is, because the parties particularly damaged by a nuisance, have their actions on the case for this damage, whereof the King cannot deprive them by this dispensation' (at 335) '... the reason why the King cannot dispense in such cases, is, not only as nuisances are contra bonum publicorum, but because if a dispensation might make it lawful to do a nuisance ... the person damaged by it would be deprived of his action, for an action cannot lye for doing that which was lawfully done' (at 341).

(248) 2 Inst 406.

(249) This tripartite division may have been suggested by the classification of the 'nuisances of the forest' by John Manwood in his Treatise of Forest Law (1580) Chap 17 s 2 (on forest law see above 7 n 25):

This formulation is significant as indicating the recognition of what would become the traditional distinction between public and private nuisances. The division of the former category into nuisances 'commune' and 'publicum' would seem to be a piece of medieval pedantry⁽²⁵⁰⁾ which was to be discarded in later centuries.⁽²⁵¹⁾

(249) (continued)

Of nuisances of the forest, there are three sorts of them: The first is called Nocumentum commune, or common nuisance; and this sort of nuisance or annoyance is that, which is a general hurt or annoyance, as well unto all the inhabitants or dwellers within the forest ... as for example, if any man that ought to make or repair any bridge ... for common passage ... so that by reason thereof men cannot have their passage in the common highway....

The second sort of nuisance is called nocumentum speciale, or special nuisance, because this sort of nuisance tendeth especially ad nocumentum ferarum....

The third sort of nuisance or annoyance may well be called Nocumentum generale, because it stretcheth to the general hurt and annoyance of the whole forest....

(250) Cf Garrett Nuisances 1: 'The distinction between the first two classes would seem arbitrary, being a question of degree, and not one of principle'. Certainly it is not quite clear what exactly was the distinction between these two species of nocumentum. The terminology has overtones of the Romanistic distinction between res communes and res publicae which Bracton had taken over (ff7-8) and which was repeated by Britton (2.2.1) and Fleta (3.1. (89 Selden Socy 1)). In the cases the terms are often used as synonyms (see eg Mary's case above ad n 246). In the eighteenth century the distinction seems to have been more clearly realised, perhaps under the influence of Coke's trichotomy: thus in R v Saintiff (1705) 6 Mod 256 there is a dictum by Holt CJ that 'the word "publicus", which is of wider extent than "communis", for there is common for two, three or more; and it will be hard to understand the word "common" to be universal....' This suggests that a public nuisance was that which was universal while a common nuisance was that which affected more than one person but not all people. Cf R v White and Ward (1757) 1 Burr 333 at 336 where counsel remark that 'this indictment of ours is laid extensively enough to be a common nuisance; though not a public one : nor did it, in fact, affect other persons than those living and passing by.

(251) See below 218.

C H A P T E R . T H R E E

ELABORATION: PRIVATE NUISANCE (1500-1700)

1. Introduction

By the seventeenth century the premier remedy for the redress of nocumenta was the Action on the Case for Nuisance.⁽¹⁾ Conceptually this action was an action in tort⁽²⁾ providing redress in damages only. As such it differed in character and purpose from the Assize of Nuisance which was a

- (1) Cf above 65-6. The Assize of Nuisance slipped into desuetude (cf n 66 below) and was finally abolished (together with the writ quod permittat and the Assize of Novel Disseisin) in 1834 by the Real Property Limitation Act 3 & 4 Will 4 sec 36 (on which see Maitland The Forms of Action 6, 65).
- (2) Technically the action on the Case (for nuisance) was an action for trespass (see above 58-61) and as such falls to be classified as a tort action. The distinction between the action for nuisance and the action for direct trespass (trespass to land) was not always clear. The action for trespass to land required that the wrong be done 'vi et armis' and 'contra pacem'. It came to be realised that where a man, for instance, broke a dam wall on his own land so that his neighbour's property was flooded it could not be said that he had acted 'vi et armis' or 'contra pacem' and thus that the appropriate form of action in this situation was the action upon the Case for nuisance rather than the action for trespass (see Shury v Pigot (1625) Poph 166 per Doderidge J; Preston v Mercer (1656) Hard 60. Cf Kiralfy Action on the Case 58). The distinction between the two forms of action was thus said to be in the question whether the damage suffered was direct or consequential: 'Trespass upon the case, and trespass vi et armis, are different in name and their nature; for the one [trespass upon the case] is called an action for a nuisance and the other are [sic] called actiones injuriarum; the one [trespass vi et armis] must be brought for a wrong done immediately to the person or his possession, the other for consequential damage.... If logs are laid in the highway by which a person is hurt, he must bring case; but if the hurt is received by logs thrown at the person, he must bring trespass vi et armis' (per Fortesque J in Reynolds v Clark (1725) 8 Mod 272).

real action providing a remedy by way of abatement of nuisances.⁽³⁾ Yet for all this the concept of nuisance under case 'though enlarged in scope, retained its original character'.⁽⁴⁾ It retained its original character because the action on the Case was essentially parasitical in nature, evolving and developing on the fringes of the existing forms of action.⁽⁵⁾ At the same time, under the regime of case, the nuisance concept enlarged its scope, mainly because the action on the Case allowed for novelty in the framing of causes of action,⁽⁶⁾ a feature fully exploited in the seventeenth century as a new social and economic milieu threw up new ideas as to the nature of the amenities attached to land-holding.⁽⁷⁾

2. The Nuisance Action under the regime of Case

2.1. Introduction

The action on the Case for Nuisance was the earliest example of an action upon the case,⁽⁸⁾ evolving, as we have seen,⁽⁹⁾ to supplement the existing remedy of the Assize of Nuisance. Consequently it tended to develop by way of analogy⁽¹⁰⁾ derived from the Assize of Nuisance. Actions on the

(3) See Kendrick v Bartland (1679) 2 Mod Rep 253 where the Court of Common Pleas

'took this difference between a quod permittat or an assise for nuisance, and an action on the case for the same; for the end of a quod permittat or an assise was to abate the nuisance, but the end of an action on the case was to recover damages'.

(4) Fifoot History and Sources 95.

(5) See below 93.

(6) Kiralfy Action on the Case 9. Cf Fifoot op cit Chap 4.

(7) Below 109, 115.

(8) Kiralfy op cit 44. Cf at 17.

(9) Above 58-62.

(10) The use of analogy in formulating actions upon the Case was one of the chief features of the development of the remedy (Kiralfy op cit 15-16). 'It is' Kiralfy writes (ibid) 'this element of Analogy which prevented the Action on the Case from becoming a real entity, with general rules common to all its forms and differing from those applicable to all other forms of action. Almost the only sign of an action on the case, is the "quod cum" or "quare cum" of the writ [cf above 59]'

Case were often described in court as actions 'in the manner of nuisance',⁽¹¹⁾ while declarations were drafted in imitation of the various nuisance writs.⁽¹²⁾

Thus it is that under the regime of case we find many of the familiar medieval types of wrong doing being redressed: actions on the case for nuisance are brought for the diversion of water-courses;⁽¹³⁾ the obstruction or narrowing of rights of way;⁽¹⁴⁾ the interference with the franchises of markets, fairs and ferrys.⁽¹⁵⁾

So too the action on the Case for Nuisance required that the plaintiff should prove damage in order to be entitled to redress.⁽¹⁶⁾ And, as under the Assize of Nuisance, damage only gave a cause of action if it was of a type which the law deemed to be wrongful.⁽¹⁷⁾

(11) As in Stapelton's Case (1355) YB 29 Ed 3 f 32 (cited Kiralfy op cit 15).

(12) See Kiralfy op cit 63-4 for examples.

(13) Kiralfy op cit 67. See also Russell and Hanford's Case (1583) 1 Leo 273 and the discussion below 139.

(14) Kiralfy op cit 65-6. Cf above 63-5.

(15) See Baker English Legal History 242-3. See The Prior of St Nedeport's Case (1443) YB 22 Hen 6 f 14 pl 23 (reproduced in Fifoot History and Sources 96) and Yard v Ford (1670) 2 Wms Sund 172 where the medieval rules (above 47-8) are substantially repeated.

(16) Being an action for damages this was a natural element of the action on the case. See Kiralfy Action on the Case 12-14 for a discussion of damage as an element of actions on the case. The early examples of actions on the case 'in the manner of nuisance' being usually brought on the grounds of non-feasance, the element of damage received especial emphasis. See the cases cited by Kiralfy op cit ibid. On the action for 'special' damages arising from a public nuisance see below 145-8.

(17) See Fitzherbert Natura Brevium 184A(a): '... Case does not lie, nor an Assize of Nuisance where it is *damnum sine injuria*'. Fitzherbert cites as authority the famous Gloucester Grammar School Case (1410) YB 11 Hen 4 f47 pl 21. There it was held that no action could lie in respect of a school set up in competition to an existing school with the result that the plaintiffs lost income. Hankford J in rejecting the action observed that '*Damnum* may be *absque injuria*, as if I have a mill and my neighbour build another mill, whereby the profit of my mill is diminished, I shall have no action against him though it is damage to me....' Cf the unreported Serjeant Jeffreys

2.2. The Rules of Liability

2.2.1. Introduction

The action on the case was developed for the specific purpose of supplementing the defects of the old forms of action. In the field of nuisance these defects were that the Assize was not available to one who was not a freeholder,⁽¹⁸⁾ nor did it lie at the instance of a freeholder who was not the original victim of the nuisance.⁽¹⁹⁾ So, also, it did not lie against one who was not the actual author of the nuisance.⁽²⁰⁾ One of the significant features of the action on the case for nuisance was the way in which it came to redress these defects in the law.

2.2.2. Availability of the Action on the Case

Generally

By the seventeenth century there was no evidence of the old principle that the action for nuisance lay only for those who were the holders of a free tenement. In order to succeed

(17) (continued)

Case (c 1470) (cited Baker English Legal History 241 n 9) in which a serjeant at law brought an action on the case against a schoolmaster because the "gabber de boys" disturbed the quiet of his chambers. The action failed 'apparently on the ground that it was lawful to set up a school anywhere' (Baker op cit 241). Generally on wrongfulness as an element of Actions on the Case see Kiralfy op cit 9-12.

(18) Above 53.

(19) Above 51.

(20) Above 52.

(21) The action on the Case was allowed to a lessee (by definition a non-freeholder (see 54 above) as early as 1469 (see YB 9 Ed 4 f35 pl 10). The landlord was allowed his action on the case where the nuisance threatened his reversionary interest (as for example where the defendant by befouling waters caused the plaintiff's tenants to leave his houses: The Prior of Southwark's Case (1498) YB 13 Hen 7 f 26 pl 4 reproduced Fifoot op cit 87) see Bedingfield v Onslow (1685) 3 Lev 209 where it is held that an action on the case for a nuisance could lie at the instance of the landlord 'in respect of the prejudice done to the reversion' and of his tenant 'in respect of the possession'.

in an action on the case the plaintiff had to show only that he was entitled to the property affected by the nuisance;⁽²²⁾ the nuisance; the fact that the defendant had caused the nuisance; and the damage suffered.

The Authorship of the Nuisance

Plainly the defendant in order to be held liable had to have created the nuisance. Under the regime of the Assize of Nuisance this elementary proposition had led to the rule that a successor in title to the author of the nuisance could not be sued since he could not be said to have created the nuisance.⁽²³⁾

This proposition was abandoned under the regime of the action of the case, the judges invoking the concept of a nuisance as a 'continuing' harm to achieve this end. In essence this involved the finding that where a structure or thing which caused nuisance damage was not abated but allowed to continue to cause harm,⁽²⁴⁾ then each day it continued provided a fresh cause of action for which the plaintiff could bring successive actions.⁽²⁵⁾ On this basis it then became possible to say that where the author of the nuisance alienated the premises to another, that other could be sued in case, not for the erection of the nuisance but for the continuance.⁽²⁶⁾

(22) Cf Comyns Digest 'Action upon the case for Nuisance' E(1): 'In an action upon the case for a nuisance, the plaintiff must show himself entitled to the thing, to which the nusans was done, at the time of the nusans'.

(23) Above 51.

(24) This became a common situation under the regime of case since the action resulted only in an award of damages only, no order of abatement (as was the case under the Assize process (above 55) being made. Thus unless the plaintiff resorted to one of the ancillary remedies (for which see below 101) the defendant was free to pay his damages and allow the offending thing to remain in situ. The usual example of this was a house or other building erected to the nuisance of 'ancient' lights (below 120). It is noteworthy that it is mainly connected with this type of nuisance that the equitable remedy by way of injunction evolved (see below 232).

(25) See below 26.

(26) Cf Beswick v Cunden cited below n.43.

Liability of Successors in title to the author of the
nuisance

In Moore v Browne⁽²⁷⁾ (1572) the defendant, the heir of her deceased husband, was sued for the diversion of a water-course.⁽²⁸⁾ The 'diversion' took the form of drawing water from a tap in a conduit, the tap having been inserted by the deceased husband. The defendant argued that she could not be sued since 'she was not the first who diverted' but it was held that since she had used the tap 'that may be called in her a new diversion'.

This decision reflects a judicial tendency to find in the conduct of the successor in title to the author of the nuisance or in the actual state affairs something which could be seen to constitute a 'fresh' nuisance and thus to give the plaintiff a 'fresh' cause of action.⁽²⁹⁾ This is perhaps

(27) (1527) 3 Dyer 319; Ben 215.

(28) Under the Assize of Nuisance as extended by the Statute of Westminster II an action would have lain against the wife and the husband had he still been alive (see above 52). It is noteworthy that in Moore v Browne nothing was made of the fact that the husband was deceased, a clear indication that the old rule was no longer considered applicable.

(29) Perhaps the seminal instance of this practice is the early case of Daulby v Berch (1331) (4 Ed 3 f36 cont 5 Ed 3 f43 pl 36 cited Liber Assize anno 4 f 6 pl 3 (see Rich v Basterfield (1847) 4 C B 783 at 805 n (a)). The case is quoted by Gale Easements 489). There it was held that a writ quod permittat prosternere could lie against the son and heir of he who erected a lime-kiln which damaged the plaintiff's fruit trees. Herle J said that

"It might be he [the father] had the kiln there, but did not use it, and the tort began with the user; or that the tort was begun, and then discontinued, and renewed again, after he was possessed of the frank tenement; and then he shall have his assize. Thus, if my father had a right of way, which was stopped by hedge or by a ditch levied across it, and the tort was submitted to without debate all the lifetime of my father, and after his death I find the way open, and enter and use it, and am afterwards disturbed by the feoffee of him who levied the hedge, I shall have an assize of nuisance.

"So here, although we have the kiln before, etc., and the tort begun, if afterwards such tort be discontinued, and then in his [plaintiff's] time it begin [again] to burn, he shall have an action for such tort".

best seen in Penruddock's case⁽³⁰⁾ (1598) where a house had been built with eaves overhanging adjoining land so that the rain fell upon the plaintiff's roof. It was held that the plaintiff could have his remedy against the defendant, who was the successor in title to the man who built the house, because 'the dropping of the water in the time of the [successor in title] is a new wrong'.⁽³¹⁾

Liability of Lessees

The question of the liability of a successor in title to be sued for nuisances created by the predecessor in title turned essentially upon the consideration whether one who was not the author of a nuisance could be sued for the damage caused by the nuisance. The question arose in this form in the situation in which the lessee of premises was sued in respect of damage caused by a nuisance not created by him but existing upon the premises at the time he came into occupation.

The question appears to have first arisen⁽³²⁾ in Ryppon v Bowles⁽³³⁾ (1615). There the defendant became the tenant of premises upon which there was a structure, previously erected by the landlord, which obscured the lights of the plaintiff's house. The plaintiff brought an action on the Case and the defendant argued

(30) (1598) 5 Co Rep 100b. The case actually involved a writ of quod permittat prosternere, but this does not affect the principle involved.

(31) In Penruddock's case the court cited Rolfe v Rolfe (1582) (unreported) where on essentially similar facts

'it was adjudged that the action was maintainable, because the def. on request made, did not reform the nuisance which his father made, but suffered it to continue to the prejudice and damage of the plaintiff, son and heir to him to whom the wrong was done'.

This suggests that the defendant's liability rested upon his failure to abate the nuisance when requested to do so. Cf below 105.

(32) Under the Assize a lessee could not be sued (per Danby J in (1496) YB 9 Ed 4 pl 10 f 35). Neither of course would the Assize be in favour of a lessee, since he was not a free-holder (see above 54).

(33) (1615) Cro Jac 374.

'that this action lies not against the defendant, for although an action lies against him who erected it (as was agreed by all the court) yet against the defendant, who is only for years, and inhabits only therein, and who hath committed no other act to prejudice the plaintiff, and who hath not authority to abate it (but if he should, would be chargeable in an action of waste), the action is not maintainable against him'.⁽³⁴⁾

No judgment was given on this argument the report merely noting that 'to that opinion Coke, Chief Justice, inclined; though the other justices doubted therein'. The point came up again in 1619 in Brent v Haddon.⁽³⁵⁾ There the owner of land erected on it a mill weir which caused the plaintiff's meadow to be flooded. Thereafter the mill was let to the defendant Haddon who was sued in an action on the case for the nuisance. The defendant argued that the action should not lie against him since 'he hath not authority to abate it, being done in the time of his lessor ... nor was it any nuisance erected by him'. This time though the court was certain of its view, and allowed the action

'for the continuance is a nuisance by him, against whom the action well lies'.

These cases were followed by that of Rosewell v Prior⁽³⁶⁾ (1701) which still stands as a definitive decision. The case arose from the erection of a building which obscured the plaintiff's ancient lights. This was held to constitute a nuisance and judgment was given for the plaintiff. Thereafter the defendant leased his premises to one Shuttleworth without abating the nuisance. The plaintiff thereupon instituted a fresh action⁽³⁷⁾ (on the case), not against Shuttleworth, but against the lessor Prior. What was unusual about

(34) Defendant also made the point that there was no continuing of the nuisance by him as in Moore v Browne (supra n 27).

(35) (1619) Cro Jac 555.

(36) Rosewell v Prior (1701) 6 Mod 117; Comb 481; 2 Salk 459; 1 Ld Raymond 392. According to Lord Raymond's report of the case the matter was argued 'two or three times' and the court held for the plaintiff after 'great consideration'

(37) Rosewell v Prior (1701) 12 Mod 635; 2 Ld Raymond 713; 2 Salk 460. This case too 'was often argued': 12 Mod 635 cf 2 Ld Raymond 713.

this was that the action was brought against the defendant who though creator of the nuisance, was not the occupier of the premises. And, as the one report of the case puts it, 'whether it lay? was the question, which was often argued'.

The defendant advanced four main contentions: 1 That the action properly lay against the tenant in occupation (citing Ryppon v Bowles and Brent v Haddon), 2 That the quod permittat would lie against the tenant (although not an Assize) and this rule 'will govern the present case, being an action on the case', 3 That the defendant although creator could not be liable for the continuance of the nuisance by the tenant. 4 That if he was liable as creator, his liability had been discharged by the damages awarded in the first action.

The plaintiff replied that by erecting the nuisance and then leasing the premises, the defendant had continued the nuisance.⁽³⁸⁾ Further, that there could be no action against Shuttleworth who, on the authority of Ryppon v Bowles, could not abate the nuisance. Also, that it was against the 'justice of the law' that the defendant be allowed to deprive the plaintiff of his remedy by leasing over the premises. And, finally, that the defendant was in receipt of rent for the premises which amounted to a 'consideration of this nuisance' and it was thus only just that he should bear liability for it.

The Court found for the plaintiff, holding the action well brought against the defendant as erector of the nuisance

'for before his assignment over he was liable for all consequential damages; and it shall not be in his power to discharge himself by granting it over; and more especially here, where he grants over receiving rent, whereby he agrees with the grantee that the nuisance should continue, and has a recompense, viz the rent, for the same And if a wrong-doer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it.'⁽³⁹⁾

(38) 'Erecting and continuance are several offences, and every day's continuance of the nuisance is a new nuisance; for it is the possession and usage of this nuisance, to the damage of another, is the cause of the action, and that is done by the [defendant]': (12 Mod 635 at 638).

(39) 12 Mod 635 at 640.

However, although finding the defendant liable to have the action brought against him, the Court added that it could equally be brought against the lessee since it was his 'fault to contract for an interest in land on which there is a nuisance'.

In the result then, it was the view of the Court that this action might have lain either against the lessor or the lessee 'the plaintiff having his election against which of them to bring it....'

Successor in title as Plaintiff

Under the Assize the action for nuisance would not lie at the instance of a plaintiff who was the successor in title to the original victim of the nuisance. In other words one who came to an already established nuisance could have no action against the perpetrator.⁽⁴⁰⁾

The reason for this rule was that the successor in title was not a freeholder at the time the nuisance was perpetrated and thus could not bring the Assize.⁽⁴¹⁾ In the sixteenth century Gawdy J sought to overcome this technicality by holding that

'an action of the case declareth the whole matter, so that it is not material when the nuisance was erected, for he that is hurt by it shall have an action.'⁽⁴²⁾

However the other judges approached the question more cautiously suggesting that the action could lie where the nuisance was of a continuing nature since 'the continuance of it after [the plaintiff obtained title] is a new wrong for which the action lieth'.⁽⁴³⁾

(40) Above 52-3. The defendant's remedy lay in a writ quod permittat prosternere (see above 16-17).

(41) See above 53.

(42) Westbourne v Mordant (1590) Cro Eliz 191.

(43) See the report of the same case (sub nom Westborn and Mordant's Case) in 3 Leonard 174. Cf 2 Leonard 103. A similar line was taken in Beswick v Cunden (1596) Cro Eliz 402. There Clench and Fenner JJ upheld the old rule that 'the tort before made is extinguished' by the conveyance

2.3. Abatement of Nuisances under the Regime of Case

Since the action on the Case afforded a remedy in damages only and since the abatement of a nuisance was often the end desired by a victim of a nuisance there was an inevitable need in the seventeenth century for ancillary remedies for nuisance which brought about the abatement of the harmful state of affairs.

Assize and Quod Permittat

The action by way of the Assize of Nuisance was not formally abolished until 1834⁽⁴⁴⁾ and thus a plaintiff could always have recourse to this remedy when intent upon obtaining abatement.⁽⁴⁵⁾

Recourse to a writ of quod permittat prosternere⁽⁴⁶⁾ was fairly common during the seventeenth century. The leading case of this time was Penruddock's case (1598)⁽⁴⁷⁾ where it was held that the writ would lie against the author of a nuisance without any prior request made for the abatement of

(43) (continued)

to the plaintiff. Popham CJ argued that the question depended upon whether the nuisance left any 'profit' to the land which could be conveyed over. If there was not 'none shall have the action but he to whom it was done'; but if there was 'and is taken ... by the continuing of the nuisance, they shall have their action'. (What appears to have been a different action between the same parties was heard by the Court of Common Pleas in Beswick v Cunden (1599) Cro Eliz 520. There the old rule seems to have been again upheld but the decision is not very satisfactory (see the remarks in Gale Easements 493 (z). This was the case in which the Court of Common Pleas sought to repel the incursions of the Action on the Case upon the Assize of Nuisance (see above 64).

(44) Above 91 n 1.

(45) Blackstone writing in the eighteenth century (3 Commentaries 222) noted that both Assize of Nuisance and quod permittat prosternere 'have been long out of use' but conceded that where 'a man has a very obstinate as well as ill-natured neighbour : who had rather continue to pay damages, than remove his nuisance ... in such a case indeed recourse was had to the old remedies, which did effectually conquer the defendant's perversness, by sending the sheriff with his posse comitatus ... to level it'.

(46) On which see above 16.

(47) (1598) 5 Co Rep 100b. See also Baten's case (1610) 9 Co Rep 53b.

the nuisance. On the other hand, the writ would not lie against one who was not the author of the nuisance, but merely the occupier of the premises upon which the nuisance was, until a request had been made (and refused) for the abatement of the nuisance.⁽⁴⁸⁾

Successive actions for damages

Under the Assize of Nuisance a structure or thing found to be a nuisance was ordered abated. Since the action on the case led to an award of damages only, there emerged under the regime of case the problem of the continuance of nuisance. That is to say that it might happen that plaintiffs who sued successfully under Case might find that the defendant, having paid the damages awarded, permitted the offending structure or thing to remain as before.

To deal with this problem the judges developed the notion of the 'continuing' nuisance, drawing the distinction between the 'erecting' of the nuisance and the 'continuing' of it (i.e. the failure to abate it).⁽⁴⁹⁾ A continuing nuisance, they said, gave a fresh cause of action,⁽⁵⁰⁾ thereby placing the victim of an unabated nuisance in the position to bring successive actions for damages in order to compel the defendant to voluntarily abate the nuisance.⁽⁵¹⁾

(48) In Shalmer v Pulteney (1696) 1 Ld Raym 277 it was held that the writ lay against any occupier who continued a nuisance, whatever the nature of his occupancy, 'for the prejudice to the plaintiff is the same'. Cf Palmer v Poultny (1696) 2 Salk 459.

(49) Cf Beswick v Cunden (1595) Cro Eliz 402. There the defendant erected a weir in a water-course which caused a permanent flooding of the plaintiff's meadows. The action lay, Gawdy J held, 'for the continuing of the first nuisance, [the flooding] but not for the levying thereof [the erection of the weir]'. See also on this case above 100 n 43.

(50) Cf Penruddock's case (1598) 5 Co Rep 100b where it was held that the defendant could sue in respect of overhanging eaves of the defendant's roof because each time rain water dripped therefrom there was a fresh nuisance. (Cf Lord Holt in Fetter v Beale (1701) 1 Salk 117 'Every new dropping is a new nuisance').

(51) Blackstone writing in the mid-eighteenth century expressed what was probably the law a century before:

Self-Help

Medieval nuisance law contemplated self-help as a legitimate means of bringing about the abatement of a nuisance.⁽⁵²⁾ The action under the Assize and the writ quod permittat, by establishing a judicial procedure for achieving the abatement of nuisances,⁽⁵³⁾ must have tended to diminish the need to resort to self-help. It is however plain that self-help never ceased to be recognised as a legitimate method of dealing with nuisances⁽⁵⁴⁾ and, the demise of the old forms of action for judicial abatement in the seventeenth century saw something of a renaissance in the remedy by way of self-help.

(51) (continued)

'Indeed every continuance of a nuisance is held to be a fresh one [citing Beswick v Cunden (supra)]; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after verdict against him, the defendant has the hardiness to continue it.'

This continued, and still continues, to be the principle of the English law. See e.g. Battishell v Reed (1856) 18 CB 696.

(52) Above 55-6.

(53) Cf above 56-7.

(54) In (1469) YB 8 Ed 4 f 5 it was decided that 'if water runs through the land of M and he stops the water in his own close, so that it surrounds my land, I may enter on his close to remove the obstruction, and he shall not maintain an action'. In (1470) YB 9 Ed 4 f35 it was held that 'If a man makes a ditch in his land, by means of which the water which runs to my mill is diminished, I may myself fill up the ditch'. Rolle 2 Abr 'Nusans' (5) cites this case for a proposition that 'If a man in his own soil erects such a thing which is a nuisance to my mill, house or land etc I may stand in my own land and fling it down. So I may enter upon his soil and deject the nuisance, and justify it in a writ of trespass'. In Raikes v Townsend (1804) 2 Smith KB 9 these placita were cited in an attempt to argue that the right to abate was restricted to mills, houses or land, but Lord Ellenborough CJ said that they 'are only put as instances' of the principle.

The right of the victim of a nuisance to resort to self-help was asserted by Coke in the seventeenth century. 'Nota reader', he wrote in a note to Baten's case⁽⁵⁵⁾ (1610)

'there are two ways to address [sic] a nuisance, one by action, and in that he shall recover damages, and have judgment that the nuisance shall be removed, cast down, or abated, as the case requires; or the party aggrieved may enter and abate the nuisance himself...'

In James v Hayward⁽⁵⁶⁾ (1630) it was held that a private individual might abate a nuisance to a public highway. In Williamson v Coleman⁽⁵⁷⁾ (1655) it was held that a man could justify the throwing down of a bank or the filling up of a ditch which obstructed his way to his common. In Howard v Fryth⁽⁵⁸⁾ (1666) it was said that a nuisance to an 'ancient' water-course could be abated by self-help. In Lodie v Arnold⁽⁵⁹⁾ (1697) it was held that a man could justify the pulling down of a house built across a way because it was a nuisance. In R v Rosewell⁽⁶⁰⁾ (1699) it was said that if a man 'builds a house so near mine that it stops my lights, or shoots water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down.'

In recognising the right to abate by self-help the judges displayed no great anxiety to contain the manner of exercise of the right.⁽⁶¹⁾ In Lodie v Arnold⁽⁶²⁾ (1697) the defendant threw down a house and the materials rolled into the sea. The court viewed this with some equanimity observing that

'when H has a right to abate a public nuisance, he is not bound to do it orderly, and with as little hurt, in abating it, as can be; and therefore was not answerable in this case for the rolling into the sea'.⁽⁶³⁾

(55) (1610) 9 Co Rep 53b.

(56) (1630) Cro Car 184; W Jo 221.

(57) (1655) Sty 470.

(58) (1666) 2 Keb 58.

(59) (1697) 2 Salk 458.

(60) (1699) 2 Salk 459.

(61) For the attitude in later centuries see below

(62) (1697) 2 Salk 458.

(63) It is not clear whether in Lodie v Arnold the nuisance complained of ('a house built across the way') was a

They did however insist that self-help could only be employed in respect of existing nuisances and could not be resorted to to prevent an anticipated nuisance.⁽⁶⁴⁾

Further it seems that self-help could be resorted to without previous notice to the offending party,⁽⁶⁵⁾ except where the premises had passed into other hands since the erection of the nuisance.⁽⁶⁶⁾

(63) (continued)

public nuisance or not. Certainly the rule there stated is usually said to apply to public nuisances. But there is no evidence of a special rule in the seventeenth century applying to private nuisances. The nearest to such a principle is found in Comyn's Digest 'Action upon the Case for Nuisance' (D4) where it is said 'Nor, cut down, or do any Damage ... in the Abatement, unless necessary'. For this James v Hayward (1630) as reported in W Jones 220 is cited. There it is reported that the court said that 'a nuisance must be abated, in such a convenient manner as it can be: if a house be levied to nuisance - the whole house shall be abated; if a part, that part only shall be abated; but, as to the house, when the nuisance is abated, it is not lawful to destroy the materials, but they shall, after abatement, remain to the owners of them, and to him who did the nuisance'. James v Hayward was a case on the abatement of a public nuisance and these principles could be said to apply only to the abatement of such nuisances.

(64) See Norris v Baker (1616) 1 Roll Rep 393; 3 Bulst 196 (sub nom Morrice v Baker). There it was held that a man could not lawfully cast down the scaffolding for the construction of a house in anticipation of the fact that when erected the house would be a nuisance to the actor's premises. Croke J also let fall the dictum that 'If the branches of your trees grow over my land, I can cut them off, but I cannot justify cutting them off before they grow over my land because I have the fear of their doing so'. Cf R v Wharton (1701) 12 Mod 510 where Holt CJ is reported as saying 'if one sees his neighbour erecting a thing which will be a nuisance, he cannot abate it till it becomes an actual nuisance'.

(65) The authority usually cited for this is Penruddock's case (1598) 5 Co Rep 100b (see e.g. Comyns Digest loc cit). There it was held that a writ of quod permittat proster-nere could lie against the author of a nuisance 'without any request made, for the law doth not require any request to be made to him who doth the wrong himself'.

(66) This too derives from Penruddock's case where it was held that where the writ quod permittat was brought against the occupier of premises who was not the author of the nuisance abatement would only be ordered where he had been requested to 'reform' the nuisance and had failed or refused to do so. Cf Brent v Haddon (1619) Cro Jac 555.

According to Coke the exercise of the right to abate by self-help destroyed any right of action for damages arising from the nuisance.⁽⁶⁷⁾ In Kendrick v Bartland⁽⁶⁸⁾ (1679) however it was held that the action for damage lay in respect of the harm sustained before self-help was resorted to.

Injunction

In the Reports or Causes in Chancery collected by Sir George Cary from 1557-1602 there appears a notation⁽⁶⁹⁾ that 'where an action upon the case for a nusans and damages only are to be recovered, the party may have help here to remove or restore the thing itself.'

In 1583 one Osburne brought a bill in the court of chancery 'to be relieved of a nuisance' committed by the erection of a

(67) Baten's case (1610) 9 Co Rep 53b, where Coke after noting the existence of the remedy of self-help (cf above 103) adds,

'but then he shall not have an action, nor recover damages, for in an assize of nuisance, or quod permittat prosternere etc., it is a good plea, that the plaintiff himself either before the writ brought, or pending the writ, has abated the nuisance: for in an assize or quod permittat, he shall have judgment of two things, sc to have the nuisance abated, and to recover damages [cf above 57], and he has disabled himself by his own act to have judgment for one of them sc to have the nuisance abated, and therefore the action does not lie.'

This dictum of course states the law under the old Assize action and does not deal with the question whether the Action on the Case for Nuisance would likewise be precluded. Kendrick v Bartland (infra) allowed an action on the case in limited circumstances.

(68) (1679) 2 Mod Rep 253. There the court after distinguishing between action under the Assize and upon the Case said that as 'the end of an action on the case was to recover damages; therefore, though the nuisance was removed, the plaintiff is entitled to his damages that accrued before....' This suggests partial acceptance of the rule laid down in Baten's case (supra).

(69) Cary 20.

mill. The cause was dismissed because the plaintiff later proceeded by way of an Assize of Nuisance.⁽⁷⁰⁾ In 1604 one Swayne 'a professor of the law' brought his action⁽⁷¹⁾ for the interference with his mill in the court of chancery 'and exception taken that the court should not hold plea thereof (sed contrarium adjudicatum) many causes of the same manner ended here'.

These precedents mark the beginnings of what was to become the most effective of all nuisance remedies, the issue of an injunction⁽⁷²⁾ out of a court of equity⁽⁷³⁾ prohibiting the creation or continuance of a nuisance. The practice however did not become firmly established until early in the nineteenth century.⁽⁷⁴⁾

(70) Osburne v Barter (1583) Choyce Cases 176.

(71) Swayne v Rogers (1604) Cary 26.

(72) The practice of the Courts of Equity of issuing injunctions dates from the reign of Henry VI (1422-1461) and was the subject of much controversy (Holdsworth 1 HEL 459). The matter came to a head in the reign of James I when the power of the courts of equity to issue injunctions was confirmed (Holdsworth op cit 461-4).

(73) The common law in fact allowed for remedies of a similar nature. The writ of prohibition was essentially a type of injunction (Pluncknett Concise History 678) and as Hazeltine has pointed out ('Early Equity' Essays in Legal History 282) the jurisdiction was not narrow:

'Parties were ... ordered not to commit waste, not to commit nuisance, not to sell land ... [P]arties were ordered to repair walls and buildings ... to place property in the same condition in which it had been, and to remove existing nuisances'.

There are instances of the use of prohibition in the seventeenth century to suppress public nuisances. See below 149. Cf also Fitzherbert Natura Brevium 185 D.

(74) See below 231.

3. The Transformation of the Nuisance Action

3.1. Introduction

So far our discussion of the action for nuisance under the regime of the action upon the case has shown the action as being more or less a surrogate of the Assize of Nuisance, applying, albeit with some supplementation, the basic concepts and principles of the medieval remedy. To some extent this is a misleading picture. The fact is that during the sixteenth and, more particularly, the seventeenth centuries basic features of the nuisance concept were significantly transformed under the influence of a new social and economic milieu.

Of particular importance in this regard was the social and economic revolution known as the enclosure movement which radically transformed the concept of land and thus ideas as to the nature of the rights incident to land ownership. The medieval idea of land ownership, as a collection of rights, powers and duties projected onto an assemblage of dispersed physical components, gave way to the idea of land as a single, enclosed, three-dimensional physical unit within whose actual and notional boundaries a man exercised exclusive, autonomous rights. Cultural changes within English society led to the formulation and recognition of new interests of land holding, involving mainly claims to the integrity of the land unit and the comfort and physical welfare of its occupants. These new interests received judicial acceptance and were incorporated into the law in the form of additional incidents of the tenure of land.

These developments had important effects upon the concept of nuisance. For one thing they caused it to become not merely an action for protecting the seisin of land but also a remedy for the protection of more abstract interests such as the personal physical welfare and well-being of the human organism. This widening of the range of interests, redressed by the action for nuisance, in turn created the need for the formulation of a broader conceptual premiss for determining the availability of the action. The outcome of this process was to confer upon the action the explicit character of an action for tort lying for the redress of a wide and largely

unspecified range of harms to interests in land.

3.2. The Background

(a) Enclosure movement

By the seventeenth century important and fundamental changes had occurred in the social and economic milieu in which the nuisance concept flourished.

The most fundamental change that had come about was that which saw the large-scale destruction of the open fields and common wastes. This occurred as a result of the movement towards the 'enclosure' of lands,⁽⁷⁵⁾ a process which denoted that

'[t]he enclosed lands of the common and open field were to become enclosed property; the scattered plots were to be joined together; the undivided fields portioned out into compact estates that would be entirely independent of one another, and surrounded by continuous hedges, the sign and pledge of their autonomy.'⁽⁷⁶⁾

Although the movement for the enclosure of open lands had begun well before the Tudor age,⁽⁷⁷⁾ it became more widespread at this time so tending to promote a new approach to the concept of land and land-holding.

(75) The literature on the enclosure movement is vast. A useful guide is found in Mantoux The Industrial Revolution in the Eighteenth Century 512-4.

(76) Mantoux op cit 156.

(77) It is not necessary for our purposes to consider the reasons which gave rise to enclosure. In essence they were economic. The open field system of agriculture (above 6ff) by its very complexity was an inefficient method of land use and exploitation. Enclosure of the open fields improved methods of tillage, while the enclosure of commons and even the arable land allowed for a shift to a pastoral type of agriculture. Enclosure undoubtedly increased wealth while also working considerable hardship upon the peasantry. We have seen (above 9 n 31) that even in the thirteenth century manorial lords tended to allow a form of enclosure ('improvement') of the manorial waste, a process permitted and regulated by the Statute of Merton (1235). Enclosure was carried on under the provisions of this statute until the seventeenth century when the first of what was to become a flood of enclosure acts was enacted

Enclosure involved the 'dividing, allotting and enclosing'⁽⁷⁸⁾ of lands. It created a new system of land tenure in which men held their land all of one piece; arable, residential and pasture land was now a single, distinct, autonomous physical unit demarkated by the surrounding fences, walls or hedges.⁽⁷⁹⁾

Enclosure thus signalled the destruction of the old system co-operative agriculture⁽⁸⁰⁾ under which the manner in which a man might use and exploit his land was regulated by the custom and regulations of the manorial community. Enclosure meant that men became entitled to do as they pleased with their land, to cultivate it when they chose, to raise whatever crops they chose, without regard for what his neighbours were doing. It meant the end of shared pastures and common rights; it postulated exclusive rights and interests in land.⁽⁸¹⁾

(77) (continued)

((1606-7) 4 Jac 1 c 11). The enclosure movement reached its apogee in the reign of George III (1727-1760) when some 1532 enclosure acts were passed, enclosing nearly three million acres of land. 4122 enclosure acts were passed in the period 1719-1845. By 1876 the process had almost run its course, stringent conditions upon enclosure being imposed by the Commons Act of that year (39 & 40 Vict c56). See generally Mantoux op cit Chapter 3. Clifford History of Private Bill Legislation (i) 13-27 provides details concerning the enclosure acts.

(78) Typically the long title of an enclosure act recited that it was 'an act for dividing, allotting and enclosing the open lands and common fields, meadows, pastures and common and waste lands in the parish of ...'. Mantoux op cit 145.

(79) It is noteworthy that it is about this time that the maxim cujus est solum ejus est usque ad coelum makes its appearance in the case law. See below 111.

(80) Described above 6ff.

(81) Cf Mantoux op cit 150; Harwood English Land Law 34-5. Clifford op cit 22 sums up the effect of the enclosure acts thus: 'By enclosures privately authorized, and by general legislation in aid of them, these rights of the community were to a large extent extinguished, and exclusive rights in the soil given to individuals. It was the substitution over the whole country of individual interests in place of common interests, as a means of furthering agriculture....'

The enclosure movement of the seventeenth century was a 'part of the great economic development that opened the modern era'.⁽⁸²⁾ It marked the beginnings of laissez faire capitalism in relation to land-use and exploitation and, as such, saw the beginnings of a principle of self-interest as the basic premiss governing the right to use and enjoy real property.⁽⁸³⁾

(b) Redefinition of land

In 1586 in the case of Bury v Pope⁽⁸⁴⁾

'It was agreed by all the justices, that if two men be owners of two parcels of land adjoining, and one of them doth build a house upon his land, and makes windows and lights looking into the other's lands, and this house and lights have continued for the space of thirty or forty years, yet the other may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action; for it was his folly to build his house so near to the other's land: and it was adjudged accordingly.'

To this the reporter added the annotation

'Nota. Cujus est solum ejus est summitas usque ad coelum. Temp. Ed. I.⁽⁸⁵⁾

It is surely no coincidence that the cujus est solum maxim should make its appearance in the English law at the same time as enclosure was changing the physical character of the system of land tenure. The maxim is usually understood to establish a concept of land as a three-dimensional

(82) Mantoux op cit 156.

(83) Cf Harwood op cit (n 81 above) 35. See also below 252ff.

(84) (1586) Cro Eliz 118.

(85) There is no real evidence that the maxim had any practical recognition as early as the reign of Edward I (1272-1307), or any time thereafter until the seventeenth century. See Sweeney 'Adjusting the Conflicting Interests of Land-owner and Aviator in Anglo-American Law' (1932) 3 Jo of Air Law 329 at 355-358.

unit of space⁽⁸⁶⁾ and to connote exclusive powers of use and enjoyment of all that is within the spatial unit.⁽⁸⁷⁾

It is encountered in this connection a few decades after Bury v Pope when Coke, in his Commentary upon Littleton (1629), discussed the nature of 'terra':⁽⁸⁸⁾

'Terra, land, in the legal signification, comprehendeth any ground, soil or earth whatsoever It legally includeth also all castles, houses, and other buildings ... so as passing the land or ground the structure or building thereupon passeth therewith. Also, ... the land whereupon the water floweth or standeth ... and lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all things even up to heaven; for cujus est solum ejus est usque ad coelum'.⁽⁸⁹⁾

Hereafter the maxim becomes a standard English legal dogma, being principally cited by the writers to describe the nature and extent of land.⁽⁹⁰⁾ However it was invoked in

(86) See generally Ball 'The Jural Nature of Land' (1928-9) 23 Illinois LR 45.

(87) See Ball 'The Vertical Extent of Ownership in Land' (1927-8) 76 U of Pennsylvania LR 631.

(88) Co Litt 4a.

(89) In the medieval law terra connoted little more than arable land (cf above 8 n 29). Gradually its meaning was extended to include all things terrestrial (cf Sheppard's Touchstone of Common Assurances (1648) 91: 'The word land strictly doth signify nothing but errable land, but in a larger sense it doth comprehend any ground, soile or earth whatsoever'.) The final stage in this evolution is to include in the concept the space super- and sub-jacent to the surface of the earth. This is effected by invoking, as Coke does, the maxim cujus est solum ejus est usque ad coelum (the addition of the phrase 'et usque ad inferos' completes the idea).

(90) See Sheppard Touch-Stone of Common Assurances (1648) 90

'By the grant of the land, or ground it selfe, all that is supra, as houses, trees, and the like is granted, for cujus est solum ejus est usque ad coelum, also all that is infra, as mines, earth, clay, quarres, and the like'.

A century later Blackstone, 2 Commentaries 18 (1766) substantially repeats this

'Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. Cujus est solum, ejus est usquer ad coelum, is the maxim of the law ... [T]he word "land" includes not only the face of the earth, but everything under it, or over it'

another sense to express a principle that a man should not be interfered with in the enjoyment of his land.⁽⁹¹⁾ Indeed it is in this connection that the maxim is cited in Bury v Pope (1586) where, it will be recalled,⁽⁹²⁾ it was held that a man 'may upon his own land and soil lawfully erect a house' without concern for its effect upon a neighbour's 'lights'. In Hughes v Keene⁽⁹³⁾ (1610) the same principle is asserted, without citation of the maxim, holding that a neighbour could not prevent another 'from making the best benefit of it' by erecting a house thereon.⁽⁹⁴⁾ The same rule is found being stated in Wilde v Minsterley⁽⁹⁵⁾ (1639) where it was held that a man could not be prevented 'from making the best use of his own land that he can', as by excavating upon it.⁽⁹⁶⁾

(91) Cf Goudy 'Two Ancient Brocards' Essays in Legal History (ed Vinogradoff) 215 at 229: 'By our older British lawyers the maxim is usually cited ... in describing the nature and extent of property generally ... [and] in asserting the legal right not to have one's uses of one's own land prevented or restricted by one's neighbour ...'. Cf Selden Mare Clausum (1652) Bk 1 chap 21:

'... surely we are owners of the ground, house and space which we possess in several as owners, that everyone for his best advantage, may freely and fully use and enjoy his own bounding air (which is the element of mankind) how fitting so ever it be, together with the space thereof in such a manner, and restrain others thence at pleasure, that he may be both reputed and settled owner thereof in Particular.'

(92) Above 111.

(93) (1610) Calth 1.

(94) '... if the houses had been new erected houses, or otherwise windows had been newly made windows in that ancient house, the erection of the new house upon that void space of ground would have been lawful, notwithstanding that the windows and lights be stopped up; for it shall not be in the power of the owner of the ancient house by setting out his new windows to prevent him, that hath the void piece of ground from making the best benefit of it.'

(95) (1639) 2 Rolle Abr 564.

(96) Wilde v Minsterley (supra) marks the origin of a right to lateral support of land. The earlier authorities had considered the question whether a house could be liable to support a neighbouring structure (see Anon (1508) Keilw 98 cf Edwards v Halinder (1594) 2 Leo 93; Poph 46; Cro Eliz 285). In Slingsby v Barnard (1616)

3.3. The Recognition of New Amenities of Landholding

3.3.1. Introduction

A significant social effect of the enclosure of lands was depopulation of rural areas and a drift of people to the cities and towns.⁽⁹⁷⁾ This, coupled with a steadily increasing growth of the national population, wrought significant changes in urban conditions.⁽⁹⁸⁾ The inevitable demand for accommodation led to the sub-division of existing buildings, the conversion of stables, sheds, cook-houses and other out-buildings into residential accommodation. Finally there occurred a wave of construction of new buildings on the open spaces in the cities. Orchards, gardens and fields disappeared as entrepreneurs erected as many multi-storey buildings as available space would allow.⁽⁹⁹⁾

(96) (continued)

1 Rolle Rep 430 it was held that a man who excavated on his land so causing his neighbour's house to collapse was liable for the damage caused. Wilde v Minsterley, without referring to Slingsby's case, took the opposite position:

'If A ... erect a new house on his copyhold land and ... if B afterwards digs his land so near the foundations of A's house that thereby the foundation of the house, and the house itself, fall into the pit, yet no action lies by A against B, because it was A's own fault that he built his house so near B's land; for he by this act cannot hinder B from making the best use of his own land that he can.'

On the other hand the court seems to have been of the opinion that a man could be obliged to support his neighbour's land (as opposed to his house) saying

'But semble, that a man who has land next adjoining my land cannot dig his land so near mine that thereby my land shall go into his pit; and, therefore, if the action had been brought for that, it would lie.'

(97) Mantoux op cit 180-185.

(98) The population of London in 1500 was about 50 000. By 1600 it was 250 000 (a 500 per cent increase) and by 1689 it stood at 530 000. See Barnes 'The Prerogative and Environmental Control of London Building in the Seventeenth Century' (1970) 58 California LR 1332 at 1335. Cf Mantoux op cit 250-1.

(99) Barnes op cit 1336. The process was not new. It had
(continued on the next page)

These changes to the nature of the urban environment are of significance insofar as they co-incide with a renaissance in matters of domestic comfort and convenience. By the Tudor Age men had ceased to design their houses on the grim model of the medieval fortress.⁽¹⁰⁰⁾ Rather houses were built with large windows which let in floods of light⁽¹⁰¹⁾ and which afforded the dwellers with a prospect⁽¹⁰²⁾ of the world without.

(99) (continued)

begun as early as the thirteenth century when, we are told, '[b]uilding, re-building, enclosure and sub-division was a continuous process ... waste sites were taken up wholesale.... Enclosures of streets and lanes ... followed by intensive building reached such proportions that they ate into highways and common land.' Williams Medieval London 17. The acceleration of this process in the seventeenth century was so great as to cause serious concern to the government and to cause it to adopt a variety of strict measures to regulate building within the city. These measures are described by Barnes *op cit passim*. It is interesting to note that one device employed to prevent excessive building was that of common nuisance. See Barnes *op cit* 1350, 1359.

- (100) Andrew Boorde's The book for to lerne a man to be wyse in buylding of his house for the helth of body (c 1540) (see F J Furnivall (ed) Andrew Boordes Introduction and Dyetary 233-242) provides a contemporary view of the ideas prevalent at the time concerning the essential 'commodities' of a house. For judicial recognition of some of these commodities see below.
- (101) 'Lightsome ... is a favourite word in these years, when men were at last secure enough to be able to open the walls of their houses to the light and the scene, without fearing an enemy.' Buxton Elizabethan Taste 72.
- (102) A house should be built, Boorde advised, so that 'the prospect to and fro the place be pleasant, fair, and good to the eye For the commodious building of a place doth not only satisfy the mind of the inhabitant, but also it doth comfort and rejoyce a man's heart to see it, especially the beautiful prospect.' For judicial attitudes toward 'prospect' see below 117.

Within the house the desire for privacy⁽¹⁰³⁾ and physical comfort came to replace the medieval practice of communal existence in large, draughty odiferous murky rooms. Chimneys led off the sulphurous smoke of 'sea' coal⁽¹⁰⁴⁾ while rudimentary sanitary practices reflected a growing preference for pure sweet air.⁽¹⁰⁵⁾

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- (103) 'The first radical change, which was to alter the form of the medieval house, was the development of a sense of privacy. This meant, in effect, withdrawal at will from the common life and common interests of one's fellows.' Mumford The City in History 328.
- (104) The use of coal in hearths, ovens and furnaces constituted a serious environmental problem even in the seventeenth century. By 1690 nearly three million tons of coal were being produced, the greater portion of which was consumed in London (see Barnes op cit (n 98 above) at 1333). Attempts to prevent its use go back as far as 1307 (see Salzman English Industries of the Middle Ages 6; Nef The Rise of the British Coal Industry (i) 157). In the sixteenth century the introduction of chimneys as a standard incident of domestic residences made the use of coal more popular as a fuel (Trevelyan Social History 98) while exacerbating the atmospheric pollution resulting from its use. By the seventeenth century the problem was sufficiently severe to induce various individuals to seek methods for purifying the air. The best known of these was the diarist John Evelyn who wrote a tract Fumifugium; or the inconveniency of the Aer and Smoke of London dissipated (1661) (Nef op cit 157 cf Barnes op cit 1333). It seems however that after 1641 the government ceased to make any effort to suppress the use of sea coal (Nef op cit 157 n 6).
- (105) Boorde devoted the third chapter of his disquisition to advising 'a man to build his house in a pure and fresh air, to lengthen his life'. The air, he said 'cannot be too clean and pure' and if it be so 'about the house and mansion, it doth conserve the life of man, it doth comfort the brain'. He warned against 'much people in a small room lying uncleanly, and being filthy and sluttish' and that there 'must be much circumspection had that there be not about the house or mansion no stinking ditches, gutters, nor canals, nor corrupt dunghills, nor sinks' As will be seen below a claim to be entitled to 'salubritas aeris' became a central characteristic of nuisance actions in the seventeenth century.

3.3.2. The Amenities

This growing appreciation of the amenities of domestic habitation was undoubtedly sharpened in the seventeenth century by the over-crowding and over-building occurring in the urban areas. Men found that the multi-storeyed buildings erected by speculators and others cut off the light to windows, that the proliferation of buildings on previously open sites obstructed the prospect from houses, while the increasing proximity of buildings subjected habitations to the stench and odours of domestic and industrial activity. The judges found themselves confronted with complaints concerning the obstruction of natural lights, of prospect and of the personal discomfort suffered as a result of the dissemination of noxious and offensive odours. Their response was to formulate more closely the incidents of land ownership, particularly in relation to the amenities of domestic habitation. A man's home, they said 'is to him as a castle and a fortress as well for his defence against injury and violence, as for his repose'.⁽¹⁰⁶⁾ He was entitled to certain basic amenities of habitation, which they said⁽¹⁰⁷⁾ to be

'habitatio hominis, delectatio in habitantis,
necessitas luminis et salubritas aeris'

'Air for his health, light for his profit, prospect for his pleasure' they proclaimed⁽¹⁰⁸⁾ to be the 'three great commodities of a house'.

(a) Prospect

Although the Tudor judges conceded that 'it is a great commendation of a house if it has a long and large prospect,

(106) Semaynes Case (1604) 5 Co Rep 91a.

(107) Aldred's Case (1610) 9 Co Rep 57b.

(108) Hughes v Keene (1610) (infra n 124).

unde dicitur, laudaturque domus longas qui prospicit argos,⁽¹⁰⁹⁾ they refused to accord this amenity legal recognition. As early as the twelfth century the building by-laws of London had expressly provided that a landowner with impunity could build so as to obscure the prospect from the windows of a house.⁽¹¹⁰⁾

In the seventeenth century the judges took a similar approach, refusing to hold that the obstruction of prospect could be actionable. In the seminal case Bland v Moseley⁽¹¹¹⁾ (1586) Wray CJ said

'that for prospect, which is a matter only of delight, and not of necessity no action lies for the stopping thereof [T]he law does not give an action for such things of delight.'

This principle was approved and followed in Hughes v Keene (1611)⁽¹¹²⁾ where it was said that although prospect was one of the 'commodities' of a house - 'prospect for his pleasure' -

'if there be hinderance only of the prospect by the new erected house, and not of the air, not of the light, then an action of the case will not lye, in-somuch that the prospect is only a matter of delight, and not of necessity.'

In Knowles v Richardson⁽¹¹³⁾ (1670) this principle was applied, it being held that an action could not lie for the erection of a wall which hindered prospect, there being no cause of action in such a complaint the plaintiff 'being not stopt of any necessary light, nor darkened....' In Arnold v Jefferson⁽¹¹⁴⁾ (1697) Holt CJ likewise adopted the principle in a dictum that

(109) Bland v Mosley (1586) cited 9 Co Rep 58a.

(110) The Assissa de Edificiis (on which see above 28) stated

'... if anyone has windows looking out on his neighbour's land, although he may have been for a long time in possession of the view [de visu] from such windows ... nevertheless, his neighbours may rightly block the view from such windows by building opposite them....'

(111) Supra (n 109)

(112) (1611) Colth 1.

(113) (1670) 2 Keb 642.

(114) (1697) Holt KB 498.

'Though stopping of lights is a nuisance, the stopping of prospect is not.'

It seems that Lord Jefferies LC in 1686 granted injunctions restraining the raising of buildings which would have interfered with the prospect from Gray's Inn gardens,⁽¹¹⁵⁾ but his practice was later repudiated by Lord Hardwicke⁽¹¹⁶⁾ who said that Lord Jefferies 'was too apt to do things in an extraordinary manner, fortiter in modo as well as in re', and laid it down that there was

'no general rule of common law, which warrants that, or ways, that building so as to stop another's prospect is a nuisance.'

This has been the consistent principle of English law ever since.⁽¹¹⁷⁾

(b) Privacy

The claim of a householder to the privacy of his habitation, on the other hand, was afforded considerable recognition in the medieval law. Under the London Assize of Nuisance actions were allowed for the opening of windows which overlooked another's house or gardens⁽¹¹⁸⁾ and there is reason to believe that the viscontial action for nuisance could be brought for invasions of privacy.⁽¹¹⁹⁾ However the seventeenth

(115) The decisions were not reported. They are mentioned in Attorney-General in relation Gray's Inn Society v Doughty 2 Ves Sn 453.

(116) Doughty's Case (supra).

(117) See also below 410, 425 n 32.

(118) See Chew and Kellaway (eds) The London Assize of Nuisance. In 1348 the assize granted redress to one who complained that his neighbours had 'six windows and two apertures ... through which they can see his private business'. (op cit 100 No 407). So too in 1350 redress was granted on a complaint that a neighbour 'has two windows through which she and her servants see the private business of the plaintiffs' (op cit 103 No 419. See also ibid Nos 420-423).

(119) See Novae Narrationes B149 (80 Selden Socy). Milson comments on the precedent that it 'seems to come from a real case ... which suggests that at any rate by local custom there might be a natural right of privacy': 'Legal Introduction' xcvi.

century preference for large lightsome windows seems to have persuaded the judges that a householder had no general right to privacy. In 1694 Holt CJ advised a plaintiff who complained of windows overlooking his land to 'fence your own yard' for he could have no action.⁽¹²⁰⁾ Hereafter nothing is heard of an action on the case for invasions of privacy until the nineteenth century.⁽¹²¹⁾

(c) Light

Claims to the commodity of natural light became prevalent in the seventeenth century.⁽¹²²⁾ They took the form of a claim that a man should be entitled to open windows in the walls of his house and that these 'lights' should not be obscured by buildings or other 'blinds' erected upon adjoining premises.

(120) Richardson v Taylor (1694) 2 Keb 642; 1 Mod 55.

(121) See below 408.

(122) Actions concerning natural light were not unknown in the medieval law. There is a specimen count in the Novae Narrationes (see 80 Selden Socy C108) in which the obstruction of lights by the erection of a house is alleged to be ad nocumentum. The London Assize of Nuisance also seems to have lain for buildings which obstructed the light reaching neighbouring houses (see Chew and Kellaway (eds) The London Assize of Nuisance xxvi). Counsel in (1443) YB 22 Hen 6 pl 23f 14 contended that an assize of nuisance would lie if 'one erects a house that stops the light of my house....' (cited Kiralfy Action on the Case 68). Actions for obstruction of light were however not common during the medieval period, no doubt because prior to the sixteenth and seventeenth centuries houses were seldom built with windows intended for the admission of light. Medieval windows were usually mere apertures in the wall covered with oiled paper or lattice (see Chew and Kellaway op cit xxvi). It was only in the seventeenth century that narrow perpendicular apertures were replaced by large glazed windows which 'let floods of light into pleasant chambers and ... galleries' (Trevelyan 2 English Social History 50).

The judicial response to these claims was to readily concede that a householder could have such an interest. In the seminal case of Bland v Moseley⁽¹²³⁾ (1587) Way CJ observed that light was a necessary commodity of a house

'for it is said, et vescitur aura aetherea',

while in Hughes v Keene⁽¹²⁴⁾ (1610) it was said that

'the light which cometh in by windows, being an essential part of the house, by which he hath three great commodities, that is to say, air for his health, light for his profit, prospect for his pleasure, may not be taken away'

In Yelverton's report of the case the existence of the right is rationalised by the observation that buildings should not obscure lights

'for by that means men may loose all their lights, which may any way come into their houses, if they may be environ'd on every side with new houses, and by this stratagem live in tenebris which the law will not allow.'

Recognition of an enforceable right to light was however complicated by the practical consideration that the corollary to such a right was that a neighbour could not erect structures upon his own land if their effect would be to obscure the windows of existing houses. In Bury v Pope⁽¹²⁵⁾ (1586) the judges of the King's Bench, apparently relying upon the maxim cujus est solum ejus est usque ad coelum,⁽¹²⁶⁾ held

- (123) (1587), cited in 9 Co Rep at 58a. The declaration is given by Kiralfy Action on the Case 213.
- (124) (1610) Calthorp 1. The case is also reported in Godbolt 183; 1 Bulstrode 115; Yelverton 216. Kiralfy op cit 68 notes that the judgment in the case 'was adjourned for eight terms, probably for discussion of the case in Serjeant's Inn, so the point was considered to be of first importance'.
- (125) (1586) Cro. Etiz 118.
- (126) See above 111.

that a man 'may upon his own land and soil lawfully erect a house or other thing against the said lights and windows, and the other can have no action'. But in the seminal decision in Bland v Moseley⁽¹²⁷⁾ (1587) Wray CJ over-came this difficulty by holding that a right to light could exist in the form of an easement restraining a neighbour from building in a way which obscured the plaintiff's windows.⁽¹²⁸⁾ Indeed the plaintiff had claimed the lights in question as easements and this form of pleading was followed in all subsequent cases.⁽¹²⁹⁾ and it became the settled rule of English law that

(127) (1586) cited 9 Co Rep 58a.

(128) 'It may be, that before time of memory the owner of the said piece of land has granted to the owner of the said house to have the said windows, without any stopping of them, and so the prescription may have a lawful beginning.'

The case of Bury v Pope afterwards came before the Court of Exchequer Chamber (sub nom Bowry and Pope's Case (1588) 1 Leon 168) and the decision confirmed though on the particular ground that the windows in question were 'but late erected'. If, the court said, 'it were an ancient window time out of memory etc there the light or benefit of it ought not to be impaired by any act whatsoever; and such was the opinion of the whole Court.'

(129) See Kiralfy Action on the Case 68. It is difficult to say whether the right to light was characterized as an easement in order to make it possible to invoke nuisance remedies or whether there existed some a priori principle of policy which postulated a right to light as existing only as an easement to be acquired by grant or prescription (see also below 123). It is possible that the latter was the case. The London Assize of Nuisance for instance seems to have admitted actions for obstruction of light only where the plaintiff could show that he had acquired a right to light as an easement. There is, for example, a case from 1331 where the plaintiff sues for the obstruction of the 'view, opening, light, air and clarity of a window' which was granted under a deed. (See Chew & Kellaway London Assize of Nuisance 73 No 312). In some cases the grant was in the form of an undertaking not to build upon adjoining land (see op cit 89 No 370. Cf also op cit 103 No 417 for a case of a dispute whether an easement of light was actually created). In Bland v Moseley (above ad n 127) the plaintiff's declaration asserted that he had a right to light as an easement acquired by long enjoyment ('pro se et tenentibus ejusdem mesuagii diversa salubria et necessaria AESIAMENTA et COMMODITATES ratione aperti AERIS et LUMINIS in et per luminaria vel fenestras praedictas splendentis et intrantis etc habuerunt ...

(continued on the next page)

a landowner could only be entitled to claim a right to light if he could establish that the right had been acquired as an easement. (130), (131)

(d) Pure Air

In 1611 William Aldred complained in an action on the case of the 'foetidos et insalubres odores' of his neighbour's pig-sty. (132) Although the defendant argued robustly that 'one ought not to have so delicate a nose, that he cannot bear the smell of hogs', the court of King's Bench resolved that the action was maintainable. It supported its view the the observation that

'in a house four things are desired habitatio hominis delectatio inhabitantis, necessitas luminis, et salubritas aeris.'

(129) (continued)

in mesuagio praedicto a tempore cujus memoria hominum non existit habuerunt et habere consueverunt etc septem fenestras vel luminaria' See Kiralfy Action on the Case 213. Cf however Palmer v Fleshees (1663) 1 Sid 167; 1 Keb 625; 1 Lev 122 where the notion of light as an easement is apparently adduced by analogy from the right to support of 'ancient' buildings (see the remarks of Field J in Dalton v Angus (1881) 6 AC 740 at 757).

(130) See Bowry and Pope's case (1588) (n 128 supra) Hughes v Keene (1611) 1 Bulst 115; Yel 216; Godb 183. Judgment in this case was adjourned for eight terms suggesting that the point was considered to be of first importance: Kiralfy op cit 68); Palmer v Fleshees (1663) (supra n 129). The question of whether a man had a right to light was also governed by the custom of some cities. The custom of London, for instance, allowed houses built upon 'ancient' foundations to be built to any height even though they obscured 'ancient' lights. See the discussion in Calthorpe's report of the case of Hughes v Keene (Calth 1) and cf Plummer v Bentham (1757) 1 Burr 247. See also the custom of York as pleaded in Bland v Moseley (supra n 127).

(131) There was a certain logic in characterizing the right to light as an easement. The coelum was a sort of channel through which the light travelled (cf Selden Mare Clausum loc cit (n 91 above) who characterizes the 'space which confines a hous from the foundations upward' as 'a chanel to the whirling aer'). A man who sought a right to light in effect required that his neighbour should allow the light unobstructed passage through the coelum. Since the neighbour was, on the cujus est solum principle, the owner of the space, what was being sought was a right analogous to a right of way across land, by definition an easement.

(132) Aldred's Case (1611) 9 Co Rep 57b (reproduced with annotations in Fifoot History and Sources 99).

Bland v Moseley,⁽¹³³⁾ the Court went on, established that no action in nuisance could lie for interference with prospect or other matters of delight. But that case had held that the action could lie for the stopping of light and air,

'and if the stopping of the wholesome air etc gives cause of action, a fortiori an action lies in the case at Bar for infecting and corrupting the air ... and this stands with the rule of law and reason, sc. Prohibetur ne quis faciat in suo quod nocere possit alieno : et sic utere tuo ut alienum non laedas.'

The right to pure air,⁽¹³⁴⁾ thus established, was not conceived, like the right to light, as being in the nature of an easement.⁽¹³⁵⁾ It seems rather that the judges saw the subjection of a landowner to noxious odours as a species of disseisin and allowed the action for nuisance to lie for this reason.⁽¹³⁶⁾

(133) *Supra* n 127.

(134) There was at this time also some consideration of the question of a landowner's right to the access of air. In Traherne's case (1613) Godb 233 and Goodman v Gore (1613) Godb 115 buildings which obstructed the stream of air to windmills were adjudged to be a nuisance and ordered abated. (The action was brought by way of an Assize of Nuisance). A similar decision was given in Anon (1621) Win 3. (It may be that these are reports of the same case. See Gale Easements 333 whose editor remarks that there 'must have been something in the air if, at that particular time, three or even two men took it into their heads to build their houses close to windmills; an eccentricity which found no imitator until 1859, when Webb built his school-house close to Bird's mill [see below 274-5]').

(135) Cf below 130.

(136) The form of declaration in case for an action for nuisance by fedites commonly alleged that the odours invading the plaintiff's land or house rendered it uninhabitable. In Sowthall v Dagger (1539) (cited Kiralfy op cit 211) a complaint concerning offal deposited in the highway near the plaintiff's house, stated that plaintiff's 'servienties et famuli sui in eodem mesuagio manentes et inhabitantes per Aeris Infeccionem hujusmodi sondidorum in magno periculo mortis ...'. In Smith v Moram (1607) (unreported, cited Kiralfy op cit 64) the court alleged that the plaintiff 'per insalubrem fetorem in mesuagio morari non potuit'. In Aldred's case (1611) 9 Co Rep 57 the count was 'quod per insalubres odores idem Willelmus in mesuagio suo continuare non potuit'.

The action for fedites became a common feature of seventeenth century nuisance law.⁽¹³⁷⁾ It was brought against butchers,⁽¹³⁸⁾ brewers,⁽¹³⁹⁾ blacksmiths,⁽¹⁴⁰⁾ candlemakers,⁽¹⁴¹⁾ tallow⁽¹⁴²⁾ and lead⁽¹⁴³⁾ smelters. It would lie, it was said, against dyers, tanners and glovers.⁽¹⁴⁴⁾ It was brought in respect of leaky privys,⁽¹⁴⁵⁾ pig-sties,⁽¹⁴⁶⁾ wash-houses and stables,⁽¹⁴⁷⁾ bad cheese.⁽¹⁴⁸⁾ It was even suggested that it should lie against persons suffering from 'a horrible sicknesse' who infected the air.⁽¹⁴⁹⁾

Very commonly the defendant in an action for fedites was one who carried on some trade or industry. Inevitably their defence to the action tended to be that their trade was lawful and of public benefit and thus ought not to be condemned as a nuisance. For the most part⁽¹⁵⁰⁾ the Tudor judges refused to allow the utility of the trade to be a defence,⁽¹⁵¹⁾

(137) Baker English Legal History 240 relates its prevalence to the absence of public health services. Prosecutions for common nuisance arising from the conduct of noxious trades were not uncommon at this time. See below

(138) Sowthall v Dagger (supra n 136).

(139) Jones v Powell (1628) Hut 135; Palm 536.

(140) Bradley v Gill (1688) 1 Lut 69.

(141) Rankett's Case (1606) 2 Rolle Abr 139.

(142) Morley v Pragnell (1638) Cro Car 510.

(143) Boynton v Gill (1640) 1 Rolle Abr 89 pl 7.

(144) Aldred's case (1611)(supra).

(145) Jones v Powell (supra).

(146) Aldred's Case (supra).

(147) Hewet v Copland (1691) 1 Lut 91.

(148) Cf Wiseman v Denham (1623) Palm 341; Ley 69.

(149) Hale's Case (c 1560) cited Baker English Legal History 240 n.7.

(150) The defence succeeded in Rankett's Case (1606)(2 Rolle Abr 139) where it was held

'Si homme facit candells deins un vill, per que il cause un noysome sent al inhabitants, uncore ceo vest ascun nusans, car le needfulness de eux dispenserava ave le noisomeness del smell.'

(151) In Aldred's case (1611) 9 Co Rep 57 the court held that

'... the building of a lime-kiln is good and profitable; but if it be built so near a house, that when it burns the smoke thereof enters into

holding that if the trade caused damage it was actionable⁽¹⁵²⁾ and that the defendant should not carry on such trades in the urban areas but rather in remote places.⁽¹⁵³⁾

3.3.3. Evaluation

The judicial recognition of the amenities of light and pure air as incidents of a landowner's proprietary rights capable of vindication through the action for nuisance, was a development of historic importance in the evolution of the nuisance concept. The significant point was that claims to pure air and necessary light (like the claims to prospect and privacy) were in essence claims to interests of personality.⁽¹⁵⁴⁾ This was concealed by the fact that the interests

(151) (continued)

the house so that none can dwell there, an action lies for it. So if a man has a watercourse ... for his necessary use; if a glover sets up a lime-pit for calfe skins and sheep skins so near the watercourse that the corruption of the lime pit has corrupted it for which cause his tenant leave the said house, an action for the case lies for it, as it is adjudged in [the Prior of Southwark's Case (1498)] 13H.7. 26.b. [for which see Fifoot History and Sources 87].

(152) See Aldred's Case (supra); Morley v Pragnell (1638) Cro Car 510.

(153) See Boynton v Gill (1640) 1 Rolle Abr 89 pl 7 where it was said of a lead-smelting works

'though the trade was legal, and for the benefit of the public and necessary, the action lay, because the trade might be carried on in waste places, and large commons remote from inclosures, so that no loss or damage would arise from it to the owners of adjoining land.'

See too Jones v Powell (1628) Hut 135 where Hide CJ observed that brew-houses and glass-houses 'ought to be erected in places convenient for them'. In R v Pierce (1683) 2 Show 327 it was held that noxious trades could be suppressed as common nuisances 'for that such trades ought not to be in the principal parts of the city, but in the outskirts'.

(154) The modern law conceives of the interests of personality as including a claim to reputation; a claim to the immunity of the feelings and susceptibilities; a claim to privacy; a claim to personal physical integrity (see generally Pound 'Interests of Personality' (1915) 28 Harvard LR 343; Stone Social Dimensions of Law and Justice 200ff). The claim to physical integrity includes

(continued on the next page)

in issue were characterized as being property rights.⁽¹⁵⁵⁾
 In this way the scope of the nuisance action was widened so as to encompass harms which were personal rather than proprietary. More particularly this development made explicit

(154) (continued)

what Pound describes as 'immunity of the mind and the nervous system from direct or indirect injury and the preservation and furtherance of mental health - freedom from annoyance which interferes with mental poise and comfort' (op cit supra at 356). In the language of nuisance law the pollution of the ambient air and the interference with natural light are traditionally called 'annoyances' (cf above 1 n 1). On analysis these annoyances can be seen to constitute the sort of interferences with mental poise and comfort that would bring them within the scope of Pound's formula. It is perhaps worth noting that Brandeis and Warren in their classic manifesto 'The Right to Privacy' ((1890) 4 Harvard LR 193 at 194) saw as a rudimentary instance of the 'recognition of the legal value of sensations', the 'qualified protection of the individual against offensive noises and odours', pointing out in a footnote (op cit 194 n 2) 'the recognition of the right to have property free from interference by such nuisances involves a recognition of the value of human sensations'.

(155) On the face of it the so-called amenities of domestic habitation were claims to some sort of individual interest in the natural elements of light and air. (Philosophically it is possible to construe the right to the use of these natural media of existence as an interest of personality. See Pound op cit (n 154 above) at 352-3). Strictly speaking the natural light and the ambient air were classified as res communes (thus Bracton f 7; Fleta 3.1. (89 Selden Socy 1) Britton 2.2.1 following Justinian's Institutes 2.2.1) and thus not susceptible of individual or private ownership, (on the question whether flowing water was res communes see below nn 203-4). The Tudor judges however ignored this principle. By recognising 'rights' to neccessitas liminis and salubritas aeris as incidents of landownership (as the 'commodities' of a 'house') and by permitting their vindication by the nuisance action (traditionally an action for the protection of proprietary interests (cf above 39) they conferred upon them the quality of individual rights of property (cf Baker English Legal History 239). By this device it was possible to award 'parasitic' damages for interferences with what were, in essence, rights of personality (on the recognition of rights of personality through the device of parasitic damages see Pound op cit 359ff. Cf Stone op cit (n 154 above) 210. See also Fleming An Introduction to the Law of Torts 186-7 who notes the various types of parasitic interests protected under the nuisance action.

the primordial role and function of the nuisance action: that of securing an individual's claim to enjoy the amenities of his land unimpaired by any interference⁽¹⁵⁶⁾ falling short of direct physical intrusion or ouster (the traditional concern of the Assize of Novel disseisin and, later, the action for trespass to land).⁽¹⁵⁷⁾

3.4. Sic utere tuo ut alienum non laedas

The judges in formulating the legal concept of land conceived of it as a three-dimensional unit of space.⁽¹⁵⁸⁾ The rights of ownership therein they expressed in the language of laissez faire individualism.⁽¹⁵⁹⁾ A man was entitled to use and exploit all that was on or in his land and could not be restrained therein by his neighbours.⁽¹⁶⁰⁾

Insofar as these statements of principle tended to imply that landownership rights in English law involved, in Blackstone's phrase 'sole and despotic dominion' which could be neither limited nor restrained they were misleading. The action for nuisance from its very earliest beginnings had been predicated on a principle that a man might be restrained in the manner in which he used and enjoyed his land if in so doing he caused wrongful damage to his neighbour. As we have seen a nuisance was conceived of as something that occurred on the land of the defendant⁽¹⁶¹⁾ or, in other words, as arising from a user of his own land by the defendant. The nuisance actions by designating a particular type of use to be a nuisance and ordering its abatement thus effectively operated as mechanism for controlling land-uses, or, in other words, for limiting the dominion of the owner of land.

(156) Not every conceivable type of interference fell to be redressed. The refusal of the judges to countenance actions for invasion of privacy or interference with prospect demonstrate this. The reasons for refusing recognition to these claims were however pragmatic rather than conceptual. See Lord Blackburn in Dalton v Angus [1881] 6 AC 740 at 824. See further below 410.

(157) See Fleming op cit (n 155 above) 186.

(158) above 111-2

(159) Above 110-111

(160) Above 113

(161) Above 33.

When the judges of the seventeenth century came to recognise the various amenities of landholding they thus found themselves confronted by a paradox. Each of the various amenities claimed for a house required the imposition of some restraint upon the ownership rights of neighbouring landowners.⁽¹⁶²⁾ Such restraints (which in principle could be imposed by invoking the action for nuisance) contradicted the concept of autonomous landownership rights as postulated under the cujus est solum ... maxim.

The judges first confronted this paradox directly when they came to recognise and formulate the right to necessitas luminis. They resolved the difficulty by invoking the concept of easements.⁽¹⁶³⁾ A landowner, they said in effect, was entitled to use his land by building thereon as and where he pleased. His power to do so was limited in one respect

(162) Insofar as claims to prospect, privacy and light were concerned the implied restraint was upon a neighbour's right to build upon his land in a way which either interrupted prospect or obscured windows or enabled premises to be overlooked. Cf above 118-123. The claim to salubritas aeris implied a restraint upon activities which caused pollution of the ambient air.

(163) Cf above 123. The concept of an easement by this time had undergone some refinement. As we have seen (above 44) Bracton tended to bring all interests in land under the term easement. In this he was expressing more the notion that an easement was some right or privilege which inured to be 'ease' or advantage or profit ('commodum') of the holder of land rather than the idea of a right in the nature of the Civil Law servitude or ius in re aliena. By the seventeenth century however 'the learning of easements was becoming more familiar to the lawyers' (Holdsworth 7 HEL 322). A distinction has been drawn between easements and profits à pondre, the latter term describing most of the rights 'of common' evolved under the old manorial system of agriculture (cf Holdsworth op cit 318ff). Easements were thus more clearly perceived as being iura in re aliena (in the Termes de la Ley (1520) an easement is defined as 'a privilege that one neighbour hath of another ... without profit, as a way or sink through his land or such like'. Cf Peers v Lucy (1695) 4 Mod 362 at 365-6). It was not however until the nineteenth century that anything like a fully developed body of principle was evolved for the law of easements (see below 230). Generally on the early history of easements see Holdsworth 3 HEL 153ff 7 HEL 321ff. See also Sims 'A Study of Rights Incident to Realty' (1920-1) 7 Virginia LR 327. See also Simpson History of the Land Law Chap 5.

only: where he had voluntarily⁽¹⁶⁴⁾ accepted a limitation by conferring an easement upon his neighbour entitling the latter to demand that structures should not be erected so as to obscure the light reaching his windows. Similarly they decided a man had the autonomous power of excavating in his land, a power which could be limited by an easement in favour of his neighbour for the support of houses or buildings upon the neighbour's land.⁽¹⁶⁵⁾

However when the judges came to admit that a householder was of natural right entitled to the amenity of salubritas aeris they adopted a rather different approach. The right to pure air, like the right to necessary light, implied a restraint upon the manner in which another might use his own land. The corruption of the ambient air, more often than not, was the consequence of the carrying on of some trade or industry which discharged noxious or offensive odours into the atmosphere. To recognise a right to salubrious air was to confer upon its holder the legal right to demand that another should not use his land as the site for noxious or offensive trades.⁽¹⁶⁶⁾

A number of options were open to the judges: they could have refused (as they had done in the cases of prospect

(164) An easement, in principle, was acquired by grant of the owner of the servient tenement. By the seventeenth century it was accepted that an easement could be acquired by implied as much as by express grant (see Holdsworth 7 HEL 334). Easements could also be acquired by prescription. In the seventeenth century cases of light and support prescription was much relied upon as the basis for the acquisition of the right to light. This was undoubtedly the result of the fact that there would have been very few instances of express grants to light. The courts, in order to ensure that men should not lose all their lights by houses being built all around them (cf Hughes v Keene cited ad n 124 above) readily allowed the allegation that a right to light had been acquired by long enjoyment to succeed. (The technical problem of how a negative servitude of this nature could be acquired by prescription was conveniently ignored. Cf Holdsworth op cit 330-341. See also Radcliffe 'The Easement of Light and Air and its Limitations under English Law' (1908) 2 4 LQR 120 at 121-4).

(165) Above 113 n 96.

(166) Cf above 125.

and privacy)⁽¹⁶⁷⁾ to recognise the amenity at all; ⁽¹⁶⁸⁾ they could (as they had done in the case of light) postulate some sort of easement of pure air; or they could recognise a right to pure air as an amenity of land and accept that men's rights to carry on trades upon their own land could be limited to the extent that such activity invaded a neighbour's right to pure air.

As we have seen, they adopted the latter approach.⁽¹⁶⁹⁾ The right of a householder to have the air upon his land pure and uncorrupted, they said, was pre-eminent over the right to carry on noxious trades.⁽¹⁷⁰⁾ Men who would carry on such trades must either do so in places where there were no habitations; they could not be carried on at all in places where they corrupted and infected the air reaching the houses of other men.⁽¹⁷¹⁾

Committed then to a principle of restraining the rights of landowners the judges naturally enough turned to the action for nuisance. In doing so they found it necessary to

(167) Above 117-120.

(168) By reasoning that since the landowner owned the coelum above his land he was free to discharge into smoke vapours and stenches and that this exercise of a ownership rights could not be restrained by a neighbour. Cf above 112.

(169) Above 124. The judges probably balked at regarding the right to pure air as an easement because of the difficulties inherent in proving the acquisition of such a right especially by prescription. The right to light could be expressed in physical terms as the existence of so many windows which had been opened for the requisite period of time. The right to pure air had however no similar physical frame of expression. It would be virtually impossible to establish objectively how long a man had enjoyed pure air or for that matter the degree of freedom from corruption of the air that he had enjoyed by long user. Cf the difficulty of establishing the amount of light that a man could be said to have acquired by his easement of light (Holdsworth 7 HEL 340).

(170) Above 126 n 153.

(171) Ibid.

refine the conceptual premisses of the action. Traditionally the action had seemed to be a remedy for the vindication of easement rights.⁽¹⁷²⁾ But since the right to salubritas aeris had not been constituted as an easement, it became necessary to explain the basis upon which the holder of a right to pure air should formulate his action for asserting the right. An action for infecting and corrupting the air, they said in the seminal decision in Aldred's Case⁽¹⁷³⁾ rested upon 'the rule of law and reason' sic utere tuo ut alienum non laedas.⁽¹⁷⁴⁾

(172) Above 39.

(173) (1611) 9 Co Rep 57b. See above 123.

(174) The origins of this most famous maxim of the law of nuisance are obscure. The essential proposition was stated by Bracton in a sentence which reads 'prohibetur nequis faciat in suo per quod nocere possit vicino' (f 232; Fifoot History and Sources 19 translates this as: '[It is] forbidden to do on his own land what may harm his neighbour'). The earliest reported mention of the maxim I have found is in Leonard's report of the case of Edwards v Halinder (1594) 2 Leon 93 where counsel, arguing that defendant was liable for damages resulting from the over-burdening of the upper story of a building, says

'by the laying of wares there, a wrong and damage follow to the plaintiff, the defendant shall be punished; for the rule is sic utere tuo, ut alienum non laedas'.

The maxim was classically stated in Aldred's Case (1611) (supra) where it is run into Bracton's words, appearing in the judgment as

'Prohibetur ne quis faciat in suo quod nocere possit alieno, et sic utere tuo ut alienum non laedas'.

For all its Latinity the maxim seems a home-grown product of English common law. Philosophically it has links with Ulpian's precepts: 'honeste vivere alterum non laedas; suum quique triburere' (Digest 1.1.10) (cf Baker English Legal History 239; Yiannopoulos 'Civil Responsibility in the Framework of Vicinage' (1974) 48 Tulane LR 193 at 202) but there is no exact equivalent of the maxim in the Roman Law (Sims 'A Study of Rights incident to Realty' (1921-2) 8 Virginia LR 317 at 335). Although Sir Edward Coke was a notorious coiner of maxims the appearance of the maxim full-blown, in Edwards v Halinder (supra) suggests that Coke was not the author of the maxim (Aldred's case was decided some seventeen years later. Coke was however one of the counsel in Edward's case (see Croke's report of the case)).

In the seventeenth century cases the judges invoked the sic utere maxim not so much as a substantive rule of law⁽¹⁷⁵⁾ but rather in order to justify and explain some restraint imposed upon the notionally unlimited rights of dominion of a landowner. It is in this sort of context that the maxim is first encountered in Edwards v Halinder⁽¹⁷⁶⁾ (1594). There the defendant occupied a shop over a cellar occupied by the plaintiff. The floor of the shop collapsed into the cellar breaking a number of wine vessels belonging to the plaintiff. He then sued the defendant in Case alleging that the floor had collapsed as a result of excessive weight being placed upon it by the defendant.

Counsel for the defendant took the line that what the defendant had done in placing things upon the floor of his shop was an exercise of his normal rights of ownership:

'Where a doing of a lawful act, by a mishap a damage cometh to another, against the will of the doer, no punishment shall follow: ... he may uti jure suo, although it be to the prejudice of another! (177)

On the other side the plaintiff argued that the defendant's liability arose because he had caused damage to another:

'Where injury or wrong is done unto any, the law gives remedy to the party grieved; and although that the shop was let unto him to lay wares there, which he has done, and it was not his intent to surcharge the said warehouse, ... yet forasmuch as by the laying of wares there, a wrong and damage follow to the plaintiff, the defendant shall be punished; for the rule is sic utere tuo, ut alienum non laedas. (178)

(175) Insofar as the maxim implied that any damage to another's property was actionable it was, even for the seventeenth century, inaccurate. As we have seen (42ff) since Bracton's time it was well established doctrine of nuisance law that damage to another might be damnum sine injuria and thus not actionable. The maxim provided no guidance as to when damage was actionable and thus cannot be seen as expressing any more than the truism that if a man causes unlawful damage to his neighbour he would be liable to an action.

(176) (1594) 2 Leon 93.

(177) 2 Leon 94.

(178) 2 Leon 93.

In Aldred's case⁽¹⁷⁹⁾ (1611) the maxim is cited by the court in the same sort of context. In reply to the defendant's contention that his pig-styes were necessary for the sustenance of man and could not be unlawful, the court cited a number of authorities showing that an action could lie against those who carried on lawful and necessary trades where the result was to cause damage to another,⁽¹⁸⁰⁾ adding that 'this stands with the rule of law and reason, sc Prohibiter re ques faciat in suo quod nocere possit alieno : et sic utere tuo ut alienum non laedas'.

In the same year the maxim was cited in Hughes v Keene⁽¹⁸¹⁾ to explain why a landowner could not build on his land and so obscure the 'ancient' lights of an adjoining building. In 1627 it is cited⁽¹⁸²⁾ to explain why a man should be held liable for diverting the waters flowing to an 'ancient' pond.⁽¹⁸³⁾ In Jones v Powell⁽¹⁸⁴⁾ (1628) it is used to explain why a brewer should be held liable for the stenches from his brewery and, in Morley v Pragnell⁽¹⁸⁵⁾ (1638), why a tallow-smelter was liable for the stenches emanating from his factory.

(179) See above 123.

(180) Above 125.

(181) (1611) Calth 1: '... it is not lawful to erect a new house ... whereby the old lights of an ancient house may be stopped up; for the rule of equity, and law, saith, utere tuo ut alienum non laedas'.
Cf Rosewall v Prior (1701) 12 Mod 635 at 640.

(182) Duncombe v Randall (1627) Het 32.

(183) '... for sic utere tuo ut ne laedas alieno.

(184) (1628) Hut 69: '... brew houses are necessary, yet the rule in law is, sic utere tuo, ut alienum non laedas...'

(185) (1638) Cro Car 510: 'Germyn, Serjeant, moved ... that an acton lies not, for he, being a tallow-chandler, ought to use his trade, which cannot be said to be a nuisance. But all the court held, that ... the action is maintainable; for everyone ought sic uti suo, quod alienum non laedat'.

Sic utere tuo ut alienum non laedas was thus a general precept, a 'rule of law and reason,'⁽¹⁸⁶⁾ of 'equity and law,'⁽¹⁸⁷⁾ under whose banner the courts were to develop various substantive doctrines and rules for regulating the conflicting interests of landowners.⁽¹⁸⁸⁾ Although the substantive rules of the doctrine of nuisance which developed under the sic utere maxim only emerged with clarity in the nineteenth century,⁽¹⁸⁹⁾ their outlines can be perceived in at least one seventeenth century decision under that of Jones v Powell (1628).⁽¹⁹⁰⁾ The action was brought in respect of the defendant's brew-house for the 'stench smoke and unwholesome vapours' that emanated therefrom and rendered the plaintiff's house so insalubrious that his family could not dwell therein 'without danger of their health'.

The mere carrying on of a trade, the court held, was not in itself a nuisance⁽¹⁹¹⁾ and people had to tolerate certain effects of lawful industrial activity.⁽¹⁹²⁾ On the other hand the fact that a trade was of public importance did not

(186) Aldred's case (n 179 above).

(187) Hughes v Keene (n 180 above).

(188) Cf Terry's characterization of the role and function of the sic utere maxim:

'much the greater part of the work of the courts has been done by taking what were really extra-legal principles, of justice or policy proper for the consideration of the Legislature, treating them as rules of law, and then, under the pretence - not always consciously false - of interpreting them and applying them to particular cases, making new rules of law based on them ... sic utere tuo ut alienum non laedas is ... of the same character. ... [T]he principle expressed in the maxim has been the guiding principle in the evolution of many more special rules forbidding various kinds of conduct which are likely to produce harm to others'.

Terry The Leading Principles of Anglo American Law s 10-11.

(189) See Chapter Six below.

(190) (1628) Hut 135; Palm 536.

(191) 'The erecting of a common or private brew-house is not of itself a nuisance, nor the burning of sea-coal in it ...' (per Curiam).

(192) '... if a man is so tender-nosed that he cannot endure sea-coal, he ought to leave his house' (per Doderidge J).

excuse any nuisance caused by it.⁽¹⁹³⁾ Stenches were only actionable where they were excessive⁽¹⁹⁴⁾ and thereby caused adjoining landowners damage.⁽¹⁹⁵⁾

In this we see the court doing more than merely deciding that a man who uses his land in a way which causes damage to a neighbour is ipso facto liable. Rather the court is groping towards a doctrine of accommodation of the conflicting interests of both landowners, a doctrine which will allow the brewer to carry on his trade and the householder to enjoy salubrious air. The principle which the court uses to express this doctrine is that of mutual limitation of rights, in terms of which the brewer may brew provided he does not cause excessive harm to the householder and, conversely, that the householder must tolerate a certain measure of discomfort arising from his neighbour's trade, a right of action only accruing where the discomfort becomes excessive.

4. The Nuisance Action and the 'Natural' Rights of Property

4.1. Introduction

In the nineteenth century the action for nuisance was to become, in essence, a device for accommodating the mutually conflicting interests of adjoining landowners.⁽¹⁹⁶⁾ To this end it would acquire a set of unique rules and doctrines,

(193) 'A tan-house is necessary, for all men wear shoes, and nevertheless it may be pulled down, if it be erected to the nuisance of another ...' (per Hide CJ).

(194) 'To burn sea coal is not a cause of action; but if it is burnt in an excessive manner an action lies' (per Jones J); 'the excessive use of sea-coal which is a nuisance to neighbours, gives an action' (per Doderidge J).

(195) '... if it is erected so near the house of another that his goods are thereby spoilt, and his house made uninhabitable by the smoke, an action lies' (per curiam).

(196) See Chap Six.

many of which were presaged in the judgements in Jones v Powell.⁽¹⁹⁷⁾ A preliminary stage in this development involved the closer identification of the nature and dynamic of the action for nuisance. This came about in the seventeenth century with the emergence of the idea that the action for nuisance lay for the protection of what came to be termed the natural rights of property.

In the medieval law there was a tendency to describe all rights incident to landholding as 'servitudes'.⁽¹⁹⁸⁾ Since the action for nuisance lay for the protection of most of these rights, it seemed as if the scope of the nuisance action was that of the vindication of servituted rights and especially the servitudes known as easements. However Aldred's case showed that a right (to salubritas aeris) though not an easement could nevertheless be asserted by way of the action for nuisance. We have seen too that the nuisance action was awarded in such instances on the ground of an infraction of the general precept sic utere tuo ut alienum non laedas. What was not clear however was the nature or character of the interests or rights which were vindicated under this new dispensation. The answer which emerged in the course of the seventeenth century was that the rights in issue were the so-called 'natural' rights of property.

4.2. The Concept of Natural Rights of Property

Bracton, we have seen, hinted at the concept of a natural right of property when he spoke of servitudes imposed by law.⁽¹⁹⁹⁾

(197) Above ad n 189.

(198) Certainly this was Bracton's attitude (see above 44). The truth is of course that the medieval lawyers made no attempt to classify the various rights incident to realty (cf Sims 'A Study of Rights Incident to Realty' (1920-1) 7 Virginia LR 327 at 328-9). They simply lumped together what in later times would be classified as 'easements' and 'natural' rights of property. So long as the action for nuisance lay indifferently in respect of each type of right there was no need to bring about any such classification. Cf Holdsworth 3 HEL 156; Simpson History of the Land Law 101.

(199) Above 44. Cf Holdsworth 3 HEL 155 n 2.

The concept was also implicit in the distinction of the medieval law between rights of common that were appurtenant and those which were appendant.⁽²⁰⁰⁾ The notion was reflected in the medieval law as involving those rights to the use and enjoyment of property which could be exercised only if acquired by prescription and those which could be exercised without prescribing therefor.⁽²⁰¹⁾

Formal recognition of the concept of a natural right of property however first occurred in relation to running waters.⁽²⁰²⁾ Bracton classified running waters as *res communes*⁽²⁰³⁾ but later writers excluded this interest from the list of things common to all men.⁽²⁰⁴⁾ This implied that

(200) Above 9 n 31.

(201) See eg (1469) 8 Ed 4 pl 14 where it is pointed out that a man was entitled to abate a nuisance to his land without first acquiring the right to do so by a prescriptive title:

'... if I should prescribe, when a man builds a house so that from the house the water runs onto my land, that I can abate that which causes the water to run on my land, such prescription is void; for by the common law I can do this well enough.'

In other words, as the case said, '[A] man has no need to prescribe for things which are of common right'. The term 'of common right' was 'a phrase roughly equivalent to the modern 'by the law of the land' (Simpson History of the Land Law 105). See Holdsworth 3 HEL 168-9, cf Simpson op cit 105-6.

(202) Interferences with watercourses, as we have seen (above 15-6) from earliest times gave rise to an action for nuisance. (Under the Assize procedure the plaintiff could obtain a writ quaere divertit cursum aquae and a writ quod permittat reducere cursum aquae would lie for those unable to obtain the assize. Diversion of public rivers could amount to a purpresture to be redressed at tourn or leet (above 24)). Actions on the case were allowed for the diversion or obstruction of water courses in the fifteenth century and after (see Kiralfy Action on the Case 67). Generally on the historical evolution of the law relating to running waters see Weil 'Running Waters' (1908-9) 22 Harvard LR 190; Lauer 'The Common Law Background of the Riparian Doctrine' (1963) 28 Missouri LR 60.

(203) f 7.

(204) Fleta (3.1), in enumerating the *res communes* omits aqua profluens. Britton (2.2.1) seems to do the same.

(continued on the next page)

landowners could acquire exclusive proprietary interests in running waters, a doctrine promoted by Coke in the seventeenth century when expounding on the nature of land in the context of the principle cujus est solum ejus est usque ad coelum.⁽²⁰⁵⁾

The case law of the time reflects a somewhat anomalous attitude towards the nature of the interests of riparian owners in the waters flowing to and over their land. It seemed that riparian owners could acquire the right to divert and take such waters as an easement conferred by custom or ancient user. This is shown by the form of pleadings used in actions brought for the diversion of watercourses providing the motive power for water-mills. The plaintiff in order to succeed in his action had, it seems, to allege and prove that the waters 'currere solebat et consuevit' to his land.⁽²⁰⁶⁾

The effect of this was thus to suggest, if nothing else, that rights in running waters, like the right to necessary light was an easement, falling to be asserted not under the *sic utere* principle but on proof of acquisition of the servitude and an interference with it.

(204) (continued)

For a possible explanation of their approach see Weil op cit (n 201 above) 193.

(205) See above 112. See also Lauer op cit (n 201 above) at 74-7. It is worth noting that the chief seventeenth century authority on waters, Robert Callis in his Reading on the Statute of Sewers (1647) 56 disputed whether there could be 'property' in 'the bare running water'. Cf Weil op cit 193-4. See further below 257.

(206) See the form of pleadings in Shury v Piggott (1625) 3 Bulst 339. Cf Weil op cit 195. The general attitude of the law is reflected by Russell v Handford (1583) 1 Leon 273; Luttrell's case (1600) 4 Co Rep 86b. For discussion of these decisions see Lauer op cit (n 201 above) at 83-4 who concludes that in 1600 'the English rule was that one acquired rights to the flow of a watercourse only by means of ancient use or prescription [I]n the absence of a grant the fact that a man had built a mill or used water to power its wheel for ten or fifteen years meant nothing; any person might build a mill higher on the stream, and interfere with the flow of water ... and no relief was available from the courts.'

The point came up for decision in a crisp form in the case of Shury v Piggott (1626). The plaintiff claimed that his water course had been stopped by his neighbour. At some earlier time the two tenements in the case had been united and the defendant now ingeniously argued that the unity of possession had extinguished the plaintiff's rights to the water course, implying thereby that the right in the waters was a mere easement capable of being extinguished by merger of title.

The case, as Lord Blackburn observed,⁽²⁰⁷⁾ appears to have 'excited a good deal of attention'. It 'was reported in six different reports'⁽²⁰⁸⁾ and it is clear from these that the question was not considered to be a simple one, the point being 'argued at the Bar, and much debated, and for further argument ... was adjourned to another time'.⁽²⁰⁹⁾ When it came up again it 'was argued at large by all the judges',⁽²¹⁰⁾ who, in the event, found in favour of the plaintiff.

For the defendant it had been argued that a 'watercourse may well be compared to the ease of a way' and as such was an easement to be extinguished by unity of possession. The plaintiff disputed the analogy on the ground that 'where the thing hath a being and existence, ... there it is not destroyed by the unity'. In effect it was the plaintiff's contention that he had a natural right to receive the water that flowed naturally to his land and that it was an actionable nuisance for his neighbour to deprive him of this right. This proposition appealed to the judges who expressed it in various ways and approved it for various reasons.

(207) Dalton v Angus (1881) 6 AC 740 at 825. Cf Lauer op cit (n 201 above) 87.

(208) (1626) 3 Bulst 339; Latch 153, Noy 84; Palm 444; Poph 169; W Jones 145.

(209) 3 Bulst 339.

(210) Ibid.

Whitlock CJ perhaps perceived the central issues most clearly:

'... the question here is of aqua profluens, and I conceive that there needs no prescription or custom in this case, for water hath its natural course, and ... natura sua descendit, it may be called usu-captio or usage.'

Ways and rights of common were different, he went on, that 'are called servitutes' and begin 'by grant or prescription',

'but in our case the water-course doth not begin by the consent of the parties, nor by prescription, but ex jure naturae, and therefore shall not be extinguished by unity'(211)

The decision in Shury v Piggott thus established⁽²¹²⁾ that a landowner could claim to have and be entitled to certain

(211) 3 Bulst 339 at 340. The other judges were rather less certain of their reasons. Jones J agreed that unity could not extinguish the right because, inter alia, 'if such a unity by construction of law should extinguish water-courses, it would be too dangerous'.

Doderidge J too was inclined to invoke reasons of policy, observing that unity did not extinguish. 'For the necessity of the thing',

'and this is the reason that common appendant by the unity of possession shall not be extinguished for it is appendant to ancient land-hide ... which is necessary for the preservation of the commonwealth: and as in this case there is necessity of bread, so in our case there is a necessity of water'

He gave as a further reason 'the nature of the thing being a water course which is a thing running':

'From the nature of water, which naturally descends, it is always current, et aut invenit aut facit viam, and shall such a thing be extinguished which hath its being from the creation.'

(212) The decision in Shury v Piggott was followed in later water cases. In Sands v Trefusis (1639) Cro Car 575 it was held that the plaintiff could succeed in an action for diversion of the water-course to his mill even though he did not allege that it was an 'ancient' mill or an 'ancient' watercourse. The court held that his action lay since he was 'lawfully in possession, and the stopping of the water is tortious, and a damage to his mill'. This case was approved by Lord Hale in Cox v Matthews (1673) 1 Vent 237, saying that a man might bring an action for the diversion of the water course to his mill 'and not say antiquum molendinum'. See also Nulmes v Hobblethwayte (1683) 3 Lev 133 a decision

incidents to the ownership of land without having to first prove that he had acquired the right by way of express grant or acquisitive prescription. The corollary to this was his action sounded in tort⁽²¹³⁾ and liability followed upon proof of damage suffered. And, generally speaking, such liability arose from the defendant's failure to observe the prescription sic utere tuo ut alienum non laedas.⁽²¹⁴⁾

(212) (continued)

at Common Pleas upheld in the King's Bench (sub nom Keblethwait v Palmes (1686) Comb 9; 2 Show 243; Carth 85; Skin 65, 175 notwithstanding a strong dissent by Holt CJ. The position thus was that, by 1673 and after, man whose watercourses were diverted or interfered with were obtaining their action without having to show that they had acquired a right to the flow of the water by long enjoyment or prescription. Their cause of action was, as said in Sands v Trefusis, (supra) a disturbance of their possession which caused damage. Cf Lauer op cit (n 29 above) 92.

(213) Cf Sands v Trefusis (1639) Cro Car 575 where the court allowed an action for diversion of waters without proof of prescriptive title, saying that 'the stopping of the water is tortious, and a damage to his mill'. Cf Tenant v Goldwin (1704) 6 Mod Rep 311 at 313 where Holt CJ pointed out that 'there is a difference between charging a wrongdoer and the tenant of the land; for to charge the terretenant one must make title by grant or prescription, but none need be made against a wrongdoer'

(214) See Tenant v Goldwin (1704) 1 Salk 21, 360; Holt KB 500; 2 Ld Raym 1089; 6 Mod Rep 311. There the plaintiff sued in case for the escape of 'filthinesses and nasty things' from the defendant's 'privy-house of office' onto the plaintiff's premises. The defendant excepted to this on the ground that it could not be proved that he was under prescriptive obligation to maintain the wall of his house so as to prevent such escapes (see 6 Mod 311 in fine). Salkeld, arguing for the plaintiff, rebutted this saying that there were cases (citing, inter alia, Sand v Trefusis (supra n 212)) where a duty was placed 'in as general a manner as this, without shewing any title' (2 Ld Raym at 1090) or, in other words, that the action was 'for a tort to his possession' (6 Mod at 312) and thus lay without the need to show any prescriptive obligation to repair. With this Holt CJ agreed. In Lord Raymond's report he is reported as holding (at 1092)

'there appeared a sufficient cause of action, to entitle the plaintiff to have his judgment: that they did not go on the word solebat, or the jure debuit reparare, as it were enough to say, that the plaintiff has a house, and the defendant has a wall,

(continued on the next page)

The decisions in Shury v Piggott⁽²¹⁵⁾ and Sands v Trefusis⁽²¹⁶⁾ thus established a general principle: a man's right to flowing waters was not an easement but rather existed 'of common right'⁽²¹⁷⁾ or, in other words, as a natural right. As such any interference with it gave rise to an action in tort on the basis that the defendant had offended against the precept sic utere tuo ut alienum non laedas.⁽²¹⁸⁾ And since the right to pure air also was not an easement⁽²¹⁹⁾ and was also redressed by the nuisance action in terms of the sic utere principle,⁽²²⁰⁾ it too could be classified as being a natural right of property. Likewise the obligation to provide lateral support to a neighbour's land was not an easement⁽²²¹⁾ and would thus also seem to be a natural right and fall to be redressable on the sic utere principle.⁽²²²⁾

In short then the implications of Aldred's case, Wilde v Minsterley and Shury v Piggott was that there existed a distinct category of real property rights which could be classified as natural rights of property⁽²²³⁾ having their own particular form of remedy in the shape of the action for nuisance under the aegis of sic utere tuo ut alienum non laedas.⁽²²⁴⁾

(214) (continued)

and he ought to repair the wall.... [T]he reason of this case is upon this account, that every one must so use his own as not to damage another ... so he must keep in the filth of his house of office, that it may not flow in and damnify his neighbour'.

(215) Supra n 207.

(216) Supra n 212.

(217) Cf above n 200.

(218) Above 137.

(219) Above 124.

(220) Above 131-2.

(221) See Wilde v Minsterley (1639) 2 Rolle Abr 564, cited n 95 above.

(222) Cf Humphries v Brogden (1850) 12 QB 739; Rowbotham v Wilson (1857) 8 E & B 123; Dalton v Angus (1881) 6 AC 740.

(223) Cf Simpson op cit 246; Baker op cit 240; Sims op cit (1921-2) 8 Virginia LR at 325ff.

(224) Cf Sims op cit (n 222 above) 334ff.

In a sense the dichotomy of natural rights of property and easements is unsatisfactory.⁽²²⁵⁾ It is however a convenient way of explaining the fact that the action for nuisance can lie for an interference with an easement as well as in cases where a plaintiff complains of acts which in no way impinge upon such easement rights as he may enjoy.⁽²²⁶⁾ And although the action for nuisance would continue to lie for the vindication of easement rights,⁽²²⁷⁾ it was to be in its guise as an action for the vindication of 'natural' rights of property that it was to achieve its further development and ultimate apotheosis.

5. The Action on the Case for Common Nuisance

5.1. Introduction

We have seen⁽²²⁸⁾ that by the sixteenth century the differentiation of private and common (public) nuisance had reached the point where the two concepts were considered to be entirely separate and distinct. This had come about through the establishment of jurisdictional rules which laid down that the courts leet could not entertain an action for private nuisance and, conversely, that the action for damages could not lie where the damages suffered were the result of a common nuisance.⁽²²⁹⁾

(225) As Simpson, History of Land Law 246 points out the 'terminology which speaks of natural rights is now, however, suspect; it is simpler and more intelligible to talk of the situations in which a landowner can sue in tort without proving a servitude, than to speak of natural rights and attempt to list these'.

(226) Cf Baker English Legal History 239.

(227) 'Such an action - in essence an action based on property - has been called "cognate nuisance" to distinguish it from the tortious action brought to protect the natural enjoyment of land': Baker op cit 239-40.

(228) Above 88-9.

(229) This latter proposition was reiterated in the seventeenth century cases. See especially Iveson v Moore (1699) 1 Ld Raym 486 where Rokeby J said (at 491-2):

'he would admit, that no particular person could have an action for the general stopping of a way
1. Because the offender is punishable at the King's suit
2. Because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason a hundred thousand may'.

See also William's case (1592) 5 Co Rep 72b (cited n 233 below).

But in the sixteenth century an exception came to be allowed to the latter proposition. If, it was said, a member of the public who suffered damage from a public nuisance could show that the damage he suffered was different to that suffered by the other persons affected by the nuisance he could bring an action on the case for that 'special' or 'particular' damage.

5.2. The Exception

This exception to the general rule was first mooted by Fortesque J in the case of Sowthall v Dagger⁽²³⁰⁾ (1538). The action arose from an obstruction of the king's highway which prevented the plaintiff from reaching his close. He sued in case for the damage thereby suffered. Baldwin CJ refused to allow the action pointing out that the obstruction 'is a common nuisance to all the King's lieges' and thus fell to be redressed 'in the Leet'.⁽²³¹⁾ Fitzherbert J however dissented:

'I agree well that each nuisance done in the King's' highway is punishable in the Leet and not by an action, unless it be where one man has suffered greater hurt or inconvenience than the generality have; but he who has suffered such greater displeasure or hurt can have an action to recover the damage which he has by reason of this special hurt. So if one makes a ditch across the highway, and I come riding along the way in the night and I and my horse are thrown into the ditch so that I have great damage and displeasure thereby, I shall have an action here against him who made this ditch across the highway, because I have suffered more damage than any other person. So here the plaintiff had more convenience by this highway than any other person had, and so when he is stopped he suffers more damage because he has no way to go to his close. Wherefore it seems to me that he shall have this action pour ce special matiere; but if he had not suffered greater damage than all others suffered, then he would not have the action!

(230) This case is usually cited as Anon (1535) YB 27 Hen 8f 27 pl 10 (Fifoot History and Sources 98). Kiralfy Action on the Case 69 has however identified it as Sowthall v Dagger C.P roll Hil 26 Hen 7 (1535) m 280.

(231) See above 88.

Nothing more is heard of this until 1584. In that year a plaintiff⁽²³²⁾ brought an action on the case for damages arising from the delay and inconvenience caused to him by the obstruction of a public highway by the defendant. Significantly the court did not reject the claim out of hand in accordance with the traditional rule as expounded by Baldwin CJ in Sowthall v Dagger. Rather we find it refusing the action on the ground that the damage suffered by the plaintiff was not in fact any different to that suffered by other users of the highway. In other words the court had approached the matter on the basis advocated by Fortesque J. Then in William's⁽²³³⁾ case the case of Sowthall v Dagger is cited in a way which indicates that Fortesque's dissent was regarded as being as much a part of the ratio of the case as the judgment of Baldwin CJ.⁽²³⁴⁾

By the beginning of the seventeenth century it had become the settled principle of English law that an action for damages in respect of a public nuisance 'lies not for a private person ... unless he can shew some special prejudice'.⁽²³⁵⁾

(232) Anon (1584) Moo KB 180.

(233) (1592) 5 Co Rep 72b.

(234) 'A man shall not have an action on the case for a nuisance done in the highway, for it is a common nuisance, and then it is not reasonable that a particular person should have the action; for by the same reason that one might have an action for it, by the same reason every one might have an action; and then he would be punished 100 times for one and the same cause. But if any particular person afterwards by the nuisance done has more particular damage than any other, then for that particular injury, he shall have a particular action on the case!'

(235) The rule was expressed thus by Sir Edward Coke (then attorney general) in argument in the case of Fineux v Hovenden (1599) Cro Eliz 665. Coke continued his statement of the law by saying

'and so it was adjudged in this court, in Serjeant Bendlows v Kemp [not reported], that he might maintain an action upon some special prejudice. And ... in Williams v Johns [supra n 232]. And therefore, in Westbury v Powel [not reported], where the inhabitants of Southwark had a common watering place, and the defendant stopped it up, and the plaintiff, being an inhabitant there, brought his action upon the case, it was adjudged maintainable'.

Later cases in which the rule is approved and followed were

(continued on the next page)

5.3. The Concept of Particular Damage

Once it was accepted that private individuals might sue for damages incurred as a result of a public nuisance the courts set about defining the type or character of damage which would entitle a plaintiff to bring the action.

Sowthall v Dagger⁽²³⁶⁾ was a case where the plaintiff complained that the obstruction of the public highway prevented him obtaining access to his close, and this thus appeared to be an instance of special damage allowing an action on the case.⁽²³⁷⁾

In Maynell v Saltmarsh⁽²³⁸⁾ (1664) the action was allowed on the plaintiff showing that his corn was spoiled by rain as a result of his not being able to transport it because the defendant had obstructed the highway.

Then in Hart v Basset⁽²³⁹⁾ (1681) the plaintiff rested his action on the delay and inconvenience suffered as a result of the obstruction of the highway. Observing that 'the common rule, that no one shall have an action for that which every one suffers, ought not to be taken too largely', the court allowed the action, finding that the plaintiff had

'particular damage, for the labour and pains he was forced to take with his cattle and servants, by reason of this obstruction, may well be of more value than the loss of a horse, or such damage as is allowed to maintain an action on the case.'⁽²⁴⁰⁾

(235) (continued)

Mary's case (1612) 9 Co Rep 111b (cited above 88); Hart v Basset (1681) T Jones 156; Paine v Partrich (1692) Carth 192; Iveson v Moore (1699) 1 Ld Raym 486. See also Co Litt 56a. Cf Holdsworth 8 HEL 424; 10 HEL 316. The rule is discussed at length in Fridman 'The Definition of Particular Damage in Nuisance' (1953) 2 U West Australia Ann LR 490; Prosser 'Private Action for Public Nuisance' (1966) 52 Virginia LR 997.

(236) *Supra* n 229.

(237) See Fineux v Hovenden (*supra* n 234); Iveson v Moore (1699) 1 Ld Raym 486.

(238) (1664) 1 Keb 847.

(239) (1681) T Jones 156.

(240) Cf Anon (1584) Moo KB 180; Stone v Wakeman (1607) Noy 120

This decision, that non-material and pecuniary loss might constitute a form of special damage, though not happily received by Holt CJ,⁽²⁴¹⁾ nevertheless became an undisputed ground for bringing the action for special damages. Thus in Baker v Moore⁽²⁴²⁾ the action was allowed where the plaintiff could show that as a result of an obstruction of the highway he had lost tenants from his house. So too in Iveson v Moore (1699)⁽²⁴³⁾ the action lay for loss of custom arising from the obstruction of the way to the plaintiff's colliery.⁽²⁴⁴⁾

In Sowthall v Dagger⁽²⁴⁵⁾ Fortesque J used as an illustration of the type of damage that should entitle a plaintiff to an action on the case the example of a horseman falling into the ditch which constituted the public nuisance in the

(241) In Paine v Partrich (1692) Carth 192 at 194 he was inclined to dispute that delay or inconvenience could constitute sufficient special damage to allow the action, saying

'Concerning special damages sufficient to maintain an action on the case ... if a highway is so stopped, that a man is delayed in his journey a little while, and by reason whereof he is damnified, or some important affair neglected; this is not such a special damage for which an action on the case will lie; but a particular damage to maintain this action ought to be direct, and not consequential; as for instance; the loss of his horse, or by some corporal hurt, in falling into a trench in the highway'.

See too Iveson v Moore (1699) 1 Ld Raym 486 at 494 where he appears to question the decision in Hart v Basset.

(242) (1696) (unreported) cited Iveson v Moore (supra) at 491.

(243) (1699) 1 Ld Raym 486; Holt 10. This case was much argued, coming before the King's Bench on a writ of error, where Rokeby and Holt JJ found against the plaintiff and Gould and Turton JJ were for. Afterwards the case was heard by all the justices of the Common Pleas and the Barons of the Exchequer (sub nom Jeveson v Moor 12 Mod 262) and judgment was given for the plaintiff.

(244) It was also alleged that the coals from the plaintiff's colliery had deteriorated during the period that the plaintiff was unable to transport them because of the obstruction to the highway. Cf Maynell v Saltmarsh (supra n 237).

(245) Supra n 229.

highway. In Fowler v Sanders⁽²⁴⁶⁾ (1617) the plaintiff had been riding along a public highway across which the defendant had laid some logs. The horse 'stumbled upon these blocks, and much hurt him' and the rider sued for damages. The court allowed the action 'because he having special damage had caused to bring that action, although the nuisance be a public nuisance'.

Ostensibly there is nothing exceptional about this decision in that the damages suffered were as much 'special' or 'particular' as the loss of custom in Iveson v Moore⁽²⁴⁷⁾ or the spoiling of the corn in Maynell v Saltmarsh⁽²⁴⁸⁾. But as Newark⁽²⁴⁹⁾ has pointed out the effect of this decision was that an action on the case for nuisance could lie for personal injuries, a proposition which, as we shall see, had the effect of blurring the boundaries of the concept of private nuisance.⁽²⁵⁰⁾

(246) (1617) Cro Jac 446.

(247) Supra n 242.

(248) Supra n 237.

(249) Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480 at 484.

(250) We have seen (above 126.) that the action for nuisance had come to protect certain interests of personality, particularly those relating to the integrity of the physical person. The import of Fowler v Sanders however was that the action could lie for actual physical harm to the person. In the nineteenth century this was to be the realm of the tort of negligence and it is in the confusion of the scope of that remedy with that of the action for nuisance under the principle in Fowler v Sanders that the blurring of boundaries occurred. See further below 362-5.

C H A P T E R F O U R

ELABORATION : 'COMMON' NUISANCE (1600 - 1900)

A. ABSORPTION INTO THE COMMON LAW

1. Introduction

Prior to the seventeenth century 'common' nuisances were the subject of leet jurisdiction⁽¹⁾ and, as such, very seldom came within the purview of the courts Common Law⁽²⁾.

During the period under discussion the situation changed. Common lawyers became interested in the activities of the courts leet and produced authoritative treatises upon their jurisdiction and functions. A general decline in the importance of the leet as an instrument of local government began about this time so that the Courts of Common law came to take over something of their functions. Influenced by the treatises on the courts leet the common law courts bodily incorporated into the common law the nuisance concept evolved in the leets. By the early eighteenth century there thus emerged in the common law an elaborated concept of common (public) nuisance the main features of which had been drawn from the law and practice of the courts leet.

2. The Common Law Courts begin to suppress 'Common' nuisances

2.1. By Writs of Prohibition

During the seventeenth century the common law courts began to suppress and punish nocumenta which had the effect of harming the public under their jurisdiction to issue writs of prohibition.⁽³⁾

(1) See above 69ff

(2) The only real point of contact was when the action on the case lay for particular damages suffered as a result of a common (or public) nuisance. See above 144.

(3) Cf above 107 n73.

In 1671, in Jacob Hall's case,⁽⁴⁾ the court of King's Bench ordered a nuisance suppressed. Hall was a rope-dancer who erected a booth for the display of his art in Charing Cross. The crowds of 'idle and naughty persons' who gathered to view the exhibition were, the local inhabitants claimed, a 'great annoyance' and they complained to Lord Chief Justice Hale. He ordered Hall summoned into his court and instructed him that pending an indictment he should desist from his activities. Hall defied this order and the chief justice committed him for contempt and ordered the booth to be prostrated.

The order of the court was in the nature of a writ of prohibition and was extraordinary in that the nuisance was suppressed without the usual process of presentment to a grand jury⁽⁵⁾ and trial of the question whether there was a nuisance. Lord Hale however justified the proceeding by citing a precedent from 1633 where

'Noyprayed a writ to remove a bowling-alley ... and had it without any presentment at all.'

Further, he appears to have considered the booth to be a nuisance per se,⁽⁶⁾ saying

'things of this nature ought not to be placed among people's habitations, and that it was a nuisance to the King's Royal Palace; besides, that it straitend the way, and was insufferable in that respect.'

(4) (1671) 1 Mod 76; 1 Vent 169; 2 Keb 846; Holt KB 538

(5) There is some suggestion that the usual procedure was followed in that the judges had a personal 'view' of the booth 'it being in their way to Westminster' and made a record of their finding. It was however an open question whether a presentment made upon a personal view of a justice could be suppressed without being put to a jury: see R v Justices of Wilts (1764) 1 Wm Bla 467.

(6) Cf R v Betterton (1695) 5 Mod 142 where Hall's case was distinguished on the ground that there was a nuisance 'per se'.

Although there was another attempt to obtain such a prohibitory writ from the Court of King's Bench,⁽⁷⁾ the procedure adopted in Hall's case did not become usual, probably because of the existence of another process by which the common law courts could exercise an original jurisdiction over common nuisances.

2.2. By Information

The normal procedure for prosecuting nuisances was a presentment by a jury of accusation. However there had long existed a process in the common law whereby offences might be prosecuted on an information laid by the king or his attorney-general to the Court of the King's Bench. By the sixteenth century this power was of an indefinite nature and there was some doubt, of a constitutional nature, whether proceedings by way of information were legitimate in criminal matters.⁽⁸⁾

(7) In R v Betterton (1695) 5 Mod 142; Skin 625 a 'writ of prohibition' was sought to suppress a play house in Lincon's Inn Fields. The application was strongly resisted, it being said 'that this would be an extraordinary way of proceeding, to try a criminal matter by a prohibition,' and that to issue the writ 'would be to condemn the party without hearing him.' Eyre J was reluctant to grant the writ, saying that 'the most proper way to proceed is by indictment' and Holt CJ, while apparently more inclined to issue the writ, ordered the matter adjourned. The reported Skinner (who was also a party to the application) appends to his report his opinion which inclined to uphold the propriety of the writ. In Lyons, Sons & Co. v Gulliver (1914) 1 Ch 631 at 653 Phillimore LJ discussed Betterton's case and suggests that the basis of the authority of the court to issue the writ was that 'in those days the Courts exercised a kind of executive control in assizes and quarter sessions and probably in London by the Court of Queens Bench, over all places of public amusement ...'

(8) See Holdsworth 9 HEL 236 ff

Nevertheless it seems that at this time there had grown up a practise of pursuing certain nuisances by way of an information.⁽⁹⁾ The history of this practice as it concerned nuisances was traced by Shower⁽¹⁰⁾ who cites precedents collected by Lord Hale extending back to the reign of Edward I,⁽¹¹⁾ and others coming forward to the reign of Charles II.⁽¹²⁾ For the most part these seem to have been in relation to nuisances to public highways and rivers, but in 1683 in R v Pierce⁽¹³⁾ we find an information being laid for keeping a soap-boilery in London and 'tried before Jefferyes Chief Justice at Guildhall.' The defendant was found guilty

'and in this case was remembered the case of a calendar-man here in London, in Bread Street. who was convicted before Lord Hale on such as information, for that the noise of it disturbed the neighbours ... and the case of the King v Jordan⁽¹⁴⁾ for a brewhouse ... about a year and a half since; and he was forced to prostrate the same.'

(9) Holdsworth op cit 239

(10) In R v Berchet (1690) 1 Show KB 106

(11) 'Trin 13 Edw I, majus, nuisance for stopping a common river punished by information, and the jurisdiction of the court well vouched' (op cit 118).

(12) 'In Trinity Term 23 Hen 8 Roll 10 Information by ... Attorney General ... for a nuisance in an highway' (op cit 115). Shower also cites Egerly's case (1641) 3 Salk 182, an information for destroying the highway with an overloaded wagon 'and the party fined and imprisoned', and R v Inhabitants of Yarton (1664) 1 Sid 140.

(13) (1683) 2 Show 327.

(14) Not reported.

Informations in Equity

In 1587 the Attorney-General brought an English information in the Exchequer against James Bond⁽¹⁵⁾ to prevent the erection of a pigeon-house on the ground that it was a 'common nuisance', and the court awarded an injunction.

This suggestion that common⁽¹⁶⁾ nuisances could be suppressed by injunctions issued out of the courts of equity was not, it seems, followed up,⁽¹⁷⁾ apparently because common nuisances were deemed to be criminal offences and thus not a proper subject for the award of an injunction.⁽¹⁸⁾

(15) Bond's case (1587) Moo KB 238

(16) Private nuisances were at this time liable to restraint by injunction. See above 106.

(17) In Baines v Baker (1752) 1 Amb 158 Lord Hardwicke refused to enjoin a small-pox hospital, apparently on the ground that it was a public nuisance. As such, he said, the proper procedure was by way of 'an information in the name of the Attorney-General.' (It is not clear however whether he meant an information brought to a court of common law or whether his point was that an injunction could not issue against a public nuisance on the request of a private individual).

(18) In Attorney-General v Richards (1795) 2 Anstr 603 counsel opposed the award of an injunction against a public nuisance, arguing that

'that is a matter completely foreign to the jurisdiction of a court of equity. It is a breach of the general police of the kingdom, and as such is considered to be a crime, and to be prosecuted in the criminal courts.

But a court of equity cannot hold cognizance of any criminal matter. It never was attempted to prosecute a suite in equity to remedy any other public mischiefs, as to prohibit rope-dancing, plays etc or to abate a nuisance or purpresture on the highway. '

However after 1795 it became the practice to issue injunctions on informations laid by the Attorney-General in respect of those public nuisances which could be said to be purprestures. (19)

2.3. Common Nuisance institutionalized as a Plea of the Crown

The most significant development in the process whereby the common law came to take over the concept of common nuisance occurred when 'Common Nuisance' was incorporated into the criminal law of England as a Plea of the Crown.

That 'nocumenta' could be classified under the heading 'pleas of the crown' is a principle that goes back to the thirteenth century when the sheriff's tourn held pleas of the crown among which were the various purpresture-nocumenta. (20) In the hey-day of the courts leet this idea was virtually forgotten. In the seventeenth century, however, there appeared a number of treatises on the jurisdiction of the leet, written by common lawyers, (21) which differentiated the jurisdiction of leet and court baron. (22) In drawing this distinction the authors noted that the leet was the successor to the tourn and thus, in theory at least, was a court of royal jurisdiction entitled to hold pleas of the crown. (23)

(19) Attorney-General v Richards (supra). The action was in the Exchequer which court enjoyed a jurisdiction to protect the revenue interest of the crown. MacDonal CB avoided the argument (above n 18) that equity could not act in criminal matters by treating the nuisance in question as a purpresture and holding that the Crown was entitled to the relief sought. See also Bagwell 'Criminal Jurisdiction of Equity' (1931) 20 Kentucky LJ 161 at 164. See further below.

(20) See above 23 ff.

(21) See Holdsworth 4 HEL 120-1; Hearnshaw Leet Jurisdiction in England 34ff. The leading treatises were those of John Kitchin Jurisdictions (1580) (see 84 n 223 above) and William Shepherd The Court Keepers Guide (1641) (see Hearnshaw op cit 38). The numerous treatises published in the seventeenth century and after are usefully collected in Webb Manor and Borough 10 n 2.

(22) Holdsworth op cit 130; Webb op cit 11 ff.

(23) 'The Leet is a court of record for the cognizance of

Since the leet had jurisdiction over common nuisances and since the leet could hear pleas of the crown, it seemed to follow that common nuisances could be classified as pleas of the crown. This at least seems to be the explanation of the fact that when Sir Mathew Hale in 1682 produced one of the earliest⁽²⁴⁾ treatises on English criminal law he included in it, under the rubric 'offences not capital of an inferior nature', what he called simply 'Nuisances'.

Hale's Pleas of the Crown⁽²⁵⁾ is remarkable for our purposes only insofar as it provides evidence that by this time nocumenta were regarded as punishable offences at common law. The treatise has little else of value in its treatment of this topic. Hale attempted no definition of the offence, and indeed the pages devoted to the topic are singularly unenlightening. They begin with a heading 'Nuisances' immediately under which there is the rubric 'bridges, publick' followed by some cryptic notes concerning the obligation to

criminal matters or pleas of the crown, and necessarily belongs to the King ...' Ritson The Jurisdiction of the Court Leet viii In fact the leet jurisdiction over pleas of the crown was theoretical only. In 1215 Magna Charta (cap 24) had deprived sheriffs of the power to hold pleas of the crown and thereafter the criminal jurisdiction of the sheriffs' tourn was taken over by other courts (see Hearnshaw op cit 94-5) leaving the tourn, and later the leet, with 'the small fragments of the once-extensive criminal jurisdiction of the sheriffs ... such disjecta membra as have appeared to the acquisitive central government too small to be worth snatching at ...' (Hearnshaw op cit 93).

- (24) Between Bracton and Hale (1609-1676) no books of any significance were produced relating to the criminal law of England. See Hall General Principles of Criminal Law 7 n 10.
- (25) Pleas of the Crown, or a Methodical Summary of the Principles Relating to that Subject (1682)

repair. The following page is devoted to 'Highways' and consists also of cryptic notes concerning the obligation of repair. The next page is merely a list of subjects which reads 'Inns, Ale-houses, Bawdy-houses Gaming-houses'. Hale then discusses rather more fully the topics of 'Common Inns' (observing that it is no offence to erect such a place 'so it be not ad nocumentun') and Ale-houses (most of the discussion of this topic being a commentary on certain statutory provisions).

Hale's work was in fact a preliminary exercise to his unfinished magnum opus The History of the Pleas of the Crown, published posthumously in 1736, and it is thus not entirely surprising that it is both cryptic and incomplete. The later History has nothing on nuisances and it was thus left to Hale's successor William Hawkins (1673-1746) to produce the first comprehensive account of nuisance as a plea of the Crown. This he did in his treatise Pleas of the Crown, or a System of the Principal Matters Relating to that Subject, digested under their proper Heads published in 1716.

Hawkins devoted four chapters of his treatise to the subject of punishable nuisances. The first, chapter 75, attempts a general statement of the nature of 'common nuisance', and thereafter there are chapters on 'Nuisances relating to Highways' (c 76) 'Nuisances relating to Bridges' (c 77) and 'Nuisances relating to publick Houses' (c 78). There is also a chapter (74) on '... the offence of keeping a Bawdy House' which offence Hawkins characterizes as a common nuisance.

Hawkins' work is remarkable for two main reasons. The first is that by the authority it came to enjoy it settled beyond question the fact that there existed at common law a concept of a public nuisance, characterized by the fact that it was a plea of the Crown. The second significant feature was that Hawkins attempted some sort of general definition of the concept thus breaking with the old

tendency of seeking the distinction between public and private nuisance in the jurisdictional distinction between courts *et* and the courts of civil jurisdiction.

'[I]t seems, he wrote, 'that a Common nuisance may be defined

to be an offence against the Publick, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires.' (26)

3. Common Nuisance in the Common Law

3.1. Scope

If Hawkins was responsible for institutionalizing the idea of a common nuisance as a criminal offence liable to prosecution as a plea of the crown, he did little toward settling the contents of the offence. For the most part his account of common nuisance is a somewhat tentative digest of the various authorities statutory and common law that bore on indictments, the maintenance and repair of public highways and bridges and the keeping of various types of public houses. There is little in all this by way of an attempt at laying down the boundaries of the concept of common nuisance or of rationalization

(26) Chap 75 s 1. Hawkins cites 2 Rolle Abridgement 83 as authority for this definition, but the folio to which he refers contains no more than a collection of the cases in which it is held that there can be no presentment of *nocumenta* affecting private interests. Indeed there can be little doubt that the definition is Hawkin's own attempt to rationalize the authorities already discussed. It is significant that in it he uses Coke's category of nocumentum publicum (see above 89) - that which is ad nocumentum totius regni - as the basis of the definition ('a thing tends to the annoyance of all the king's subjects') but uses the appellation 'common nuisance' to describe it. In other words Hawkins has rolled Coke's 'common' and 'public' *nocumenta* into one composite concept which he describes by the traditional term 'common' nuisance.

of the relationship between the various categories of things which by his account fell to be regarded as common nuisances. Indeed a reading of Hawkins on common nuisance leaves one with the impression that the author had no particular clear view of what a common nuisance was or why it was liable to prosecution rather than a civil action.

Bacon's New Abridgement of the Law,⁽²⁷⁾ which appeared during the middle decades of the century, relied upon Hawkins (adopting his definition of common nuisance) but in the mode of exposition was something of an improvement upon Hawkins. Under the heading 'What shall be said to be a nuisance',⁽²⁸⁾ Bacon listed the following:

(i) 'keeping a Bawdy-house' (ii) 'all common gaming-houses' (iii) 'all common stages for Rope-dancers' (iv) play-houses (though these were 'not nuisances in their own nature, but may become such by accident') (v) obstructing a highway by ditches, hedges, gates, logs or otherwise 'rendering it less commodious' (vi) diverting navigable rivers (vii) setting up of brew-houses, glass-houses, chandlers' shops and swine sties 'in such inconvenient parts of a town, that they cannot but greatly incommode the neighbourhood.'

Like Hawkins, Bacon made no attempt to rationalize this list of subjects being content to derive them from the cases, Hawkins's treatise, and the statutes. It was left to Blackstone in his Commentaries (1765), to provide a statement of the scope of the concept of public nuisance

(27) A Gentleman of the Middle Temple [Mathew Bacon] A New Abridgement of the Law (1736-1766). On Bacon's authorship of this work see Holdsworth 12 HEL 169. The work is less of an abridgement and more of a treatise and marks the beginning of a new style in the exposition of the law (Holdsworth op cit 170).

(28) Bacon 3 New Abridgement 'Nuisances' (A)

which sought to extract some general principles from the authorities and which knitted these together into something approaching a coherent, rational and comprehensive statement of the concept as reflected by the sources:

'Of this nature are' he wrote⁽²⁹⁾

1. Annoyances in highways, bridges and public rivers, by rendering the same inconvenient or dangerous to pass: either positively, by actual obstruction; or negatively, by want of reparation ...
2. All those kinds of nuisances (such as offensive trades and manufactures) which when injurious to private man are actionable, are, when detrimental to the public, punishable by prosecution ...
3. All disorderly inns or ale-houses, bawdy-houses, gaming-houses, stage-plays unlicensed, booths or stages for rope-dancers, mountebanks, and the like are public nuisances, and may upon indictment be suppressed and find
4. Eaves-droppers, or such as listen under walls or windows ... are a common nuisance, and presentable at the court leet: or are indictable at the sessions ...
5. Lastly, a common scold, communis rixatrix ... is a public nuisance to her neighbourhood.

Of these species of common law public nuisance only the first two were of any importance in the future development of the nuisance concept. The quaint, medieval idea of a scolding woman as a public nuisance⁽³⁰⁾ had

(29) 4 Bla Comm 187

(30) See above 78.

fallen into desuetude even in Blackstone's time⁽³¹⁾ as had the idea that eavesdropping constituted a public nuisance.⁽³²⁾ The concept of a disorderly house as a public nuisance was partly derived from leet practice and partly based on the somewhat dubious authority of Jacob Hall's case.⁽³³⁾ The concept itself received

(31) Kitchin Jurisdictions 22 ('scolds and brawlers to the noyance and disturbance of their neighbours') was the source Blackstone relied upon in including scolding as a common nuisance. A prosecution for this offence was brought in 1704 in R v Foxby 6 Mod 12, 178, 213, 239; 1 Salk 266; Holt 274, and was the occasion of some judicial jocularly (Holt CJ said that the prescribed punishment of ducking in a ducking stool was 'better in a Trinity than in a Michaelmas term' (6 Mod 12) and suggested that 'ducking would rather harden than cure her; and if she were once ducked, she would scold on all the days of her life.' In R v Saxfield(1705) 2 Ld Raym 1094 it was laid down that the offence could be committed by a woman only. In R v Taylor (1730) Sess Cas 131 and R v Cooper (1746) 2 Stra 1246 indictments charging woman with scolding were dismissed as being too generally laid. In the latter case the court agreed that 'it should be laid to be ad commune nocumentum of her neighbours, for every degree of scolding is not indictable'. There are no further cases of prosecutions for the offence (prosecutions were brought in the nineteenth century in the United States of America where the offence still exists. See 15 Am Jur 2nd 815).

(32) Indeed there appears to have been no prosecutions for this offence at common law See 2 Russell on Crime 1398

(33) Under leet practice those who kept disorderly houses were presentable (see Kitchin Jurisdictions 104). Hawkins 1 Pleas of the Crown Chap 78 s 1 laid it down that

'... the Keeper of an Inn may by the common law be indicted and fined, as being guilty of a publick nuisance, if he usually harbour thieves, or persons of scandalous reputation, or suffer frequent disorders in his house, or set up a new Inn in a place where there is no manner of need of one, to the hindrance of other ancient and well governed Inns, or keep it in a place in respect of its situation, wholly unfit for such a purpose.'

(continued on the next page)

but little further elaboration and its contribution to the further development of the nuisance concept was minimal. On the other hand the remaining species of common nuisance mentioned by Blackstone - annoyances in the highway and the carrying on of noxious trades - are important in the history of the concept of nuisance for what they contributed to the evolution of the concept and thus deserve fuller examination here.

3.2. Noxious trades.

The concept of a noxious trade as a public nuisance is a creature of the recognition in Aldred's case of the

(33) continued

He also said that the keeping of a gaming-house was a nuisance 'in the eyes of the law (op cit Chap 75 s 6), a proposition supported by R v Dixon (1716) 10 Mod Rep 335. There was some suggestion, emanating from Jacob Hall's case (1671) (supra 150) that a play-house could be suppressed as a public nuisance (cf Betterton's case (1695) (supra 151 n 7). Hawkins (op cit Chap 76 s 7) laid it down that a play-house was a common nuisance only 'if it draw together such numbers of coaches or people, as prove generally inconvenient to the places adjacent' distinguishing play-houses from the other sorts of 'houses' proscribed as nuisances on the ground that as they had

'been originally instituted with the laudable design of recommending virtue to the imitations of the people, and exposing vice a folly, [they] are not nuisances in their own nature, but may become such by accident ...'

The proposition that bawdy-houses were public nuisances seems to be based on a dictum of Coke (3 Inst 206) that

'the keeper, he or she, of such houses is punishable by indictment at the common law: for although adultery and fornication be punishable by the ecclesiastical law, yet the keeping of a house of bawdrie or stewes, or brothell house, being as it were a common nuisance is punishable by the common law...' (emphasis supplied).

This suggestion was followed in R v Pierson (1706) 2 Ld Raym 1197. In R v Williams (1712) 10 Mod Rep 63 it was held that

'Keeping a bawdy house is a common nuisance ...[T]he keeping here is the governing and managing a house in such a disorderly manner as to be a nuisance...'

See also R v Higginson (1762) 2 Burr 1232

right to salubritas aeris as an incident of domestic habitation.⁽³⁴⁾ We have seen that the leets acted against those tradesmen who befouled the public ways.⁽³⁵⁾ The Common Law Courts, however, when they came to take jurisdiction to suppress noxious trades, rested the offence not so much upon the need to protect the public health but rather upon the interference with householder's rights to salubritas aeris.

The earliest recorded case of the Courts of Common Law acting to suppress a noxious trade was the information laid, in R v Pierce⁽³⁶⁾ (1683) against one who erected a soap-boilery. The defendant argued that his trade was lawful but Jefferyes CJ, finding the accused guilty, said that

'though such a trade is honest and may be lawfully used, yet if by its stench it be an annoyance to the neighbours, it is a nuisance'.

There is a hint here that the prosecution lies for what is essentially a private nuisance, where the nuisance is so extensive as to affect an entire neighbourhood. Certainly this was the view taken by Bacon⁽³⁷⁾ who wrote that

'It seems the better opinion, that a Brew-house, glass-house, Chandler's shop or stie for swine, set up in such inconvenient parts of a Town, that they cannot but greatly incommode the neighbourhood, are common nuisances.'

(34) See above 123.

(35) See above 73 ff

(36) (1683) 2 Show 327. There appear to have been earlier cases of informations laid against tradesmen for causing a nuisance. They are mentioned in R v Pierce (and cited above 152).

(37) 3 New Abridgement Nuisance (A)

The policy of the law in allowing prosecutions of noxious trades as common nuisances was mentioned in 1726 in R v Pappineau.⁽³⁸⁾ The accused had been convicted of a public nuisance in that he had kept stinking hides near a public highway. The sentence of the court had been that a fine be levied. Strange upon a writ of error contended that the sentence could not stand since it did not include an order for the abatement of the nuisance. He argued that

'... the intent of indictments for nuisances was in order to have an end put to them by one suit, and to avoid a multiplicity of action, and it is upon this reason that an indictment for a publick nuisance is given before an action upon the case, because it makes an end of things at once, which is not done by giving damages in a civil action. The inconveniences to the publick are intended to be removed by these endictments for nuisances; but that cannot be effected in any manner other than by judgement to abate the nuisance ...

This identification of the private wrong as the subject of a public prosecution is very evident in the later case of R v White and Ward ⁽³⁹⁾ (1757). There the defendants were charged with maintaining buildings 'for making noisome, stinking and offensive liquors ... whereby the air was impregnated with noisome and offensive stinks and smells; to the common nuisance of the King's liege subjects ... passing the said King's common highway...'

The defendants took the point that this indictment was too vague in its statement of the offence committed. The prosecution however replied

'... an offensive stench is of itself a nuisance; even though it should not be strictly hurtful. An indictment merely for a stench would have been good ... It depends upon rendering the property of other persons incommodious and uncomfortable to them.'

(38) (1726) 2 Str 687: Also reported sub nom R v Papinian Sess Cas 136.

(39) (1757) 1 Burr 333.

Lord Mansfield agreed with this saying that

it is not necessary that the smell should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable!

Thus it was that by the time Blackstone came to expound⁽⁴⁰⁾ the concept of public nuisance he was able to include under this head 'those kinds of nuisances⁽⁴¹⁾ which when injurious to private man are actionable'. These were punishable as public nuisances 'when detrimental to the public'.⁽⁴²⁾

3.3. Highway Nuisances

The idea that the obstruction of passage along a way was a nuisance goes back to the original, undifferentiated *nocumentum* concept of the twelfth century.⁽⁴³⁾ In the thirteenth century, as we have seen, this idea was applied

(40) Blackstone loc cit (supra 159)

(41) It is interesting to note the tendency to designate acts which corrupt the ambient air as, simply, nuisance. This is an early indication of a usage which would identify the term with annoyance to the sensory organs of perception.

(42) Blackstone loc cit (supra 159) There is not much in the law at this time which indicates when it is that these nuisances are detrimental to the public. In *R v White and Ward* (1757) (supra n 39) Lord Mansfield said that the 'very existence of the nuisance depends upon the number of houses and the concourse of people: and this is a matter of fact, to be judged of by the jury'. In other words the approach seems to have been that the question whether the nuisance was detrimental to the public was treated as a question of fact rather than of law, an approach which allowed the judges to avoid the problem of formulating a test of what constituted a public nuisance. This device of relying upon the findings of a jury as the determinant of the existence of a nuisance is, of course, as old as the nuisance concept itself. Cf above 38 and 43 n 43

(43) Cf above 10 - 11

to obstructions of the King's highway so as to create the primordial form of a public nuisance.⁽⁴⁴⁾

The original idea of a highway nuisance as some physical obstruction to the passage way of the King's people, was expanded by the development of the principle that those persons under customary obligations to repair highways who were derelict in this duty could be presented in the tourn as having acted ad commune nocumentum. In retrospect we can see that presentments under this head were essentially a part of the primitive local government machinery for ensuring the maintenance and repair of the public highways and bridges.⁽⁴⁵⁾ In the sixteenth century this machinery was replaced by a more sophisticated instruments for the administration of these public services in which the idea that want of reparation of the highway was a nuisance at common law became irrelevant and redundant.⁽⁴⁶⁾ But the idea that a highway nuisance might consist in something more than the erection of physical obstructions to passage lingered on, providing the common lawyers with a theme capable of many variations. In the eighteenth and nineteenth centuries the common law judges exploited this theme by creating new forms of public nuisance, derived from the idea of obstruction of the highway, but expressing more sophisticated public interests. It is necessary to explore these variations on the theme of highway nuisances since they contributed, in greater or lesser degree, to the shades of meaning that were gathering around the word nuisance and which would influence the ultimate development of the nuisance concept.

(44) Above 23 ff

(45) Cf above 5

(46) See below.

B. HIGHWAY NUISANCE AND THE DEVELOPMENT OF THE
CONCEPT OF PUBLIC NUISANCE

1. Introduction

Blackstone defined⁽⁴⁷⁾ annoyances in highways (under which head he included bridges and public rivers) as the rendering them 'inconvenient or dangerous to pass' either positively 'by actual obstruction' or negatively 'by want of reparation'.

2. Nuisance by want of reparation.

The story of want of reparation of a highway as a species of public nuisance, in essence is the story of the evolution and development of institutions of local government for the maintenance and repair of key public facilities.⁽⁴⁸⁾ As such it largely falls beyond the scope of this work, and it will suffice to merely indicate here the main outlines of the development of the concept.

The medieval principle was that 'the common services needed for social life were to be performed, not by any specialized organs of the community, but by being shared among all citizens, serving compulsorily without pay'.⁽⁴⁹⁾ Under this scheme of things the concept of want of reparation as a common nuisance provided a convenient mechanism by which these duties could be enforced. By the sixteenth century however it had become plain that specialized organs of local government were needed to supervise the maintenance and repair of such public facilities as highways, bridges and water-ways. Parliament took the initiative and enacted in 1531 a Statute

(47) Loc cit (supra 159)

(48) Sidney and Beatrice Webb found it necessary to include this story in their monumental study of the history of English local government. 'In the evolution of road administration in England' they wrote 'we shall see exemplified ... the whole story of English Local Government ...' (Webb The King's Highway 1)

(49) Webb op cit 2.

of Bridges⁽⁵⁰⁾ in 1532, a 'Statute of Sewers⁽⁵¹⁾

(50) 22 Hen 8 c 5. The public obligation to repair bridges is the earliest example of the medieval concept of the duty to repair (cf above 5 n 17). The great importance of bridges as aids to travel and transport meant that from early times the law 'strenuously enforced the obligation to maintain all bridges forming part of the public highway, by whomsoever they had been erected and however moderate might be their utility to the public'. (Webb op cit 88) On the origins of bridge-building, usually by holy men undertaking the work as an act of piety, see Jusserand English Wayfaring Life 41 ff; Jackman The Development of Transportation in Modern England 14 ff Webb op cit 85-7). Dereliction of this duty was presentable in the leet as a common nuisance and, more commonly, before the King's Justices (for numerous examples see Flower 1 Public Works in Medieval Law (32 Selden Socy) passim). The general rule was that the county was liable to repair the bridges within it (see the Case of Bridges (1609) 13 Co Rep 33; Webb op cit 88; Holdsworth 10 HEL 324). The Statute of Bridges regularized and defined the incidence of the duty to repair (s 3) and visited upon the Justices of the Peace their duty to 'enquire, hear and determine ... of all manner of annoyances of bridges broken in the highway to the damage of the King's liege people' and to take such steps against the persons liable to repair as 'necessary and convenient for the speedy amendment of such bridges'. Further they were empowered levy rates upon the county 'convenient and sufficient for the repairing, re-edifying and amendment of such bridges'. (s 4) These provisions mark the beginning of a new system of bridge maintenance by specialist organs alimented by compulsory taxation, which rendered the concept of public nuisance largely irrelevant, its sole remaining function being that of providing a vehicle by which men's civil obligations might be tested and determined in a court of law. (See further Webb op cit 90ff Jackman 144ff). The whole mass of statute and common law relating to bridges was discussed by Hawkins 1 Pleas of the Crown Chap 77 'of nuisances relating to Bridges'.

(51) 23 Hen 8 c 5. The navigable rivers of England were more subject to physical obstruction than the land highways and the concept of common nuisance as the obstruction of a highway flourished in this context until well into the nineteenth century (see below 183). Other rivers and streams and ditches (the 'fossatum') of early nuisance law (see above 35) were from an early time under stricter control. From the twelfth century it was the practice of the crown to issue commissions to investigate and report upon the conditions of streams, sea-walls, dykes, sluices,

(continued on the next page)

and in 1555 a 'Statute of Highways' (52)

(51) (continued)

drainage ditches and the like. The commissioners were required to survey and enquire, through specially summoned juries, as to the condition of these facilities in various districts, to establish the incidence of duties of maintenance and repair, to settle disputes, and even to execute repairs. (For a full account of the origin and work of these commissions and the 'juries of sewers' see Webb Special Authorities Chap 1 ; see also Holdsworth 10 HEL 199ff) The Statute of Sewers of 1532 established the commissioners and Courts of Sewers as permanent local authorities with a fixed constitution and procedures (see Holdsworth op cit 202-3.) The leading authority on the subject was Robert Callis' Reading on the Statute of Sewers (delivered in 1622, first published in 1647).

(52) (1555) 2 & 3 P and M c 8 (The preamble states that the act was passed 'for the amending of highways, being now both very noisome and tedious to travel in and dangerous to all passengers and carriages'.) This act shifted the duty of repair from the manor to the parish and created the office of Surveyor of the Highways. The surveyors took over the leet function of 'viewing' the highways and presenting (to the Justices of the Peace) those who were derelict in their duty. The act further provided that on four appointed days each year the people of the parish were to come together, with the necessary implements for repairing roads, make all necessary repairs under the direction of the surveyor. Those who neglected to perform this 'statute labour' were to be fined, the fines to be applied to meeting the costs of highway maintenance. The work was to be done without remuneration and the office of surveyor was likewise unpaid. (See generally on the act Jackman op cit 33-5. The system of road administration established under it is discussed by Webb The King's Highway Chap 2-4). The effect of the Act was thus to establish an organized system for the repair of highways. Statute labour continued in one form or another as the device for maintaining highways until 1835 when it was abolished (by the Highway Act of that year 5 & 6 Will 4 c 50). The later history of highway administration under this new dispensation was largely concerned 'with attempts to regulate the increasing traffic and to divide the increasingly irksome financial responsibility for the upkeep of the roads between their users and the community at large'. (Dyos and Aldcroft op cit 34). The concept the failure to repair a highway was a common nuisance thus tended to become irrelevant and redundant except as the technical vehicle for the enforcement of the duties established by the statute. (Cf Webb op cit Chap 4: 'Road Administration by Presentment and Indictment').

These enactments established in effect systems for the administration of local affairs from which emerged a body of administrative law. For historical reasons this body of law continued to be classified under the heading of common nuisance by want of reparation of highways, bridges and the like.⁽⁵³⁾ In fact though the connection with the primordial nuisance concept was by now so remote as to no longer justify the appellation.⁽⁵⁴⁾

3. Obstruction

3.1. Introduction

Actual physical obstruction of the highway by the establishment or maintenance of physical barriers to the safe and convenient passage of users however continued to be an essentially common law concept. When Hawkins came to consider 'What shall be said to be a nuisance to the Highway' his version, significantly in the light of what has been said above concerning the 'nuisance' of want of reparation, was that of the old common law notion of obstruction by hedges, ditches and the like:

'... all injuries whatsoever to any highway [he wrote] as by digging a ditch, or making a hedge overthwart it, or laying logs of timber in it, or by doing any other act which will render it less commodious to the King's people, are publick nuisances at common law.'⁽⁵⁵⁾

(53) Hawkins' account of nuisances to highways (1 Pleas of the Crown Chap 76) and bridges (op cit Chap 77) is a summary of the legislature enactments relating to these topics.

(54) Cf nn 50, 52 above

(55) Op cit Chap 76 s 48

By the late eighteenth century the idea of a highway nuisance in the form of the erection of barriers and the like across the passage way no longer represented the chief form of obstruction of the public right of passage. Rather obstruction tended to arise as a result of congestion of the highways by vehicular traffic. Obstruction of the highway thus became a product of the use of highways for purposes of passage, a paradox which increasingly focused judicial attention upon the question of the exact nature of the public interest in highways and, more specifically, the public's right to free passage over the highway.

3.2. The Public in the Highways

Implicit in the idea of the public right of passage in the highways was the idea that users of the highway were entitled to be free of harm or inconvenience while using the highway for passing and repassing.

This idea was brought out in the eighteenth and nineteenth centuries in a series of decisions in which persons were convicted for common nuisances in that they had endangered or inconvenienced members of the public using the King's highways. This notion is well illustrated by the case of R v Vantandillo⁽⁵⁶⁾ (1815). There a child suffering from small-pox was carried by its mother in a public passage. Two children in a nearby school contracted the disease and died. A prosecution was brought against the mother, the indictment being that the child has been taken 'into and along a certain open public way ... used for all the King's subjects' this being done

'to the great danger of infecting with the said contagious disease ... all the lieges ... to the damage and common nuisance of all the lieges ...'

(56) (1815) 4 M & S 73.

For the defence it was pointed out that the only offences to the public health known to the common law were 'spreading the plague and neglecting quarantine'. The prosecution pointed out that legislation introduced in Parliament 'for the purpose of subjecting this offence to punishment' had been withdrawn since 'it was taken for granted that to carry infected persons about the streets of London was an indictable offence.'

The Court, in convicting the accused, conceded that it 'had not found upon its records any prosecution for this specific offence,

'Yet there could be no doubt that in point of law that if a person unlawfully, injuriously and with full knowledge of the fact, exposes in a public highway a person infected with a contagious disorder, it is a common nuisance to all the subjects and indictable as such ... [N]o person having a disorder of this description upon him, ought to be publicly exposed to the endangering the health and lives of the rest of the subjects.'(57)

The interest of the public's safety in the highways extended to cover cases where the public was endangered by conditions not actually on or in the highway.

Thus in R v Watts ⁽⁵⁸⁾ (1703) a man was convicted upon an indictment for not repairing a runious house adjacent to the highway. It was alleged that the defendant was liable to repair the house ratione tenurae. This obligation was disputed, but the court convicted, holding

'that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood(59)... And as the danger is the matter that concerns the public, the public are to look to the occupier...'

(57) Cf R v Burnett (1815) 4 M & S 272 where an apothecary who inoculated patients against the samll-pox was successfully prosecuted for causing them to walk in the public thoroughfares 'to the great danger of infecting with the said contagious disease all the subjects who were on the highway, ad commune nocumentum' On the risk of small-pox infection as a nuisance see below... See also R v Henson (1852) Dears 24 (bringing an infected horse into a public place).

(58) (1703)1 Salk 357. Also reported sub nom R v Watson (1703) 2 Ld Raym 856.

(59) A nuisance writ for the repair of a runious house lay at common law. Cf above 50 n 76.

In R v Lister ⁽⁶⁰⁾ (1857) a man was convicted of a public nuisance in that he had stored a quantity of explosives near a public highway because of the danger of the users of the highway. And in R v Mutters ⁽⁶¹⁾ (1864) a conviction for public nuisance was sustained for carrying on blasting operations so that 'the use of the houses or the traffic of the roads was rendered unsafe'.

Implicit in the latter decisions is an idea that to inspire fear or alarm in the users of the highway might amount to a public nuisance, ⁽⁶²⁾ an extension of this notion being that users of the highway should not be subjected to any indecent spectacles thereon. It is true that in 1733 in R v Gallard ⁽⁶³⁾ the accused 'being a woman'

(60) (1857) 7 Cox CC 342. The keeping of gun-powder magazines had been held to be a nuisance in R v Taylor (1742) 2 Stra 1167. Cf Crowder v Tinkler (1816) 19 Ves 617.

(61) (1864) Le & Ca 491; 10 Cox CC 6.

(62) The prosecution in R v Pease (1832) 4 B & Ad 30 illustrates. The prosecution was brought against the directors of the Stockton and Darlington Railway Co., the first railway to use locomotive engines for conveying passengers and goods, for public nuisance in that they caused their locomotive engine and attached carriages

'to move along the said ... railway ... for a great length of way, to wit, one mile, with great noise, force, and violence ... [and that the engines did] exhibit terrific and alarming appearances, and make divers loud explosions, shocks and noises, whereby it became dangerous for the subjects of this realm to go, return, pass and repass on ... the common highway, near to ... the said railway ... to the great terror, and common nuisance of all the liege subjects ...

At the trial it was found that the engines by 'their appearance and noise alarmed the houses of many of the King's subjects when travelling along the highway, and thereby occasioned many accidents.' The prosecution failed only because it was held that the Company was authorized by statute to perpetrate such nuisances. See below 312.

(63) (1733) Kel W 163.

was indicted 'for running in the common way naked down to the waist' and the conviction was quashed 'for nothing appears immodest or unlawful.' However after 1809 there occurs a series of prosecutions for indecent exposure, on the basis that the act done was *ad commune nocumentum* of users of the highway,⁽⁶⁴⁾ from which emerged a general

(64) The seminal decision was R v Crunden (1809) 2 Camp 89. This case reflects the judge's uncertainty as to whether the offence was one *eo nomine* or merely a species of public nuisance. But in the next case, R v Reubegard (1830) (unreported, cited R v Webb (1848) T & M 23) a 'French master' was charged for 'exposing his person at a window' to a female in an opposite house and convicted because those in the street could have seen him, and 'if they could have seen him, it was a nuisance'. Then in R v Watson (1847) 10 LT (OS) 204; 2 Cox CC, a prosecution failed because the complainant was the only person who saw the indecent act. Lord Denman CJ plainly considered that the act was punishable only if it could be said to be *ad commune nocumentum*:

'The general rule is, that a nuisance must be public; that is to the offence or injury of several. There is no precedent of such an indictment as the present, and we are not inclined to make one'

The hint to prosecutors was clear, and in the next case involving indecent exposure, R v Webb (1848) 2 Car & K 933; 1 Den 338; 3 Cox CC 183 the indictment recited that the accused had acted 'to the great damage and common nuisance' of the complainant 'and the other liege subjects' to the Queen. The exposure was however only to the complainant and the defendant argued that a conviction could not follow since there was no 'public' nuisance. ('This is an indictment for a nuisance at common law, and to sustain it, it must be shown that the exposure was in an open and public place, and publicly "to the people"' (3 Cox CC 183 at 184)). The Court agreed, citing R v Watson (supra). Pollock CB seemed to have some doubts as to whether the exposure was indecent at all: 'I remember' he said 'that, in our older Courts of Justice, the Judge retired to a corner of the Court, for a necessary purpose, even in the presence of ladies'. He concluded however, 'That, perhaps, would be indecent now' (2 Car & K 934 at 940). Later decisions reflect a tendency to abandon the idea that indecent exposure was an offence only if it could be said to be *ad commune nocumentum* (see R v Holmes (1853) 2 Car & K 361, but cf R v Elliot & White (1861) Le & Ca 103).

doctrine that passers-by on public highways should not be exposed to that which was indecent or disgusting.⁽⁶⁵⁾

3.3. The Public Right of Passage

Wheeled traffic became a common feature of the public highways during the seventeenth century.⁽⁶⁶⁾ The number of wheeled vehicles using the highways increased so rapidly⁽⁶⁷⁾

(65) See R v Grey (1864) 4 F & F 73. The accused was charged with displaying in his window a large picture of a man covered with sores. Willes J convicted saying there was no doubt that 'the exhibition of the picture on a highway is a nuisance ... No man has a right thus to expose disgusting and offensive exhibitions in or upon a public highway'. See also R v Clark (1883) 15 Cox CC 171 where the exposure of a dead body on the highway was held to be calculated to shock and disgust passers-by and was thus a nuisance at common law. Cf R v Price (1884) 15 Cox CC 389.

(66) Webb The King's Highway 69, 79. Already in 1621 efforts were made to prevent the use of wheeled vehicles because 'they so galled the highways ... that they were public nuisances' (See Webb op cit 74, 81). One of the early instances of an information for a public nuisance was that brought against a waggoner for 'spoiling' a highway by traversing it with an excessively laden wagon. (Egerley's case (1641) 3 Salk 183. The nuisance found in this case may have been a nuisance by statute rather than at common law. Legislation had been introduced in 1629 limiting the weight to be carried by wagons (Webb op cit 81 cf Hawkins op cit Chap 76 s 65). Hawkins mentions these provisions when noting 'one particular nuisance which is made such by statute... and that is... the carrying of excessive loads...' (op cit Chap 76 s 51). Cf Garrett Nuisances 35 who describes the offence as being 'a nuisance at common law'.

(67) See Jackman The Development of Transportation in Modern England 113ff who shows that the congestion of London's streets from wheeled traffic was already prevalent in the seventeenth century, a state of affairs which led to the introduction of licensing laws in an attempt to control the number of vehicles and coaches which used the streets.

that very soon the public thoroughfares, especially in urban areas,⁽⁶⁸⁾ became much congested. R v Russell⁽⁶⁹⁾ (1805) is the first reported instance of a prosecution for the obstruction of the public highway of a member of the public using the highway for travelling thereon. The accused, 'the principal waggoner in the west of England' was indicted on a charge that he left his waggons standing 'for a long and unreasonable time' to the hindrance and annoyance of the King's subjects, passing and repassing. The defendant argued that

'it was not every public inconvenience which was a nuisance. That partial obstructions of this kind, which arose out of the necessary means of carrying on trade and business in a populous city having narrow streets ... did not constitute a nuisance, the public passage not being impeded, though narrowed by such partial obstructions.'

The court however rejected this contention, adopting an absolute view of the nature of the right of public passage over the highway that was to be rigidly maintained in subsequent cases.⁽⁷⁰⁾ It said that

'it should be fully understood that the defendant could not legally carry on any point of his business in the public street to the annoyance of the public.'⁽⁷¹⁾ That

(68) Cf Jackman op cit 303 who notes that in some cities 'the streets which were narrow had to be widened to accommodate the increasing traffic' but that in some places this was not feasible and 'the only things to be done were to regulate the driving of waggons, carts etc ...'

(69) (1805) 6 East 427; 2 Smith KB 424.

(70) See below 180

(71) R v Jones (1812) 3 Camp 230 where a timber merchant was indicted for obstructing the highway by sawing timber in the street prior to carrying it into his yard. It was argued that his activity was no different to that of drayers and other tradesmen who halted vehicles in the public street for loading and unloading of goods. But Lord Ellenborough CJ would have none of this, reiterating that if anyone for any purpose caused inconvenience to the public using thoroughfares which 'is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance.' 'The rule of law on this subject'

the primary object of the street was for the free passage of the public, and anything which impeded the free passage, without necessity,⁽⁷²⁾ was a nuisance... This this was a species of nuisance to be found in many other places, and was fit to be suppressed.'

In R v Cross⁽⁷³⁾ (1812) the proprietor of the Greenwich stage was similarly indicted. A more sophisticated defence was raised, it being contended that the stage-coaches provided a public service and a

'great share of accommodation is thus afforded to the public, which much more than counter-balances any partial inconvenience which the practice may occasion!'

Lord Ellenborough CJ however rejected the argument, observing that

'every unauthorized obstruction of a highway to the annoyance of the King's subjects is an indictable nuisance ... a stage-coach may set down or take up passengers in the street, this being necessary for the public convenience: but it must be done at a reasonable time;⁽⁷⁴⁾ and private premises must be procured for the coach to stop in during the interval between the end of one journey and the commencement of another. No one can make a stable-yard of the King's highway.'

(71)(continued)

he added darkly 'is much neglected, and great advantage would arise from a strict and steady application of it.'

(72) There was some authority for this qualification. Rolle cites a case ((1618) Hill 15 Ja BR) to the effect that a nuisance to the highway is not committed by unloading billets 'before my house for my use' because of the 'necessity'. But, the decision goes on to say that if the billets 'continue there for a long time after the unloading' the offence is committed. See 2 Rolle Abr 137. Cf Hawkins op cit Chap 76 s 49; Bacon New Abridgment 'Highways' (E).

(73) (1812) 3 Camp 224.

(74) What Lord Ellenborough had in mind here is revealed by his reply to defendants contention that if his activities were a nuisance, then nuisances existed 'every time a rout is given by a fashionable lady in the west end of the town.' 'Is there any doubt' the Chief Justice replied

'that if coaches, on the occasion of a rout,

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Obstruction by use of adjoining premises

The concept of obstruction of a highway by the presence of vehicles standing in the streets for purposes of loading or unloading passengers or goods provided the germ for the recognition of another species of public nuisance by way of obstruction of the thoroughfare.

We have seen that Hall's & Betterton's cases⁽⁷⁵⁾ suggested that play-houses or other public entertainments might constitute a public nuisance for that they attracted crowds or coaches to the nuisance of the neighbourhood. The ratio of these cases was elaborated in a number of nineteenth century decisions.

In R v Moore⁽⁷⁶⁾ (1832) a gun-maker established a shooting range some distance from a highway. Crowds gathered about this place and an indictment on a charge of public nuisance was brought against the gun-maker. His defence was that he could not be held responsible for the fact that people he had not invited collected about his premises. Lord Tenterden CJ brushed this aside with the remark that if ' a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable', while Littledale J found him to be responsible because the crowd was the foreseeable consequence of his own actions. Tainton J rested the conviction on the authority of Hawkin's disquisition⁽⁷⁷⁾ on Hall and Betterton, saying that the 'present is a very similar case'.

(74) (continued)

wait an unreasonable length of time in a public street, and obstruct the transit of his Majesty's subjects who wish to pass through it on carriages or on foot, the persons [responsible]... are guilty of a nuisance? In measuring out the punishment, the Court would examine whether the act was repeated, and what degree of public inconvenience was experienced.

(75) Above 150-1, 160 n 33.

(76) (1832) 3 B & Ad 184; ILJ (OS) MC 30.

(77) Hawkins 1 Pleas of the Crown Chap 76 s 7.

Two years later the redoubtable Richard Carlile was charged with causing a public nuisance⁽⁷⁸⁾ as a consequence of the crowds that gathered about his book-shop in Fleet Street to view a scandalous exhibit. Carlile appeared in person and defended the charge with vigour⁽⁷⁹⁾ and some impudence.⁽⁸⁰⁾ Carlile was convicted by a jury after Park J, in charging it, had cited the cases of Cross, Jones and Russell and observed that the accused in carrying on his trade 'must not do anything there that injures his neighbours, so so as to be a private nuisance; nor anything which annoys the public, which is a public nuisance.'

3.4. Obstruction of Navigation

The most elaborate and extensive consideration of the nature of the public right of passage in the highway occurred however in relation to obstructions made in navigable rivers.

(78) R v Carlile (1834) 6 Car & P 636. Carlile was the well-known free-thinker who published the writings of Tom Paine and others. In 1830 his property was assessed for church rates which he refused to pay. His assets were siezed in execution and in response he placed effigies of a bishop and a devil in the window of his shop.

(79) Citing various instances of public events which attracted crowds to view them. He also mentioned 'Mr Very's daughter,' a reference amplified by the reporters of the case in the following note: 'Mr Very was a confectioner in Regent Street, and he had a daughter who attended to his shop, who was considered so beautiful that a crowd of three or four hundred persons used daily to assemble and stand at his shop windows for the purpose of looking at her... [T]he inconvenience was so great, both to Mr. Very and his neighbours, that he was obliged to send his daughter out of town.'

(80) Carlile suggested that the judge's procession to St Pauls might also constitute a nuisance by the crowds it attracted.

Since earliest times public rivers had been regarded as a species of public highway over which all citizens enjoyed a right of free passage.⁽⁸¹⁾ During the medieval era this right was much encroached upon as men established mill-weirs in rivers⁽⁸²⁾ or acquired, as a franchise, the right to fish in the rivers.⁽⁸³⁾ Magna Charta ordered the removal of all obstructions to navigation of public rivers,⁽⁸⁴⁾ an injunction repeatedly confirmed by supplementary legislation in succeeding centuries.⁽⁸⁵⁾ Nevertheless there were 'few rivers in England which were naturally navigable over much of their course before the seventeenth century. Almost everywhere they tended to be cluttered up by mills and fish-garths or intersected by weirs - sometimes up to ten feet high - which impeded

(81) This principle was most plainly established by Magna Charta (1215) (cf above 24 n 83; Jackman The Development of Transportation in Modern England 157)

(82) The owners of land riparian to public rivers would establish a mill and construct dams and weirs to provide the necessary motive power. The continued existence of these obstructions without complaint would in time give rise to the presumption of some prescriptive right to title to so obstruct the river (cf Jackman op cit 162). Although technically public nuisances, and thus liable to abatement (since a public nuisance can never be authorized by prescription, it was unlikely that such long established enterprises would readily be ordered to be abated (see Williams v Wilcox (1838) 8 Ad & El 314 at 335-6). Cf Note: 'The Public Trust in Tidal Waters' (1970) 79 Yale LJ 762 at 770.

(83) The Crown could grant the franchise of exclusive fishing in any waters falling within the royal domaine. Magna Charta prohibited further grants of this franchise (Hale De Jure Maris c 4 (cited Neill v Devonshire (1882) 8 AC 135 HL at 176-7). The right of fishing contemplated the erection in the river of 'kyddels' stakes connected by network and supporting a large net) and weirs (also used for trapping fish and for the launching of boats) (see Hale De Jure Maris c 5 (cited Attorney-General v Emerson [1891] AC 649 at 656. See also Malcomson v O'Dea (1863) 10 HL Ca s 593 at 619-20).

(84) Cf above 24 n 83

(85) See Jackman op cit 23 ff for details of this legislation.

the passage of barges and boats'.⁽⁸⁶⁾ It was only in the seventeenth century that mercantile interests and local authorities⁽⁸⁷⁾ began successfully to clear the rivers under authority of private 'improvement acts'.⁽⁸⁸⁾ With this improvement of navigation the matter of the nature and extent of the public right of passage in navigable waters became important. The eighteenth century saw the emergence of a doctrine which asserted the public right of navigation in tidal waters to the exclusion of the private property in public rivers.

The Public Right

The chief source of authority for this new approach were the writings of Sir Mathew Hale first published in 1787.⁽⁸⁹⁾ In the treatise De Portibus⁽⁹⁰⁾ Hale laid it down that there existed in respect of ports a trinity of rights which were, respectively, the jus regium of the Crown, the jus privatum of the franchise holder and a jus publicum which existed in the public at large. In this trinity the jus publicum was predominant:

'... the people have a public interest, a jus publicum of passage and repassage with their goods by water ... [T]he jus privatum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the King's subjects. as the soil of an highway is, which though in point of property it may be a private man's freehold, yet it is charged with a public interest of the people, which may not be prejudiced or damnified.'⁽⁹¹⁾

(86) Dyos and Aldcroft British Transportation 38.

(87) The Commissions of Sewers (for which see 167 n 51) made some tentative efforts in this connection but it was clear 'by 1650 that they were neither the appropriate bodies nor did they have adequate legal powers to make rivers navigable' (Dyos and Aldcroft op cit 41).

(88) See Jackman op cit 164ff; Dyos and Aldcroft op cit 41-45; Clifford Private Bill Legislation (i) 5ff.

(89) Hale wrote extensively on the law relating to the sea and sea shore. His work was published in Hargrave's Law Tracts (1786) 1-248 under the title 'A Treatise in three parts : Pars Prima - De Juri Maris et Brachiorum ejusdem. Pars Secunda - De Portibus Maris. Par Tertia - Concerning the custom of goods imported and exported'. (See Holdsworth 6 HEL 588 n 4).

(90) See n 89 above.

(91) De Portibus Chap 6.

But not only was the jus privatum of franchise holders subject to the jus publicum so also was the jus regni. The Crown, Hale said, was charged with the duty of protecting and preserving the public right⁽⁹²⁾ even to the extent that the Crown itself could not establish, permit or license that which was an obstruction to the public right of passage.⁽⁹³⁾

The right of public navigation in ports and tidal rivers was widely accepted by the nineteenth century judges.⁽⁹⁴⁾ Initially the nature of the right was expressed by way of the analogy of a public highway⁽⁹⁵⁾

(92) De Portibus Maris c 7 (p87):

'... we are to observe, that the common law hath intrusted the King with the patronage and protection of the jura publica, as highways, public rivers, parts of the sea, and the like, so the care of preventing and reforming all public nuisances therein is left to him, and his courts of justice ...'

(93) 'Where a nuisance concerns immediately all men, as the obstruction of a port [or] the making of a weir in a public river; this can neither be licensed nor dispensed with, though the King and the owner of the soil should consent thereunto, because it is immediately a common nuisance, and all are directly or immediately concerned with it'.

Hale First Treatise (a manuscript work of Lord Hale published in Moore The History of the Foreshore. See at 380).

(94) Who however confined it within fairly narrow limits, refusing to recognize that there was an incidental right of tow-path along navigable rivers (see Ball v Herbert (1789) 3 Term Rep 253 overruling the earlier decisions in Young v - (1698) 1 Ld Raym 725; Vernon v Prior(1747) (unreported, cited in 3 Term Rep 253 at 254)). So too they refused to hold that the public had a common law right of passage over the sea-shore (Blundell v Catterall (1821) 5 B & Ald 268).

(95) Hale used the analogy in his treatises ('[waterways] are in the nature of common highways in which all the King's subjects have a liberty of passage' First Treatise (Moore 339)). The analogy was repeated in the earliest judicial formulation of the right by Wood B in Anonymous(1808) 1 Camp 519 n: 'A navigable river is a public highway; and all persons have the right to come there in ships, to unload, moor, and stay there as long as they please'. In Attorney-General v Johnson(1819) 2 Wils Ch 87 at 103 Lord Eldon observed that 'prima facie the subject has a right to use that which may be called a water-highway, and which prima

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(although the analogy was not exact).⁽⁹⁶⁾ Later formulations of the right tended to emphasize its character as a jus publicum of an absolute nature. Thus Best J in Blundell v Catterall (1821)⁽⁹⁷⁾ said that

'[Inland navigations] like the sea and its shores, were ... the property of the public, and the right of the public in them was not acquired by any compromise with the interests of any individual'⁽⁹⁸⁾

(95) (continued)

facie includes the water between the high and low water mark when it covers the soil'. See too Ashurst J in Ball v Herbert (supra) who observed that when a river is made navigable 'it is made a common highway for all the King's subjects ...'. Cf Lord Denman CJ in Williams v Wilcox (1838) 8 Ad & El 314 at 329 who said that 'it cannot be disputed that the channel of a public navigable river is a King's highway'. He repeated this language in Mayor of Colchester v Brooke (1845) 7 QB 339 at 373 where he said that 'it cannot be disputed that the channel of a public navigable river is properly described as a common highway'.

(96) As noted by Buller J in Ball v Herbert(supra): 'Callis compares a navigable river to an highway; but no two cases can be more distinct. In the latter case if the way be foundeous and out of repair the public have a right to go on the adjoining land: but if a river should happen to be choaked up with mud, that would not give the public a right to cut another passage through adjoining lands'. In Williams v Wilcox (1838) 8 Ad & El 314 at 329 Lord Denman CJ noted also that the 'nature of the highway which is a navigable river ... [is] attended by the important circumstance that on no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions ...'

(97) (1821) 5 B & Ald 268 at 283.

(98) Cf Holroyd J in the same case who said(at 294) that 'By the common law, all the King's subjects have in general a right of passage over the sea with their ships, boats, and other vessels for the purposes of navigation, commerce, trade and intercourse, and also in navigable rivers'. Bayley J (at 304) emphasized the pre-eminent nature of the right in these terms: 'many of the King's rights are, to a certain extent, for the benefit of his subjects, and that is the case as to the sea, in which all of his subjects have the right of navigation and of fishing ... and the King can make no modern grants in derogation of those rights'.

In Williams v Wilcox⁽⁹⁹⁾ (1838) Lord Denman CJ emphasized that the public right of passage in a navigable was 'paramount to the power of the Crown' extending over the whole of the channel,⁽¹⁰⁰⁾ while other judges emphasized that the public right of navigation was pre-dominant over private titles in the river.⁽¹⁰¹⁾

The Concept of Nuisance to Navigation

The Common Law Courts had come to deal with nuisances to navigation in the seventeenth century under their

(99) (1838) 8 Ad & El 314.

(100) '... we cannot conceive such right to have been originally other than a right locally unlimited to pass on all and every part of the channel...' (at 329) '[It is] an almost irresistible conclusion that the paramount right ... must have been a right in every part of the space between the banks'. Further he adds that 'It is difficult ... to see how any such grant [of piscary] made in derogation of the public right previously existing, and in direct opposition to that duty which the law casts on the Crown, of reforming and punishing all nuisances which obstruct the navigation of public rivers, could have been in its inception valid at common law' (at 333-4).

(101) See Lord Westbury LC in Gann v Free Fishers of Whitstable (1864) 11 HL Cas 192 at 207 who noted that the ownership of the Crown in the soil of the foreshore 'is for the benefit of the subject, and cannot be used in any manner so as to derogate from or interfere with the right of navigation, which by law belongs to the subjects of the realm... If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right'. Cf Lord Denman CJ in Mayor of Colchester v Brooke (1845) 7 QB 339 at 374 'The right of soil or arms of the sea and public navigable rivers ... must in all cases be considered as subject to the public right of passage, however acquired: and any grantee of the Crown must of course take subject to such right. See also Williams v Wilcox (1838) supra (n 99) at 330 where Lord Denman uttered the dictum that 'the right of the public

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emerging jurisdiction to hear informations laid against those who perpetrated public nuisances. (102)

In his treatise De Portibus Maris Hale described (103) the various forms that nuisances to navigation might take. These included obstructions by sunken vessels, depositing refuse or ballast in the channel, decayed wharves, piers or quays, unbuoyed anchors, the construction or extension of weirs, shortening a port by building too far into the water, impeding the mooring of ships (where such right existed free of toll) towing or hauling ships or vessels up or down a creek, to or from a port town, allowing a port or public passage to become silted up or stopped. (104)

(101) (continued)

being supposed to be paramount by law, the grantee must be taken to be cognizant of such right'.

(102) Previously obstructions of water-courses and rivers fell within the purview of the courts leet. (For medieval presentments for the obstruction of navigable rivers see eg Flower 2 Public Works in Medieval Law (40 Selden Socy) 112-114, 125, 300 (see also op cit xxiii-xxv); Murphy 'English Water Law Doctrines before 1400' (1957) 1 Am Jo of Legal History 103 at 110ff). Although there was old authority for the bringing of informations for the obstruction of rivers (see above 152 n 11) the practice seems to have become general only in the seventeenth century. Hind v Mansfield (1615) Noy 103 seems to be the earliest reported case. See also Attorney-General v Philpot (1633); Attorney-General v Errington (1641) (unreported, cited R v Russell (1827) 6B & C 566 at 582; The Sutton Pool case (1665) (unreported cited R v Russell (supra) at 572).

(103) Chap 7 passim.

(104) In the First Treatise (Moore 338) Hale described the nuisances more shortly as being

'Generally that which stops the port or chokes it up, as casting out of filth or ballast or otherwise, obstructs the passage of ships ... or stopping up a channel or rode ... are prima facie nuisances'.

Bacon 3 New Abridgement 'Nuisance' (A) wrote that 'as navigable Rivers are deemed Highways, it is a nuisance to divert part of the river... also the laying of timber in a common river ... is equally a nuisance ... if thereby the passage of boats etc is obstructed; and from hence also it seems to follow, that private stairs ... are common nuisances ...'

In Hind v Mansfield (1615) Noy 103 it was held to be a public nuisance to 'weaken' the flow of a river.

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In the nineteenth century the judges adopted a strict attitude toward the sanctity of the public right of passage in navigable waters,⁽¹⁰⁵⁾ refusing to admit any type of obstruction as being not liable to suppression. This attitude is most strikingly revealed in relation to improvements to harbours and ports by the construction of wharves, piers and quays.⁽¹⁰⁶⁾ Where any such improvements were effected without the authority of an enabling Act the judges did not recoil from ordering them abated and removed.⁽¹⁰⁷⁾

The idea that a wharf or quay or pier might constitute a nuisance followed from the fact that to be of any use these structures had to be situated well into navigable waters so as to enable their easy access by the vessels that they were to service. But by being so situated they

(104) (continued)

In *R v Clark* (1802) 12 Mod 615 it was held that the building of locks in a public river was a nuisance since 'to hinder the course of a navigable river is against Magna Charta, c 23'.

(105) Cf the remarks of Lord Denman CJ in *Williams v Wilcox* (1838) (supra n 101) at 330 holding a weir across a navigable river to be a nuisance: 'If ... the Crown had at any period the prerogative of raising weirs in such parts as were not at the time actually required by the subject for the purposes of navigation, it follows from the very nature of a paramount right on the one hand and a subordinate right on the other, that the latter must cease whensoever it cannot be exercised by to the prejudice of the former ... [There is] nothing unreasonable or unjust in [this]... for, the right of the public being supposed to be paramount by law, the grantee must be taken to be cognizant of such right...' (emphasis supplied).

(106) In the early nineteenth century there was a considerable increase in the number of ships using the ports, a fact which called for additional wharves and quays in order to speed-up and facilitate the loading and unloading of vessels. See Dyos and Aldcroft *British Transport* 54-5.

(107) See for instance the Portsmouth Harbour cases (*Attorney-General v Richards* (1795) 2 Anst 603; *Attorney-General v Parmeter* (1811) 10 Price 378; *Attorney-General v Burridge* (1822) 10 Price 350, where improvements (a dry-dock and wharf), erected by private entrepreneurs who claimed a right to do so under a Crown grant, were ultimately order abated as nuisances to the port (on the ground that the grant (made in 1628) had lapsed before construction of the improvements was commenced in 1785). See also *Attorney-General v Johnson* (1819) 2 Wils Ch 87 and *R v Lord Grosvenor* (1819) 2 Stark 511, where the construction of a wharf in the Thames was enjoined and punished.

also constituted an obstruction to the general right of passage over the waters. Hale resolved this paradox by pointing out that, though a quay or wharf might constitute a purpresture⁽¹⁰⁸⁾ it did not necessarily follow that it was also a common nuisance.⁽¹⁰⁹⁾ In order to be a nuisance the construction would have to 'be a damage to the port and navigation' and whether it was or not was thus a question of fact to be determined by a jury.⁽¹¹⁰⁾

Insofar as the public right of navigation was conceived of as predominant and absolute right, Hale's formulation of a nuisance to navigation as being a question of fact rather than law to some extent diminished the absolute character of the jus publicum. That is to say, the right though pre-eminent was not of such an absolute character as to preclude any encroachment upon the public passage over the waters. By making the test one of fact rather than law, Hale allowed for a more flexible determination

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- (108) De Portibus Cap 7: 'It is not every building below the high-water mark, nor every building below the low-water mark, that is ipso facto in law a nuisance, for that would destroy all the quays that are in all the ports of England ... Indeed where the soil is the King's, the building below the high-water mark is a purpresture, an encroachment, an intrusion on the King's soil, which he may either demolish, or sieze, or arent at his pleasure'.
Cf. also Attorney-General v Richards (1795) 2 Anst 603 where the Court of Exchequer claimed the right to enjoin the constructions in Portsmouth Harbour (see 107 supra) on the ground that they were purprestures. Cf on the nature of purprestures above 23ff.
- (109) Hale op cit ibid: ' ... it would be impossible for the King to license the building of a new wharf or quay, whereof there are a thousand instances, if ipso facto they were a common nuisance; for the King cannot license a common nuisance'. Cf above 81-2.
- (110) 'In the case therefore of a building within the extent of a port, in or near the water, whether it be a nuisance or not is quaestio facti and to be determined by a jury, on evidence, and not quaestio juris'.
Hale op cit ibid. Cf above 164 n 42.

of whether the construction of quays, wharves etc might be permitted.⁽¹¹¹⁾

But although the Courts adopted Hale's definition of a nuisance to navigation⁽¹¹²⁾ they applied it with great vigour, refusing to admit any counter-vailing considerations as a defence once a structure was found to be, in fact, a nuisance. Thus in 1819 when the Earl of Grosvenor and others sought to erect an embankment and wharves in the Thames with the consent of the Corporation of London, who were the conservators of the river, the Court of Chancery issued an injunction restraining the works.⁽¹¹³⁾ The defendants contended that the works would improve navigation in the river. Lord Eldon while conceding this nevertheless adopted the attitude that the sole question to be considered was 'whether this sort of proceeding can be authorized and can be stated to be no nuisance'. Finding that the works had been done without the authority of an Act of Parliament or a writ ad quod damnum,⁽¹¹⁴⁾ he issued the injunction. Lord Grosvenor

(111) If the matter had remained quaestio juris the effect would have been that since a quay by definition obstructs navigation all quays etc would per se have qualified as nuisances. Cf R v Shepard (1822) 1 LJ (OS) KB 45 where the court intimated that a minute obstruction would not amount to a nuisance.

(112) eg MacDonald CB in Attorney-General v Richards (1795) 2 Anst 603 at 615: '... the question of nuisance being, as laid down by Lord Hale a question of fact, and not of law'; Richards CB in Attorney-General v Burrige (1822) 10 Price 350: 'It is clear that the question whether a port is straitened by building too far into the water is questio facti and not questio juris, and it is therefore proper that it should be determined by a jury'. See also R v Shepard (1822) (supra).

(113) Attorney-General v Johnson (1819) 1 Wils Ch 87.

(114) A writ issued before the grant of any franchise or liberty to determine what harm would be caused to others by the award of the franchise (see above 46 n 63). The writ was also used where it was desired to divert an ancient highway or water-course. This could only be done with the King's license which was not granted until it was established, by an inquisition held under the authority of the writ ad quod damnum, that the diversion would not be detrimental to the public (cf R v Ward and Lyme (1632) Cro Car 266). Specimen writs are given in the Registrum Omnium Brevium (1595) 247.

and his associates were thereafter indicted on a charge of erecting the structures 'to the injury of the navigation of the river'.⁽¹¹⁵⁾ Again the defendants argued that their works would improve the navigation of the river.⁽¹¹⁶⁾ Abbott CJ however dismissed these arguments saying the 'question here is whether a public right has not been infringed' and observing that

'Although the benefits which were enjoyed before the erection were limited to particular times and seasons of the weather, and were enjoyed by occasionally, yet the public are not to be deprived of them by the erection of a wharf for mere private convenience'.

The jury found the defendants guilty.

So too in R v Randall⁽¹¹⁷⁾ (1842) where a wharf had been erected which enabled the unloading of ships Wightman J instructed the jury that they were to consider only whether the wharf 'occasioned any hindrance or impediment whatever to the navigation of the river' and that they could not take into consideration the 'circumstance that a benefit had resulted to the general navigation of the river'. And in R v Betts⁽¹¹⁸⁾ (1850) Lord Campbell CJ held that

'it is for the jury to say whether an erection of this kind [a bridge] is a damage to navigation or not. That the utility of such work ... may be taken into account as a compensation, is a point on which ... I cannot concur The true question is, whether a damage occurs to the navigation in the particular locality; and that is a question for the jury. An indictment would not lie merely for erecting piers in a navigable river; it must be laid "ad commune nocumentum": and whether it was or not must be decided by a jury'.

(115) R v Lord Grosvenor and Others (1819) 2 Stark 511.

(116) The place where the construction was being carried out was normally not covered by water for 18 hours a day. It was contended that the works would rectify this and also provide refuge for large ships.

(117) (1842) Car & M 496.

(118) (1850) 16 QB 1022 at 1037.

This uncompromising⁽¹¹⁹⁾ attitude towards the preservation of the integrity of the public right of passage was however questioned in R v Russell⁽¹²⁰⁾ (1827). There an indictment was brought against the defendants for obstructing the navigation of the river Tyne before the great coal port of Newcastle. The defendants were the owners of coal mines in the vicinity and for purposes of shipping coals they had erected two staiths in the Tyne, being elevated railways along which coal was transported in wagons and then deposited in waiting vessels.⁽¹²¹⁾ At the trial Bayley J in instructing the jury⁽¹²²⁾ said that

'... the use of a navigable river was not for passage only, but for other important rights which might supersede the right of passage'

and that

'when a great public benefit accrued from that which occasioned the abridgment of the right of passage, that abridgment was not a nuisance, but proper and beneficial'.

Bayley J then instructed the jury to acquit the defendants if they thought that the obstruction of the public passage was 'for a public purpose and produced a public benefit' and if the staiths were 'in a reasonable situation and a reasonable space was left for the passage of vessels navigating the Tyne'.⁽¹²³⁾

(119) The only modification the judges permitted was in the case of an obstruction so slight or minute as to constitute an obstruction to navigation in the most technical sense. See R v Shepard (1822) 1 LJ (OS) KB 45; R v Tindall (1837) 6 Ad & El 143.

(120) (1827) 6 B & C 566.

(121) This method of loading was an improvement upon the earlier method by which coals were loaded into lighters ('keels') which then came alongside the ship and loaded into her by hand, a process which took longer and was more expensive than loading by staiths.

(122) 6 B & C 566 at 569-70.

(123) These propositions of course challenged the prevailing view of the jus publicum as a right of an absolute nature. They can be seen as an attempt to accommodate the right of navigation to other rights of a public (or even private) nature. The medium for achieving the accommodation was the concept of 'reasonableness' allowing for adjustment of rights in a mutually beneficial fashion. In adopting this concept Bayley J anticipated one of the great developments in the theory of property rights and nuisance law. See further below 329

A new trial was sought on the grounds of a misdirection to the jury. The matter was argued by four counsel on either side (seven of whom were to become judges) before Bayley, Littledale, Holroyd JJ and Lord Tenterden CJ. In support of the application counsel for the plaintiffs contended that the direction of Bayley J was wrong in that it conflicted with the established propositions that 'no infringement of a public right of this nature can be legal unless there has been a writ of ad quod damnum' and that 'the communication of a mere benefit by a private person cannot be any defence for depriving the public of a right'. As to the latter proposition they argued that the 'notion of justifying the obstruction of a public right by shewing that a collateral benefit results from it, is perfectly novel' and that there was 'no trace of any such doctrine in any decided case or text writer of authority'. (124)

Counsel for the defendants relied heavily on Lord Hale's dictum that the question of whether there was a nuisance or not was a question of fact to be decided by a jury. This being so, they argued, it follows that the jury

'sanction the enquiry, whether there by any benefit resulting to the public from such erections, to compensate the public the unavoidable abridgment of their right of passage, that abridgment necessarily arising in some degree wherever the shore is built on, and being pro tanto an evil, the only fact that can be presented to the jury so as to redeem the character of the encroachment, and entitle it to protection, must be the fact of compensation. (125)

The Crown met this argument by contending that the plea of not guilty put the fact of the obstruction by the defendant 'and that only' in issue. There was thus no room for the jury to

(124) 6 B & C 566 at 579.

(125) 6 B & C 566 at 574 Bayley J was thus entitled, their argument continued, to put to the jury the advantages flowing from the use of staiths for loading was 'the furtherance of commerce, to which the rights of navigation are instrumental'. The staiths achieved an effect of enlarging the dimensions of the port (by the economy of space achieved, the rapidity with which vessels could be loaded, factors which allowed more vessels to use the port than ever before) and so were 'a benefit, not a nuisance, to the navigation'.

consider collateral benefits.⁽¹²⁶⁾ Lord Hale's proposition had to be understood as meaning that what was to be left to the jury was whether any perceptible injury has been done to the port

'and any sensible inconvenience felt by the ships resorting to it, that is to say, whether the encroachment extends to parts "where ships or vessels might formerly have ridden", not whether a benefit has been conferred upon other persons greater in degree than the injury done to those making use of the port'.⁽¹²⁷⁾

The Court was divided in its opinion. Lord Tenterden CJ reiterated to the view he had expressed (as Abbott CJ) in Lord Grosvenor's case,⁽¹²⁸⁾ while Bayley J adhered to the principles enunciated by him at nisi prius. Holroyd J agreed with Bayley J, while Littledale J, who had been consulted in the matter while still at the bar, declined to give an opinion.

Holroyd J followed Bayley J in the view that the public right of navigation was not absolute in its nature. Rather, he held, it was a right qualified by the existence of other public rights (such as fishing, loading and unloading, access to the wind) so that

'the enjoyment of each of those rights by some is frequently and necessarily an obstruction to the free and complete enjoyment either of the same right or of some other of the above rights in others'.⁽¹²⁹⁾

(126) '... considerations of public policy are not legitimate grounds for the decision of nuisance or no nuisance'.
6 B & C 566 at 580.

(127) 6 B & C 566 at 581.

(128) 'Admitting that there is some public benefit both from the price and condition of the coals, still I must own that I do not think those points could properly be taken into consideration in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of vessels on this public navigable river was injured by these erections'.
6 B & C 566 at 602.

(129) 6 B & C 566 at 586.

Accordingly it could not be said that

'such obstruction ... necessarily or as a matter of law, a public or private nuisance. Each of the rights above mentioned must at times occasionally yield and become subordinate, as may be necessary or reasonable, at least in part, to some of the others'.⁽¹³⁰⁾

Whether or not a particular user of the right of passage was thus a nuisance was a question to be determined in the circumstances⁽¹³¹⁾ and that question was 'according to Lord Hale, a question of fact for the jury'. In this case the

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- (130) A proposition anticipated by Best J in his dissenting judgement in Blundell v Catterall (1821) 5 B & Ald 268 on the public right to use the sea-shore for bathing. Arguing that the sea-shore was in the nature of a public highway, Best J (at 277) said that there was nothing inconsistent with this view in the fact that certain persons might be granted exclusive rights over the sea-shore:

'The owner of the soil of the shore may erect such buildings or other things as are necessary for the carrying on of commerce and navigation on any parts of the shore that may be conveniently used for such erections, taking care to impede, as little as possible, the public right of way. This is not more inconsistent with a public right of way over it than the right of digging a mine under a road, or the erecting of a wharf on a river, are inconsistent with the right of way along such road or river. The former does not interfere with the use of the road; and although the latter, in order to be useful, must be carried out beyond the high water mark, and, whilst the tide is up, must somewhat narrow the passage of the river; yet, such wharves are necessary for the loading and unloading of vessels, and the right of passage must be accommodated to the right of loading and unloading the craft that pass. The law in these, as in other cases, limits the balances opposing rights, that they may be so enjoyed as that the exercise of one is not injurious to the other'.

- (131) '... the ships lie at the wharfs ... in the port or river, to load or unload, and their obstruction to others is or is not, as well as the erection of the wharf itself, a nuisance to the navigation, in like manner as the staiths ... themselves in the coal trade are or are not a nuisance according to the circumstances'.
6 B & C 566 at 587.

evidence suggested that the staiths were less a nuisance to navigation than the keels, and the jury 'upon the evidence were of that opinion'⁽¹³²⁾ and thus there was no ground for ordering a new trial.

Bayley J defended his direction to the jury in a judgment which, in substance amounted to a vigorous assertion of the doctrine of free enterprise in trade according to the principles of laissez faire. He took as his point of departure the proposition that the right of navigation was not in essence a mere right of passage: 'trade and commerce are the chief objects, and the right of passage is chiefly subservient to these ends'.⁽¹³³⁾ These ends required facilities for loading and unloading which admittedly amounted to encroachments upon the navigation but at the same time they advance 'the main purposes of a port, its trade and commerce'.⁽¹³⁴⁾ This being so staiths and the like are 'a justifiable erection, not a nuisance'. The argument that the staiths were not for the benefit of the public since they had been erected for private profit the judge disposed of with a broadside of laissez faire philosophy,⁽¹³⁵⁾ arguing that their effect was to lower the

(132) Holroyd J also closely analysed the direction by Bayley J to the jury and found it 'in substance correct'.
6 B & C 566 at 589-592.

(133) 6 B & C 566 at 594.

(134) '... upon what principle can the erection of a wharf or staith be supported? It occupies a space where boats before had navigated. It turns part of the waterway into solid ground; but it advances some of the other purposes, the main purposes of a port, its trade or commerce' ... Make an erection for pleasure, for whim, for caprice; and if it interferes in the least degree with the public right of passage, it is a nuisance. Erect it for the purposes of trade or commerce ... and it is a justifiable erection, not a nuisance'. (Here Bayley J cites Lord Hale's observation that not all structures upon the foreshore are 'ipso facto in law a nuisance, for this would destroy all quays ...' (see 186 n 108 above)). 6 B & C 566 at 595.

(135) 'If the conduct of many individuals, though proceeding wholly and exclusively from private motives of private profit, produce results of great public benefit ... [am I to say that public benefit did not occur] because public benefit was never in the contemplation of the individuals by who it is produced' 6 B & C 566 at 596.

price of coal in the markets of the kingdom⁽¹³⁶⁾ and thus to be productive of great public advantage. These factors, he concluded were thus proper considerations to be put to the jury, and for this reason he could not order a new trial.⁽¹³⁷⁾

In its immediate context the majority view in R v Russell can be said to be an attempt to apply a doctrine the rights in navigable waters should be determined by the invisible hand of the market rather than according to a principle of an absolute, state-maintained, public trust in public waters.⁽¹³⁸⁾

(136) "Encourage the trade, make the article cheap, and improve its quality and who reaps the benefit? The market to which the article is sent ... Facility in loading is one of the chief means to give the trade encouragement... It increases the number of sellers and has a tendency to produce such a competition as will keep the price low'. 6 B & C 566 at 597.

(137) After the decision, a fresh indictment was preferred against the defendants, but was not proceeded with, one reason being, ironically enough, that another innovation in the shipping trade, the introduction of 'steam boats for towing' had rendered the matter 'less important' (see R v Ward (1836) 4 Ad & E 384 at 389 n c).

(138) Cf Note "The Public Trust in Tidal Areas" (1970) 79 Yale LJ 762 at 769. It was perhaps a distaste for that doctrine that led to the subsequent repudiation of the decision. See R v Ward (1836) 4 Ad & E 384 where Lord Denman (at 404-5) observed, anent R v Russell that 'no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest ...' The decision was likewise repudiated by Lord Campbell CJ in R v Betts (1850) 16 QB 1022 at 1037 and held to be 'not law' by Jessell MR in Attorney-General v Terry (1874) 9 Ch App 423 at 423 n. Sir James Stephen Digest of Criminal Law 140 n 4, however, thought it 'misunderstood' and said it established that the public had a right to use navigable waters and to anchor ships therein for 'a reasonable time'. In his view the difference between the judges over this case boiled down to whether 'Bayley J had influenced the jury by referring to the collateral advantage of cheapening coal on the London market'. Another champion of the decision was Justice Daniel of the US Supreme Court who in the case of the State of Pennsylvania v The Wheeling & Belmont Bridge Company (1851) 13 US 249 at 286 vigorously supported the doctrine in R v Russell, commending Bayley J's charge to the jury and his subsequent judgement as 'lucid' and 'entirely conclusive'. Daniel J's own view was 'that upon the plainest principles of common sense, no act in reference to the public, by which a public benefit is conferred, can be denominated a nuisance ...'

Be that as it may, the great significance of R v Russell, in relation to the evolution of the nuisance concept lies in the conception advocated by Holdroyd and Bayley JJ⁽¹³⁹⁾ that mutually conflicting interests can be accommodated by a concept of mutually limited rights allowing for the recognition of competing interests without assigning to any interest some pre-eminent or predominant status. This concept though apparently repudiated along with the decision in R v Russell was soon to reappear in the realm of nuisance law when it would be adopted and applied as the cornerstone of a developed concept of nuisance.

C. THE EMERGENCE OF THE 'STATUTORY' NUISANCE

1. Introduction: The Impact of the Industrial Revolution

During a period falling roughly between the years 1760 to 1830 the face of England was transformed by what would be called the Industrial Revolution. The growth and development of industry during these years had far-reaching social, economic, cultural and environmental consequences many of which permeated through to the concept of nuisance,⁽¹⁴⁰⁾ bringing about important developments within the concept. These developments were first manifested in relation to the concept of common nuisance.⁽¹⁴¹⁾

2. The Health of Towns

One of the most remarkable consequences of the Industrial Revolution was an ever-increasing concentration of a growing

(139) And Best J in Blundell v Catterall (supra n 132).

(140) Cf Chafee's remark that 'One could easily write an informative account of the development of the Industrial Revolution from nuisance cases alone'. Chafee Cases and Materials on Equity 795. See generally Brenner 'Nuisance Law and the Industrial Revolution' (1973) 3 Jo Legal Studies 403.

(141) For the impact of the Industrial Revolution on the concept of private nuisance see below 247.

population⁽¹⁴²⁾ in densely crowded industrial and urban agglomerations. In many places this intensification of urbanization was directly related to the existence of industrial enterprises thus creating what came to be known as the industrial towns. Usually industries were established in the low-lying areas in order to be close to the canal and railway transportation routes. These areas were usually vacant sites, and it was here then the the factories were built and also the housing to accommodate the labour forces of industry. The many thousands of workers' houses built during the early stages of the Industrial Revolution were erected on the principle of providing the greatest amount of accommodation in the smallest area. The houses were constructed 'back to back' with the result that two rooms out of four on each floor had no direct daylight or ventilation and there were no open spaces except the passages between the doubled rows. Cheap materials and poor workmanship combined to cause this type of housing to become the quitessential slum.⁽¹⁴³⁾

(142) An increase in population was one of the phenomena which accompanied the Industrial Revolution. In 1750 the population of England and Wales was six and a half million; in 1801 nine million; in 1831 fourteen million (Ashton The Industrial Revolution 2). During the period 1801-1861 the percentage of people living in towns with a population of 20,000 and over increased from 17% to 38% (Brenner op cit (n 140) 409). To what extent the increase of population was a cause or effect of the Industrial Revolution is debatable : Ashton op cit 3ff. See, for a full discussion of population trends in the industrial age, Mantoux The Industrial Revolution in the Eighteenth Century 344ff.

(143) Cf the contemporary description cited by Webb Special Authorities 402

'The principle of speculation is to take large tracts of ground by the acre, and to crown as many streets and lanes into it as they can ... These houses are therefore of the meanest sort; one built with the worst and slightest materials ...'

Cf Hosking The Making of the English Landscape 226: 'Bad materials and fewer of them, and bad workmanship, reduced the cost of building ... Birmingham specialized in in close, dark and filthy courtyards ... and many of their houses were built back to back in order to get the maximum number on to each expensive acre. The local medical men did not object, but rather commended them for their

(continued on the next page)

In these places was unleashed what the Webbs aptly describe as a 'devastating torrent of public nuisances'.⁽¹⁴⁴⁾ The regular method of disposal of refuse was to dump it in the streets. Dunghills, middens and open cess-pools were invariable features of every street, lane and court. The houses themselves were usually without toilets or drains,⁽¹⁴⁵⁾ and the ubiquitous pig was as much a feature of the industrial towns as it had been in the medieval city, as were slaughter-houses which were to be found in yards, courts and cellars, adding blood, offal and filth to the refuse in the streets.⁽¹⁴⁶⁾ The stench was pervasive and appalling, the product of rotting refuse and industrial effluent.⁽¹⁴⁷⁾ Likewise smoke and soot from the innumerable factory chimneys polluted the air and defiled houses, clothing and food.⁽¹⁴⁸⁾ Such water supplies as there were were polluted by the filth of the thoroughfares and the absence of water-borne sewerage⁽¹⁴⁹⁾ and, as Mumford notes, next to dirt the new towns boasted a new blight upon human sensibility - noise, an omnipresent consequence of industrial activity which occurred both day and night.⁽¹⁵⁰⁾

(143) (continued)

cheapness.... Decent people moved out if they could, and the born-squalid moved in: the swamp of slums spread a few years behind the speculative builder everywhere'.

The word 'slum' was first used in the 1820's. It was derived from the term 'slump' meaning 'wet mire', and so referred especially to the low lying, badly drained land upon which the workers' houses tended to be constructed in the typical industrial town.

(144) Op cit 400.

(145) Webb op cit 402; Mumford op cit 526; Hoskings op cit 284.

(146) Webb op cit 401.

(147) The Webbs op cit 404 cite the case of Bristol in 1822 when generally two or three times a week, 'a most sickening and offensive vapour' emanated from a local gas works and hung over the city, its effluvia 'capable of awakening the soundest sleeper, and interrupting the respiration of all who have not very strong lungs'.

(148) On atmospheric pollution during the Industrial Revolution see also below 247-8

(149) Webb op cit 404; Mumford op cit 526.

(150) Op cit 538. He quotes an 'ear-witness account of Birmingham' in the 1850's:

(continued on the next page)

The effect of these conditions - the dark, overcrowded unventilated houses, the filthy streets, the polluted waters - was to create health hazards of massive proportions, whose grim threats were to be fully realised as epidemics of cholera and typhoid swept over Britain during the first half of the nineteenth century.

Viewed from the point of view of the nuisance concept, the various components which made up the insanitary conditions which afflicted the typical industrial town were the Webbs' 'devastating torrent of public nuisances'. That nuisances of this sort should have existed on this massive scale must be attributed to the fact that the machinery designed for suppressing public nuisances had broken down. (151)

3. The Decline of the Leet

We have seen (152) how it was that the courts leet emerged as institutions of local government charged, inter alia, with the function of the cleansing of streets and the suppression

(150) (continued)

'In no town in the world are the mechanical arts more noisy: hammerings incessantly upon the anvil; there is the unending clang of engines; flame rustles, water hisses, steam roars The people live in an atmosphere vibrating with clamour....'

The metal industry had always been noisy. Camden in Britanniae Descriptio (1607) II 105 observed that in Sussex in the seventeenth century the 'beating with hammers upon the iron, fill the neighbourhood day and night with their noise'. (Cited Mantoux op cit 279). In Birmingham in 1795 the sound of hammering could be heard at three o'clock in the morning (Mantoux op cit 281)

(151) It should be pointed out that the insanitary conditions in the new industrial towns were also in part due to the fact that many of these places when first established did not fall within the jurisdiction of the Leets. As the Webbs observe (op cit 400) it was '[e]xactly where the local institutions were of the weakest type' that the population was allowed to grow in the manner which produced the conditions described above. Where there were operating leets they did initially seek to provide some control over the activities of industry (see Webb Manor and Borough 55, 105).

(152) Above 75-78.

of insanitary practices, a jurisdiction acquired by an extension of the primordial concept of a public nuisance as a purpresture upon the King's highway. By the seventeenth century it was becoming plain that the Leet was no longer capable of effectively discharging this role.⁽¹⁵³⁾ Already in the 1660's resort was being had to the alternative device of appointing special commissioners under the authority of local private acts of parliament, charged with the task of improving the conditions of the streets and thoroughfares of towns and cities. Initially the function of these 'improvement commissioners' was 'the dull routine business of paving, lighting and cleansing the streets'.⁽¹⁵⁴⁾ Gradually their functions were extended to include 'preventing encroachments, removing obstructions, regulating the traffic ... prohibiting the wandering of pigs in the thoroughfares, naming streets and numbering houses, putting down nuisances and making by-laws....'⁽¹⁵⁵⁾ In short the improvement commissioners assumed the functions of the Leet which gradually slipped further into decline, the demoralized jurors returning presentments which

'become steadily more perfunctory, often degenerating into a careless return of "omnia bene" or, as in a Welsh manor in 1804, "all well but the pigs"'.⁽¹⁵⁶⁾

(153) Chiefly because the machinery by which the leet operated was ineffective:

'Its whole procedure in its successive stages of presentment, amerciamento, affeering, and distraining for small fines was cumbrous and often ineffective; and the absence of any provision against a recurrence of the offence gave the locality the very minimum of protection'.

Webb Manor and Borough 125.

(154) Webb Special Authorities 236.

(155) Ibid. For the earliest improvement act ((1662) 14 Car 2 c 2) see Clifford Private Bill Legislation (ii) 268-70; Webb op cit 277. The enactment of improvement acts became common after 1763 (cf Webb op cit 242) and between 1785 and 1800 211 local acts for the improvmeent of towns were passed (see Buer Health Wealth and Population in the Early Days of the Industrial Revolution chap 7) and between 1800 and 1845 nearly 400 were obtained in 208 towns (Clifford op cit 291).

(156) Webb Manor and Borough 122. The decline of the leets is traced in great detail in this work. See also below 201-2

4. Sanitary Reform

During the early nineteenth century epidemics of cholera swept across England, bringing in their wake a public outcry for the reform of what was called the 'health of towns'. In 1839 the government ordered Poor Law Commissioners to institute an enquiry into ways and means of improving public health. This work was undertaken by Edwin Chadwick, a Poor Law commissioner and professional bureaucrat. In 1842 Chadwick published his important and influential Report on the Sanitary Condition of the Labouring Population.⁽¹⁵⁷⁾

This work is of interest in relation to a study of the concept of nuisance in that Chadwick in his Report cited the common law concept of nuisance as the instrument for achieving the reform of the sanitary conditions in England. The 'substantive English law', Chadwick observed, contained

'extensive and useful provisions, and complete principles for the protection of the public health'.

These provisions included the Statute of Sewers⁽¹⁵⁸⁾ and the Highway Acts.⁽¹⁵⁹⁾ In addition there existed, at common law, a set of general remedies

'under the comprehensive title nuisance (nocumentum) meaning anything by which the health or personal safety, or the conveniences of the subject might be endangered or affected injuriously'.⁽¹⁶⁰⁾

Under the nuisance concept, Chadwick went on to say,⁽¹⁶¹⁾

'the subject is entitled to protection against things which are offensive to the senses, from which no injury to health or other injury can be proved than the often overlooked but serious injury of discomfort, of daily annoyance, as by matters offensive to the sight, as by allowing blood to flow in the streets; by filth, by offensive smells, and by noises'.

(157) See generally Finer The Life and Times of Sir Edwin Chadwick.

(158) See above 167.

(159) See above 168.

(160) Chadwick Report 348.

(161) Chadwick Report 348-9.

In support of this Chadwick cited authorities showing it to be a common nuisance to divide a house in order to enable 'poor people to inhabit it by which it will be more dangerous in time of infection';⁽¹⁶²⁾ or to corrupt the air⁽¹⁶³⁾ or waters⁽¹⁶⁴⁾ or to create noise⁽¹⁶⁵⁾, together with some scattered citations from the 'sanitary regulations' of London's Ordinance of the Streets.⁽¹⁶⁶⁾

After outlining the law of nuisance Chadwick turned to consider the 'State of the Special Authorities for reclaiming the execution of the laws for the Protection of the Public Health'.⁽¹⁶⁷⁾ Of these the Courts Leet, he observed, were the most important 'because the most cheap and accessible' yet the fact was that at the present time they achieved little or nothing in this connection. Indeed, Chadwick wrote, 'there is scarcely one town in England ... that does not present an example of standing violations of the law, and of the infliction of public and common as well as private injuries, the tenements over-crowded, streets replete with injurious nuisances, the streams of pure water polluted, and the air rendered noisome'.⁽¹⁶⁸⁾

The fact was that in 'the rural districts the Courts Leet have generally fallen into desuetude'.⁽¹⁶⁹⁾ Indeed so much so was this that although 'the nuisances which favoured the introduction and spread of cholera' were for the most part evils within the cognizance of the Leets and could not have existed if the Leets had acted properly, 'yet so complete was the desuetude of the machinery of these courts that it appeared nowhere to be thought applicable' and an entirely new machinery of local health boards was created to deal with the 'pestilence'.⁽¹⁷⁰⁾

(162) Citing R v Pedley (1834) 1 Ad & E 822.

(163) Citing Aldred's case (1611) 9 Co Rep 57.

(164) Citing a number of medieval enactments: op cit 350-1.

(165) Citing the unreported case of The Duke of Northumberland v Clowes (1824).

(166) Op cit 353-354.

(167) Chadwick Report 354.

(168) Op cit 354-5.

(169) Op cit 358.

(170) Op cit 360.

The chief causes of the ineffectiveness of the leets was the absence of funds 'by which the common remedy by indictment could now be prosecuted';⁽¹⁷¹⁾ the fact that the 'complication of various nuisances in some of the larger manufacturing districts has frequently become so great as to put them beyond any existing legal remedy, whether public or private, by placing out of the apparent possibility of distinct technical proof any injury or particular effect arising from any one';⁽¹⁷²⁾ and the fact that the citizens whose duty it was to serve on the leet juries performed their duties in the most perfunctory manner.⁽¹⁷³⁾

The thrust of Chadwick's Report was thus that the medium for the preservation of the public health was the nuisance concept, this to be achieved through the resuscitation and improvement of 'the constitutional machinery for reclaiming its execution'.⁽¹⁷⁴⁾

(171) Ibid.- Chadwick goes on to say that 'the most offensive and injurious nuisances' were those 'supported by large capital' so that their suppression was 'practically available only to persons who can afford to risk large sums in litigation'. He cites the example of one who spent in excess of £4 000 in seeking to prevent the pollution by a dye-works, of a stream supplying a village and was then regarded by 'persons of his own class as the persecutor of the author of the nuisance'. (id).

(172) Op cit 360.

(173) Op cit 358. Chadwick mentions that the jurors were mainly tradesmen who 'attend unwillingly and at inconvenient sacrifice of time; who can have little or no information in respect to the evils in question before them; no time to master such information as may be brought before them casually; little interest and scarcely any real responsibility imposed for ensuring any mastery of it; and neither time nor adequate means at their disposal for the removal of such evils as those in question when presented to them'.

(174) Chadwick also called for the execution of great works of sanitary engineering including the construction of underground, lined sewers, pipe drainage, universal provision of water-closets and the provision of abundant supplies of piped water for street cleansing and the flushing of sewers. See Chadwick Report passim. See also Finer The Life and Times of Sir Edwin Chadwick 209ff.

5. The Sanitary Legislation

In 1846 Parliament enacted a statute 'for the more speedy removal of certain nuisances.'⁽¹⁷⁵⁾ The nuisances aimed at by the Act were 'the filthy and unwholesome condition of any dwelling house or building', the 'accumulation of any offensive or noxious matter, refuse, dung or offal' and 'the existence of any foul or offensive drain, privy or cess-pool'.⁽¹⁷⁶⁾ In respect of these the Act empowered local authorities to issue complaints to Justices of the Peace who might then order abatement of the nuisance,⁽¹⁷⁷⁾ the costs of such proceedings to be recovered from the party responsible for the nuisance. The general effect of the legislation was thus to meet Chadwick's complaint that the existing procedures of indictment or information were too clumsy and expensive to enable litigation for suppression of public nuisances. The Act thus laid the foundation of what was to become a new procedure for suppressing nuisances, that of the 'summary proceedings'.

In 1847 the legislature enacted two statutes of further significance for the principle of sanitary reform. These were model 'improvement' acts intended to be adapted by local authorities as measures for sanitary improvement.

The Town Clauses Improvement Act⁽¹⁷⁸⁾ provided, as it were, a model strategy for local authorities for the improvement of the sanitary conditions in towns. This Act and its satellite, the Police Town Clauses Act,⁽¹⁷⁹⁾ were particularly significant since they were founded in the fruits of the

(175) 9 & 10 Vict c96: 'An act for the more speedy Removal of certain Nuisances and ... for the Prevention of contagious and epidemic Diseases'

(176) §1

(177) Ibid.

(178) 10 & 11 Vict c 34: 'An act for consolidating in one Act certain provisions usually contained in Acts for paving, draining, cleansing, lighting and improving Towns'.

(179) 10 & 11 Vict c 89: 'An act for consolidating in one Act certain provisions usually contained in Acts for regulating the Police of Towns'.

research of Chadwick and his disciples and devised so as to meet and combat the most serious and prevalent sanitary defects in the towns which those researches had revealed.

The Town Clauses Act provided for local authorities to appoint a surveyor of paving and drainage, an 'inspector of nuisances',⁽¹⁸⁰⁾ and an 'officer of health'.⁽¹⁸¹⁾ The authorities were vested with powers to control and regulate sewers, drains, the paving, lighting and cleansing of streets, the ventilation of buildings, lodging houses, and the supply of water.

The Act made special provision for a collection of traditional common nuisances. It was provided that if

'any candle-house, melting-house, melting-place, or soap-house, or any slaughter-house, or any building or place for boiling offal or blood, or for boiling or crushing bones, or any pig sty, necessary house, dung-hill, manure heap', -

be certified by the inspector of nuisances 'to be a nuisance or injurious to health' it might be suppressed.⁽¹⁸²⁾

The Act also empowered local authorities to direct prosecutions 'for any public nuisance whatsoever created, permitted or suffered',⁽¹⁸³⁾ and that nothing in the act should be construed to render lawful that 'deemed to be a nuisance at common law' nor exempt any person 'guilty of nuisance at common law' from prosecution.⁽¹⁸⁴⁾

The Police Town Clauses Act contained a number of sections which in effect amounted to a codification and elaboration of the common law nuisance of obstructing the highway or endangering the safety of passengers.⁽¹⁸⁵⁾

(180) s. 9.

(181) s. 12.

(182) s. 104, 105.

(183) s. 106.

(184) s. 107.

(185) ss 21-29.

The Nuisances Removal Act of 1846 was temporary and expired in 1848. In that year its provisions were renewed by a further enactment.⁽¹⁸⁶⁾ The Act provided that where notice was given to duly appointed local authorities that any dwelling house or building was 'in such a filthy and unwholesome condition as to be a nuisance or injurious to the health of any person' or that upon the premises there was 'any foul and offensive ditch, gutter, drain, privy, cesspool or ashpit; or any such thing 'kept or constructed so as to be a nuisance or injurious to the health of any person' or that any accumulation of dung, manure, offal or refuse or any cattle or animals were, or were kept so as to be a nuisance or injurious to the health of any person, a similar though more elaborate procedure for summary abatement might be initiated.⁽¹⁸⁷⁾

In 1848 Parliament also enacted the first piece of legislation aimed at 'promoting the public health' as a whole.⁽¹⁸⁸⁾ The Act created a 'Board of Health' and provided for the establishment of local health boards empowered to appoint surveyors, medical officers of health and 'inspectors of nuisances'. These officers were charged with a variety of duties relating to the inspection and control of sewers, drainage, the cleansing of streets, slaughter-houses, offensive trades, lodging houses, street repairs, water supplies, mortuaries, cemeteries and 'nuisances'. The 'nuisances' dealt with by the Act concerned mainly drains, sewers etc which were 'offensive' or 'likely to be prejudicial to health', the keeping of swine or pig-styes in dwellings or in a manner 'so as to be a nuisance to any person' (which latter nuisance was deemed to be also a punishable offence) and were subject to proceedings for summary abatement.

(186) '11 & 12 Vict c 123. This Act was sloppily drawn and badly conceived' : *Finer op cit* 336.

(187) § 1.

(188) 11 & 12 Vict c 63: 'An Act for Promoting the Public Health.' See *Finer op cit* chap 319ff.

The Act was not a notable success. Its provisions relating to the establishment of local health authorities were permissive and thus not enforced in all places.⁽¹⁸⁹⁾

In 1855 the statutes of 1846 and 1848 relating to nuisance removal were repealed and replaced by a consolidating act entitled Nuisances Removal Act for England 1855.⁽¹⁹⁰⁾ The Act provided that local health authorities established under the Public Health Act and other specified local authorities were to administer its provisions. The Act provided a more elaborate procedure for summary abatement of nuisances (defined essentially in the terms employed in the Act of 1848) and granted powers of entry to inspect premises and to abate nuisances thereon. The Act further provided penalties for the pollution of waters by gas manufacturers,⁽¹⁹¹⁾ the keeping or sale of unwholesome food,⁽¹⁹²⁾ the conduct of certain trades or activities 'causing effluvia' and conducted so as 'to be a nuisance or injurious to the health of the inhabitants of the neighbourhood'⁽¹⁹³⁾ and the maintenance of overcrowded houses.⁽¹⁹⁴⁾

In 1875 there was enacted the most comprehensive and ambitious piece of sanitary legislation. The Public Health Act 1875⁽¹⁹⁵⁾ was not only mandatory in its provisions but its ambit extended to almost all significant aspects of the promotion of public health. Besides making elaborate provision for the existence powers and duties of local authorities and the institution of legal proceedings by them, it set out in Part III extensive provisions relating to sanitary matters. Included herein were provisions for the regulation of sewerage and drainage, the

(189) See Holdsworth 14 HEL 225.

(190) 18 & 19 Vict c 121.

(191) s 23.

(192) s 26.

(193) s 27.

(194) s 29.

(195) 38 & 39 Vict c 55.

scavenging and cleansing of streets, houses and ditches, provision of water supplies and prevention of their pollution; the regulation of cellar dwellings and lodging houses, offensive trades, unsound food-stuffs, infectious diseases and hospitals, and the regulation of nuisances. For the purposes of the Act nuisances were defined to be:

1. Any premises in such a state as to be a nuisance or injurious to health.
2. Any pool, ditch, gutter, watercourse, privy, urinal, cesspool, drain or ash-pit so foul or in such a state as to be a nuisance or injurious to health.
3. Any animals so kept as to be a nuisance or injurious to health.
4. Any accumulation or deposit which is a nuisance or injurious to health.
5. Houses so over-crowded as to be dangerous or injurious to the health of the inmates.
6. Factories and workshops not kept in a cleanly state.
7. Certain fire places and furnaces which did not consume their own smoke.
8. Chimneys sending forth such quantities of black smoke as to be a nuisance.

Local authorities were charged with the duty of inspecting their district with a view to ascertaining whether any such nuisances existed and implementing the machinery provided by the Act for abating nuisances. Householders and persons aggrieved were entitled to inform the authority of nuisances, and upon such information being laid the authority was to call upon the person responsible for the nuisance to abate it. Any person failing to act upon such instruction was to be summoned before a court of summary jurisdiction which, being satisfied that the nuisance existed, could make an order for its abatement. Failure to comply with the order was a criminal offence carrying a per diem penalty.⁽¹⁹⁶⁾

(196) Ss 92-98.

In addition the Act contained provisions for the suppression of any offensive trade (specified by the Act as any candle-house melting house melting place or soap-house or any slaughter or place for boiling bones, blood or offal, or any place of trade or manufacture 'causing effluvia') certified to be 'a nuisance or injurious to health'. (197)

6. Nuisance under the Statutes

The essential effect of the statutory provisions outlined above was not so much the creation of a distinctly new category of nuisances. (198) Rather it was to supplement the existing processes of indictment, information and action as means of suppressing nuisances. The procedures for the summary abatement of nuisances applied however only to those nuisances specified in the legislation, so that where a nuisance could not be said to be of a type mentioned in any of the relevant enactments, the victum was obliged to fall back on the traditional processes of the common law.

For the purposes of these legislative provisions the term 'nuisance' thus tended to be accorded its traditional common law meaning. In The Great Western Railway Co v Bishop (199) (1872) Cockburn CJ was inclined to restrict the scope of the nuisances which could be said to fall within the purview of the legislation to those which were

(197) § 114. The trades of blood, bone, soap or tripe boiler, or of fell-monger or tallow melter and any 'other noxious or offensive' trade, business or manufacture, in terms of section 112 could not be carried on in any district without the written consent of the local authority.

(198) The legislature could of course pronounce a particular condition or state of affairs to be a nuisance, regardless of whether it was such at common law or not. To some extent this did occur, but the general tendency was for the Legislature to designate as nuisance only those conditions or activities which had already been considered to be such at common law, or treated as such in the courts Leet..

(199) (1872) LR 7 QB 550 at 552.

'injurious to health'.⁽²⁰⁰⁾ In subsequent cases the judges, while accepting that not all common law nuisances could be said to be liable to the summary abatement-procedures provided by the legislation,⁽²⁰¹⁾ took a somewhat broader view of the effect of the legislation, holding that a nuisance in the sense of that which interferes with personal comfort, though not necessarily injurious to health, came within the provisions of the legislation.⁽²⁰²⁾

(200) '[The Nuisance Removals Act 1855] speaks of nuisances or things injurious to health, and I think that ... it was intended for the benefit of public health or health generally, to secure the means of abating things that were either matters of public or private nuisance, of public nuisance as coming within the word "nuisance", and private nuisance coming within the words "injurious to health"; but whether you regard public or private nuisance, still it was intended that the powers of this Act should apply only when the thing complained of was injurious to health ... [T]his Act cannot be considered as comprehending within its provisions all things which would amount to nuisances in point of law... It is plain that the object was to protect the public health and private health of individuals living in towns ...'.

(201) In Malton Board of Health v Malton Manure Co (1879) LR 4 Exch D 302 at 307 Stephen J followed Bishop's case (supra) saying that 'the word "nuisance" cannot be taken in its fullest sense, as that would lead to some obvious absurdities'. In Bishop Auckland Local Board v Bishop Auckland Iron Co (1882) LR 10 QB 138 at 140 he intimated that the legislation could not apply to 'mere common law nuisance like the non-repair of a highway'.

(202) In Banbury Sanitary Authority v Page (1881) LR 8 QB 97 Grove J held that for purposes of section 47 of the Public Health Act 1875, which made it an offence to keep a swine-stye or pigs 'so as to be a nuisance to any person', 'the word "nuisance" is here used in the ordinary legal sense, and includes, in addition to matters injurious to health, matters substantially offensive to the senses'. In the Bishop Auckland case (supra) Stephen J said that the formula 'nuisance or injurious to health' did not mean 'nuisance injurious to health' :

'The natural sense of the words seem to me... [to be] a nuisance either interfering with personal comfort or injurious to health ... I think the legislature intended to strike at ... anything which would diminish the comfort of life though not injurious to health, and at anything which would in fact injure health'.

D. THE RISE OF 'PUBLIC' NUISANCE

1. Introduction

The recognition, in the eighteenth century, by the Common Law of the 'common' nuisance, raised the question of the exact nature and character of this species of nuisance. The conventional answer, advanced especially by the treatise writers, was that 'common' nuisance was an offence against the public⁽²⁰³⁾ and, as such, distinguishable from 'private' nuisance⁽²⁰⁴⁾ in that it was a species of criminal offence.⁽²⁰⁵⁾

2. 'Common' Nuisance as an offence against the Public.

We have seen how it was that the Courts Leet came to assume a jurisdiction to suppress nuisances which affected community interests.⁽²⁰⁶⁾ We have seen too that the nuisances pursued in the Leet was denominated as 'common' nuisance⁽²⁰⁷⁾ and characterized as a species wrong pursued by the King on behalf of the public.⁽²⁰⁸⁾

(203) Hawkins (1 Pleas of the Crown Chap 75 s 1) defined a common nuisance as 'an offence against the Publick'. So too Blackstone (4 Comm 177) described 'common' nuisances as 'such inconvenient or troublesome offences as annoy the whole community in general, and not merely some particular person....'

(204) See Blackstone loc cit. See also Blackstone 3 Comm 216 (cited in the following note).

(205) Hawkins (1 Pleas of the Crown Chap 75 s 1) defined common nuisances as

'offences, under the degree of capital, more immediately against the subject, not amounting to an actual disturbance of the peace....'

So too Blackstone (4 Comm 176) classified common nuisances under the heading of 'Public Wrongs' in a chapter entitled 'Of offences against the Public Health and the Public Police or Economy' where the offence is described as 'a species of offences against the public order and economical regime of the State'.

He also laid it down (3 Comm 216) that 'nuisances are of two kinds; public or common ... which ... we must refer ... to the class of public wrongs, or crimes and misdemeanours; and private nuisances....'

(206) Above 72ff.

(207) Above 80.

(208) Above 81ff.

Upon closer examination the leet concept of a nuisance can be seen to have acquired a particular connotation. The leet was an organ of local administration staffed by laymen concerned not so much with the niceties of the Common Law as with the exigencies and needs of local government and administration. The medieval system of local government was largely based on the principle of community responsibility for the performance of the various works which would later be known as local government services. To this end each member of the community was visited with customary duties and responsibilities to be performed voluntarily and without remuneration. The work of the leet thus often amounted to little more than ensuring that each individual member of the community had discharged his civic duties and responsibilities. Those who did not were presented to the Leet as offenders to be punished for their dereliction. Very often the charge laid before the Leet in these cases alleged that the offender had perpetrated a nocumentum. (209)

It was in this sense that the leet concept of common nuisance came to be denominated as an offence against the public. (210) In this sense too the leet concept of common nuisance was not so much that which was malum in se, an offence against the king's peace, as that which interfered with the institutions of secure and orderly government.

(209) See Webb Statutory Authorities for Special Purposes 358. The 'notion of obligation' they write

'elucidates what was understood by the conception of nuisance, which had swelled into so large a part of the framework of law in which the ordinary citizen found himself. A nuisance implied a breach of obligation. If every person fulfilled his lawful duty, according to the customs of the Manor and the Common Law, no one would do or suffer anything to be done to the annoyance of his neighbours. Any breach of this fundamental obligation was therefore a nuisance, active or passive.'

(210) Cf Stephen A General View of the Criminal Law 105:

'The public have a right to breathe the air in a natural and unpolluted state. A man who makes foul or unwholesome smells commits a nuisance unless he can justify or excuse himself. The public have a right to pass safely along public highways without danger or interruption. A person whose duty it is to repair the

To a large extent it was this concept of a nuisance which was the subject of judicial and legislative elaborations in the eighteenth and nineteenth centuries which have been traced above. The industrial revolution in transforming an essentially rural and agrarian society into one which was essentially urbanized and industrialized had intensified the social need for institutions which protected the general security, the health and the peace of the public. In responding to these claims the courts and the legislature found in the latest concept of common nuisance an institution which contained and expressed the essential claims of the public welfare which they sought to advance. (211)

(210) (continued)

roads, and who fails to do so, whereby their safety or convenience is seriously diminished, commits a nuisance. The public have a right to be undisturbed by riotous or disorderly proceedings and collections of ill-conducted persons. Those, therefore, who gather together collections of disorderly persons commit a nuisance. In accordance with this principle, brothels, gaming houses, betting houses, and disorderly places of entertainment are ... common nuisances'.

(211) In retrospect the elaboration of the concept of common nuisance can be seen to be a part of the process for establishing and institutionalising some of the components of what would subsequently be identified as the paramount social interest of 'general security' (see Pound 3 Jurisprudence 268ff; Stone Social Dimensions of Law and Justice Chap 6). This claim or interest included the establishment of measures or devices for maintaining the 'general safety' of the public (cf Stone op cit 280) the public health (Stone op cit 291) and the public peace and order (Stone op cit 293). Stone (op cit 280) points out that these interests came into prominence as a result of the transformations of the physical conditions of social life by the industrial revolution:

'The mushroom appearance of densely populated cities, the unhealthy and ugly veil cast over them by industrial smoke and other excreta, the disease-breeding qualities of factories ... the increased perils in congested areas from catastrophe, epidemic, and human malefaction - all these gave to the claims of the general safety and health an importance they had not had in agricultural and petty industrial civilisation'.

The main manifestations of the recognition of this interest were measures for the regulation of 'conditions of labour, the structure of dwellings, theatres and other

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3. Common Nuisance as a Crime

For all this, there was an irresistible tendency to classify a common nuisance as a species of criminal offence,⁽²¹²⁾ a tendency which is well illustrated by the fact that when, in the nineteenth century, attempts were made to codify the criminal law of England it was considered right to include in such a code a crime denominated as 'common nuisance'.⁽²¹³⁾ The various draft codes each provided a definition of 'common nuisance',⁽²¹⁴⁾ and attempted a statement of the scope and content of the offence.

(211) (continued)

haunts of men; of the construction, use and equipment of roads and vehicles ...' (Stone op cit ibid). The interest of the public health likewise led to 'elaborate controls of the food men eat, of the air that they breathe, of the external world that they see, and increasingly of the noises that they hear ... to measures for the control of infectious diseases' (Stone op cit 281).

(212) See above n 205.

(213) Three attempts were made during the nineteenth century to codify the criminal law. The first was by a Royal Commission appointed in 1833 (see Holdsworth 15 HEL 143-4, 146)(hereinafter referred to as the 1833 Commission). The second was the unofficial codification attempted by Sir J.F. Stephen in 1877 published as a Digest of the Criminal Law. The third was by a Royal Commission appointed in 1879 (of which Stephen was a member)(hereinafter referred to as the 1879 Commission).

The 1833 Commission issued eight reports (published as Parliamentary Papers) between 1834 and 1845. The Seventh Report contained a draft penal Code (Parl Pap (1847-8) xxvii). The Report and Draft Code of the 1879 Commission was printed as C 2345 of 1879 (Parl Pap 1878-9) xx 169). Common nuisances were dealt with in Chapter XIII of the Code prepared by the 1833 Commission; in Chapter XIX of Stephen's Digest and in Part XIV of the Code prepared by the 1879 Commission.

(214) The 1833 Commission's definition (op cit 145) was:

'A common nuisance consists in any unlawful act or omission which injures or annoys, or tends to injure or annoy Her majesty's subjects in the enjoyment of any public right or privilege, or which causes or directly and manifestly tends to cause any public calamity, mischief, or disorder, or which causes, or directly tends to cause, any common injury, damage inconvenience, or annoyance to her majesty's subjects, in respect of their habitations, personal safety, health, comfort or property'.

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It was generally agreed that obstructions to highways, bridges and navigable rivers were common nuisances,⁽²¹⁵⁾ although the 1877 Commission argued that in certain circumstances such nuisances should not be the subject of criminal prosecution.⁽²¹⁶⁾ It was also generally agreed that activities which affected the public in their health safety or

(214) (continued)

Stephen's Digest (art 197) defined a 'common nuisance' to be

'an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects'.

Royal Commission of 1879 in its draft code defined (op cit 96) a common nuisance as

'an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives' safety health property or comfort of the public, or by which the public are obstructed in the exercise or enjoyment of any right common to all her majesty's subjects.'

(215) 1833 Commission, Seventh Report, 58 (art 3); Stephen's Digest arts 210-212. The Commission in fact elaborately listed the species of public facilities falling to be protected in this way. Under the heading 'Nuisances to public rights' it stated it to be a nuisance to damage or destroy any gaols, bridges, harbours, ports, docks, quays, landing-places, market-places, roads, weirs, defences from the sea, flood or inundation, canals, public rivers, water-courses, springs, wells, highways, or other land, buildings, erections or works lawfully used enjoyed by the subjects or intended to be a safeguard or protection to the subjects. The nuisance consisted in 'unlawfully injuring or damaging such things or unlawfully hindering or obstructing the subjects in the using or enjoying of them or in diminishing or rendering less safe, secure or convenient of such things or any right, privilege or advantage' appertaining to them.

(216) See below 216-7. The Commission did not make specific mention of highway nuisances in its draft code though clearly contemplating that such could in appropriate cases be regarded as common nuisances.

comfort were common nuisances though there were divergences in the expression of this idea.⁽²¹⁷⁾

Disorderly houses in their various manifestations were considered to be common nuisances by Stephen and the 1879 Commission but not by the Commission of 1833.

For the rest there is little unanimity as to what else should be included under the rubric. The 1833 Commission included the corruption of wells and springs, fireworks, and the keeping of ferocious animals, topics not adverted to by the other reports. Stephen's Digest included lotteries while others did not. The 1879 Commission regarded certain dealings with human corpses as common nuisances, a topic not adverted to in the other reports.

There was general agreement that the common law offence of public indecency should not be regarded as a common nuisance but should be classified as an offence against morality;⁽²¹⁸⁾ and the 1833 Commission argued that the exposing

(217) The 1833 Commission spoke of 'nuisances to the habitation and to the comforts and convenience of society' treating offensive and noxious trades as the source of this type of nuisance (op cit 58 (art 8)). Stephen's Digest (art 208) spoke of 'Nuisances to Health, Life and Property' describing anything 'which endangers the health, life, or property of the public or any part of it' as a common nuisance and citing as specific examples the exposure for sale of impure foods, the exposure of infected persons in public places, the keeping of flammable or explosive substances in urban areas. Stephen's Digest treated noxious trades as a distinct species of common nuisance (art 209), while the 1879 Commission made no reference either to the general public safety or convenience or to the matter of noxious trades. Its only specific concern in this connection was with the exposing for sale of impure food-stuffs (art 153)).

(218) The 1833 Commission classified both the keeping of disorderly houses and public indecency as 'Offences against Public Morals and Decency' (op cit 61 arts 2, 3). Stephen Digest (art 190) classified 'public indecencies' under 'offences against morality'; (op cit Chap 18) as did the 1879 Commission (Draft Code xiii s 146).

of an infected person in a public place was a crime against public health rather than a common nuisance,⁽²¹⁹⁾ as was that of exposing for sale impure food-stuffs.⁽²²⁰⁾

Finally, it may be noted that the least documents of eaves-dropping and scolding were believed to be antiquated and probably to be in desuetude.⁽²²¹⁾

But for all this it was not always necessarily true that what was termed a common nuisance could be properly said to be a crime strictly so-called. For one thing a common nuisance unlike other crimes could not be pardoned by the Crown and for another thing it was sometimes more accurate to say that a 'prosecution' brought in respect of a common nuisance was in reality nothing more than an attempt to determine the existence of a civil obligation.⁽²²²⁾ Indeed

(219) Cf Report 56 'Offences Against Public Health' art 5 where it is observed that the offence though 'sometimes classed under the head of Public Nuisances ... it has appeared to us to belong more appropriately to that of Public Health'.

(220) Op cit art 4.

(221) Cf the 1833 Commission which in its Report (at 13) observed

'There are several antiquated offences, characteristic of the rude simplicity of the times when they were made the subject of prosecution as crimes which we have ventured to omit, and with ought, we think, to be expressly repealed if any common law misdemeanours other than those included in the Digest are retained. These are the offences of eaves-dropping, or listening under other men's walls or windows, or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales; of being a common scold, which was confined to women, and punishable by the ducking-stool, or trebucket castigatory.

See too Stephen Digest art 208 n 1.

(222) Attention was drawn to this in the Report of the 1879 Commission (op cit (n 213) 22) where it was pointed out that 'when a civil right such as a right of way is claimed by one private person and denied by another, the mode to try the question is by an action. But when the right is claimed by the public, who are not competent to bring an action, the only mode of trying the question is by an indictment or information, which is in form the same as an indictment or information for a crime. But it was very early determined that, though it was in form a prosecution for a crime, yet that it involved a remedy for a civil right, the Crown's pardon could not be

the Royal Commission of 1879 went so far as to propose in its draft code that a distinction be drawn 'between such nuisances as are and such as are not to be regarded as criminal offences'. (223)

(222) (continued)

pleaded in bar [cf above 81-3]'. These points had often been taken in judicial proceedings where the judges, while admitting the 'civil' nature of the proceedings tended to continue to characterize them as criminal (usually because to do so meant that the rule of *autrefois acquit* could be invoked to prevent a 'defendant' being harrassed by repeated 'prosecutions' brought to establish an obligation to repair the highways. See *R v Mann* (1815) 4 M & S 337; *R v Burbon (Inhabitants)* (1816) 5 M & S 392; *R v Russell* (1854) 3 E & B 942; *R v Johnson* (1860) 2 E & E 613). See too *R v Paget* (1862) 3 F & F 29 where, upon indictment for obstructing a highway, it was shown that the accused had abated the obstruction and the court found that there was 'substantially nothing to try' and entered a verdict of not guilty. As the reporters of the case observed (3 F & F 27 n cc) this suggests that 'the proceeding is substantially of a civil and not a criminal character' (compare *R v Train* (1862) 3 F & F 22). See too *R v Broke* (1859) 1 F & F 514 where Pollock CB allowed the evidence to be summed up as in a civil case, saying that the case involved 'a mere question of right. It is in reality, a cause, and the defendant ought to have the same rights as in a civil action'. In *R v Stephens* (1866) LR 1 QB 702 the court relied upon the 'civil' nature of a prosecution brought for common nuisance by obstruction of a public river to hold that *mens rea* need not be proved on the part of the accused. Mellor J supported this view with the observation

'Inasmuch as the object of the indictment is not to punish the defendant, but really to prevent the nuisance from being continued, I think that the evidence which would support a civil action would be sufficient to support an indictment'.

(223) Op cit (supra n 213) 22. Common nuisances which endangered 'the lives safety or health of the public, or which injures the person of any individual' the draft code (s 151) designated as an indictable offence. It went on to provide (s 152) that any person convicted 'upon any indictment or information for any common nuisance other than those mentioned ... shall not be deemed to have committed a criminal offence' These recommendations never bore any fruit in English law. They were however given effect in the criminal code of Canada: see *R v Toronto Railway Co* [1917] AC 630.

4. The Recognition of 'Public' Nuisance

This element of ambivalence in the concept of common nuisance was symptomatic of wider duality which underlay the concept. Coke, as we have seen,⁽²²⁴⁾ had suggested that in fact nuisances could be classified into three types: 'private' 'common' and 'public'. During the eighteenth and nineteenth centuries, however, it was conventional to treat the terms 'common' and 'public', when applied to nuisances, as being synonymous.⁽²²⁵⁾ That there was indeed a distinction between the 'common' and 'public' nuisances however came to be apparent in the nineteenth century when the Courts of equity began to assume a jurisdiction to suppress nuisances which were not private nuisances.

Injunctions against Public Nuisances

The courts of equity, we have seen,⁽²²⁶⁾ had begun to issue injunctions at the request of private individuals for the suppression of nuisances. In 1752 Lord Hardwicke LC in Baines v Baker⁽²²⁷⁾ had however refused to award an injunction upon the application of a private individual, giving as his reason the fact that the nuisance was 'a public nuisance' and thus properly redressed by an information brought by the Attorney-General.⁽²²⁸⁾ In addition there was some reason to

(224) Above 89.

(225) Thus Blackstone (cited n 205 above) spoke of nuisances which were 'common or public' in contradistinction to those which were 'private'. Cf Gile's New Law Dictionary (1772) : s.v. Nuisance : 'Nuisances are publick and common, or private : a common nusance is defined to be an offence against the publick ... by doing a thing which tends to the annoying of all the King's subjects, and is common against all ...'; Garrett and Garrett Nuisances 1: 'Nuisances are of two kinds (1) Common or Public ... and (2) Private'

(226) Above 106-7.

(227) (1752) 1 Amb 158.

(228) 'Bills of this sort are founded on being nuisance at common law. If a public nuisance, it should be an information in the name of the Attorney-General, and then it would be for his consideration, whether he would file such an information'.

believe that a court of equity could not in any event enjoin a nuisance affecting the public since 'common' nuisances were criminal offences and the courts of equity traditionally acted civilly only and not criminally. (229)

However in 1795 the Court of Exchequer, relying on the fact that it had jurisdiction in respect of the fiscal interests of the Crown, enjoined⁽²³⁰⁾ the purprestures in Portsmouth Harbour⁽²³¹⁾ on the ground that they invaded the proprietary interests of the Crown.⁽²³²⁾

(228) (continued)

The Attorney-General was the legal representative of the Crown and thus the appropriate officer to act in matters affecting the interests of the Crown. Insofar as a nuisance might be a purpresture it would naturally follow that the Attorney-General would act to redress this invasion of the proprietary interests of the Crown. His jurisdiction to act in respect of public nuisances could also be founded on the fact that the monarch as parens patriae was expected to act to protect the rights and interests of subjects not otherwise capable of obtaining the assistance of the law. This jurisdiction lay with the Court of Chancery, presided over, as it was, by the Chancellor the keeper of the royal conscience. Here again the Attorney-General as the Crown's legal representative was the appropriate official to institute proceedings on behalf of affected citizens. In principle the Attorney-General could act mero motu or at the instigation of a member of the public. In the latter case the action was known as a relator action, being brought 'at the relation of' a member of the public. It was however not an action by the private individual since as in the action brought mero motu, 'the Sovereign as parens patriae, sues by the Attorney-General' (per Jessell MR in Attorney-General v Cockermouth Local Board (1874) LR 18 Eq 172 at 176). See generally de Smith Judicial Review of Administrative Action Chap 9.

(229) See above 153. Cf Mack 'The Revival of Criminal Equity' (1903) 16 Harvard LR 389 at 390.

(230) Attorney-General v Richards (1795) 2 Anstr 603.

(231) Cf above n 109.

(232) 'Where the King claims and proves a right to the soil, where a purpresture and a nuisance have been committed, he may have a decree to abate it': per MacDonald CB at 616. It can be argued that the Court in fact acted here on the ground that the wharves and quays were public nuisances. If the action was brought simply on the basis that the encroachments were purprestures it would have been possible for the court to avoid ordering their suppression by considering whether they could not be arrested (cf above 24 n 80). Since there was no enquiry

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Then in 1799, in Mayor and Commonalty and Citizens of the City of London v Bolt⁽²³³⁾ Lord Loughborough LC, sitting in Chancery, granted an injunction against ruinous houses, though adding that there was 'a much more proper and effectual remedy' namely that the mayor 'upon the presentment of the ward [leet] that these houses are a public nuisance' could obtain an order for the abatement of the nuisance.

In 1811 in Attorney-General v Cleaver⁽²³⁴⁾ Lord Eldon LC evinced considerable reluctance to proceed against a public nuisance by injunction. Sir Samuel Romilly argued that 'the general jurisdiction [of the court] to restrain a public nuisance stands upon very strong authority; the opinion of two judges of high character, that this was the common acknowledged jurisdiction.'⁽²³⁵⁾ Lord Eldon however rejected this contention, observing that the main instances of grants of equitable relief were in the Court of Exchequer and then in respect of purprestures upon the jus privatum of the Crown. Where the purpresture was 'merely a public nuisance to all the King's subjects' then, Lord Eldon held, the proper proceeding was to seek a trial at common law before a jury on the question of whether there was in fact a nuisance,⁽²³⁶⁾ and on this ground he refused to award the injunction.

(232) (continued)

of this sort it seems that the encroachments were enjoined because they affected the public right of navigation in the harbour, in which case they were enjoined because they were public nuisances, and not merely because they were purprestures. Cf Read 'Equity and Public Wrongs' (1933) 11 Can BR 73 at 165-6;

(233) (1799) 5 Ves 129.

(234) (1811) 18 Ves 211.

(235) Citing Baines v Baker (supra)(n 226); Mayor of London v Bolt (supra). He also argued that

'The principle upon which this court interferes, is the irreparable mischief The ground of the application is, not that this act is a crime, but that it occasions irreparable injury to several persons'.

(236) Cf below 233n 16

But in 1819 in Attorney-General v Johnson,⁽²³⁷⁾ persuaded by the precedents in Exchequer he distinguished Attorney-General v Cleaver, and held that an injunction might issue in Chancery against a public nuisance which threatened 'irreparable' harm.⁽²³⁸⁾ Thereafter the jurisdiction of Courts of Equity to issue injunctions at the suit of the Attorney-General to restrain or abate public nuisances was undoubted,⁽²³⁹⁾ as Cotternam LC pointed out in robust terms in Attorney-General v Forbes⁽²⁴⁰⁾ (1836):

'With respect of the question of jurisdiction, it was broadly asserted that an application to prevent a nuisance to a public road was never heard of. A little research, however, would have found many such instances. Many cases might have been produced in which the court has interfered to prevent nuisances to public rivers and to public harbours; and the Court of Exchequer, as well as this court, acting as a court of Equity, has a well established jurisdiction ... to prevent nuisances to public harbours and public roads; and, in short, generally to prevent public nuisances.... The jurisdiction is exercised ... for the purpose of exerting a salutary control over all for the protection of the public'.⁽²⁴¹⁾

(237) (1819) 2 Wils Ch 87.

(238) 'The complaint is, therefore, to be considered as of not a public nuisance simply; but what, being so in its nature, is attended with extreme probability of irreparable injury to the property of the plaintiffs, including also danger to their existence; and on such a case, clearly established, I do not hesitate to say an injunction would be granted'.

(239) See also Read 'Equity and Public Wrongs' (1933) 11 Can BR 73 at 162-3.

(240) (1836) 2 My & Cr 123 at 133..

(241) Cf the contemporaneous view of the American Supreme Court in Georgetown v Alexandria Canal Co (1838) 12 US 91 at 98 (per Barbour J):

'... it is now settled that a court of equity may take jurisdiction in cases of public nuisance by an information filed by the Attorney-General. This jurisdiction seems to have been acted on with great caution and hesitancy ... yet the jurisdiction has been finally sustained, upon the principle that equity can give more adequate and complete relief than can be sustained at law. Whilst, therefore, it is admitted by all that it is confessedly one of delicacy; and accordingly, the instances of its exercise are rare, yet it may be exercised in those cases in which there is imminent danger of irreparable mischief before the tardness of the law could reach it'.

The scope of the jurisdiction was however not abundantly clear. In Attorney-General v Sheffield Gas Consumers Co (242) (1853) there are dicta which suggest that a court of equity would not enjoin every case of a public nuisance, (243) and the accepted rule seemed to be that equity would only enjoin public nuisances which affected the public interest in streets or other public thoroughfares. Or as Turner LJ observed in the Sheffield case (244)

'is not on the ground of any criminal offence committed or, for the purpose of giving a better remedy in the case of a criminal offence, that this court is or can be called on to interfere. It is on the ground of injury to property that the jurisdiction of this court must rest' (245)

'Public' Nuisances

The Courts of Equity, while thus allowing injunctions to issue against nuisances affecting the public, insisted that only the Attorney-General had locus standi to seek the injunction. (246) For this reason the question of the character

(242) (1853) 3 De G M & G 304.

(243) Per Lord Cranworth LJ (at 314) 'I dissent from ... [the] proposition in point of law, that if it be once established that there is a public nuisance there must be an injunction to restrain it'.

(244) (1853) 2 De G M & G 304 at 320.

(245) See Read op cit (n 238) 167ff. In the United States of America, on the other hand, the injunction came to be widely used in respect of nuisances affecting the safety, health or morality of the public. See Bagwell 'Criminal Jurisdiction of Equity' (1931) 20 Kentucky LJ 161.

(246) Baines v Baker (1752) (cited supra n 227); Crowder v Tinkler (1816) 19 Ves 618 at 621 ('where the subject of complaint is a matter of public nuisance, the Attorney General alone can sue'); Attorney-General v Forbes (1836) 2 My & Cr 123 at 129. The injunction was however allowed to a private individual where the nuisance threatened 'particular and special injury': Crowder v Tinkler (supra) at 621; Sampson v Smith (1838) 8 Sim 272; Spencer v London and Birmingham Ry Co (1836) 8 Sim 193.

of the nuisance in issue was important. Significantly, the courts of equity in formulating the rules as to locus standi to obtain the injunction invariably spoke of 'public' nuisance⁽²⁴⁷⁾ (as opposed to 'common' nuisance) and defined this type of nuisance in terms which emphasised the number of persons affected by it.

Thus in the seminal case of Baines v Baker⁽²⁴⁸⁾ (1752) Lord Hardwicke LC said that for purposes of the award of injunctions

'the notion of a private nuisance is, where it affects only particular persons It then becomes a public nuisance when it affects many persons, though it might likewise at the same time be of a private nature too....'

Kindersley V-C in Soltau v De Held (1851) used a similar test, stating that in order to

'constitute a public nuisance, the thing must be such as, in its nature or its consequences, is a nuisance - and injury or a damage, to all persons who come within its sphere of operation though it may be so in a greater degree to some than it is to others'(249)

(247) See for example Baines v Baker (1752) (cited in the text below); Mayor of London v Bolt (cited above 220); Attorney-General v Cleaver (1811) 18 Ves 212; Crowder v Tinkler (1816) 19 Ves 618; Attorney-General v Johnson (1819)(cited n 237 above).

(248) (1752) 1 Amb 158.

(249) (1852) 2 Sim (NS) 133 at 142. He illustrated the proposition thus

'For example, take the case of the operations of a manufactory, in the course of which operations volumes of noxious smoke, or of poisonous effluvia, are emitted. To all persons who are at all within the reach of those operations it is more or less objectionable, more or less a nuisance in the popular sense of the term. It is true that to those who are nearer to it it may be a greater nuisance, a greater inconvenience than it is to those who are more remote from it; but, still, to all who are at all within the reach of it, it is more or less a nuisance or an inconvenience. Take another ordinary case, perhaps the most ordinary case of public nuisance, the stopping of the king's highway; that is a nuisance to all who may have occasion to travel that highway. It may be a much greater nuisance to a person who has to travel it every day of his life than it is to a person who has

This quantitative concept of a nuisance was in fact not particularly novel. It had attained some sort of recognition even in the twelfth century⁽²⁵⁰⁾ and underlay the well-established rule of common law that an action on the case could not lie in respect of a nuisance presentable at the leet.⁽²⁵¹⁾ Blackstone had intimated that it was the

(249) (continued)

to travel it only once a year, or once in five years; but it is more or less a nuisance to everyone who has occasion to use it. If, however, the thing complained of is such that it is a great nuisance to those who are more immediately within the sphere of its operations, but is no nuisance or inconvenience whatever, or is even advantageous or pleasurable to those who are more removed from it, there, I conceive, it does not come within the meaning of the term public nuisance'.

He, however, also added the observation (at 144)

'that it does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance. One may illustrate that very simply, by supposing the case of a man building up a wall which has the effect of darkening the ancient lights of half-a-dozen different dwelling-houses. It does not follow that, because half-a-dozen persons or a dozen persons are suffering by the darkening of their ancient lights by the one act, that, therefore, it is a public nuisance which can be indicted at the suit of the Crown, or for which the Attorney-General can file an information in this Court. It is a private nuisance to each of the several individuals aggrieved'.

(250) Cf above 26.

(251) See above 87-89. The rationale of this rule was that nuisances affecting a number of persons should be redressed by way of a single proceeding brought ex officio rather than leaving it to each affected individual to bring his own action, lest the wrongdoer be exposed to an intolerable multiplicity of actions (*ibid*). The Court of the Sherfiff's Tourn and the courts leet could provide the appropriate machinery for ex officio complaints in the form of its jury of presentment. It seemed appropriate to refer nuisances affecting a multiplicity of persons to these courts since they already exercised a jurisdiction over nocumenta of a 'public' nature in relation to purprestures upon the (King's) highways (cf above 25). The establishment of an exception to the general rule which allowed an action for damages in respect of a 'common' nuisance where special damages could be shown (see above 145) tended to preserve the older notion, mainly through the reiteration of the judicial determination not to allow such an action except where it would not lead to a multiplicity

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point of distinction between 'common' and 'private' nuisances.⁽²⁵²⁾ The test of the number of persons affected by a nuisance was even used at Common Law to determine whether a nuisance was indictable or not. In R v Lloyd⁽²⁵³⁾ (1804) an indictment was preferred by the Society of Clifford's Inn 'for a nuisance' by the noise created by the accused in carrying on his occupation of tin-smith. The evidence was that only three attornies were in fact affected by the noise and Lord Ellenborough CJ said:

'That upon this evidence the indictment could not be sustained; and that it was, if anything, a private nuisance. It was confined to the inhabitants of three numbers of Clifford's Inn only ... it was therefore not of sufficiently general extent to support an indictment'⁽²⁵⁴⁾

The effect of this decision has been understood to be that a private nuisance which affects a substantial number of persons can be denominated as a 'public' nuisance.⁽²⁵⁵⁾ The point

(251) (continued)

of actions. It is perhaps significant that where the exception was in issue, the judges tended to speak of 'public' rather than 'common' nuisance: see, eg, Hubert v Groves (1794) 1 Esp 148.

(252) 'Common nuisances are ... indictable only, and not actionable, as it would be unreasonable to multiply suits by giving every man a separate right of action for what damnifies him in common only with the rest of his fellow-subjects' (4 Comm 167). Elsewhere (3 Comm 219) he expresses the point in these terms: '... no action lies for a public or common nuisance, but an indictment only: because the damage being common to all the king's subjects, no one can assign his particular proportion of it; or if he could, it would be extremely hard, if every subject in the kingdom were allowed to harass the offender with separate actions'.

(253) (1804) 4 Esp 200.

(254) Cf R v Davey (1805) 5 Esp 217 where Heath J applied a similar principle, in charging a jury in regard to an indictment for a nuisance 'ad commune nocumentum of the inhabitants' of a town arising from the smoke issuing from furnaces maintained by the defendant. On the basis of the evidence of the discomfort caused by the smoke, Heath J advised the jury that

'[t]o make this nuisance indictable, it should appear to be more extensive, so much so, as to be generally dangerous'.

(255) The decision in Lloyd's case was adverted to in the Report of the 1833 Commission (op cit n 213). The

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was taken too in the cases dealing with indecent conduct as a nuisance.⁽²⁵⁶⁾ There Lord Denman CJ laid down⁽²⁵⁷⁾ the rule that to be indictable

'the nuisance must be public, that is, to the injury of offence of several'.⁽²⁵⁸⁾

(255) (continued)

Commissioners suggested that nuisances 'to the habitation, comfort and convenience of society' caused by noxious trades should only qualify as a 'common nuisance' where it affected the inhabitants of more than three houses, observing

'To what number, at the least, such injury must extend to constitute a public nuisance, does not appear from any decision or authority; it is, however, convenient that some limit should be appointed; and looking to the above negative authority [R v Lloyd] on this point, and the principle which regards a public prosecution as a more convenient mode of obtaining a redress in respect of an injury to many than can be afforded by a multiplicity of actions, we have suggested that the indictment should be maintainable when the number of dwelling houses exceeds three' (emphasis supplied).

It will not escape notice that the Commission here has adopted the nomenclature of 'public' (as opposed to 'common') nuisance and appears to be suggesting that a private nuisance becomes 'public' when it affects a number of individuals. See also R v Webb (1848) 1 Den 338 where Cresswell J, alluding to the decision in R v Lloyd said that it

'seems to intimate that, if the nuisance there charged had been proved to have been more extensive, it would have been indictable, even though it had not amounted to a general public nuisance in the ordinary sense of the expression'.

Here again there is the suggestion that a private nuisance affecting many individuals would necessarily be regarded as some sort of public nuisance even though it could not be said to be a common ('general public') nuisance.

(256) Above 172-4.

(257) R v Watson (1847) 10 LT (OS) 204. Cf n 65 above.

(258) Cf the comments of Denison (1 Den 345-8) upon this proposition:

I. This case decides that an indecent exposure which consists in a single transitory act (i.e. a temporary personal exposure as distinguished from the exhibition of an indecent picture, &c.) in the actual sight and view of only a single person, though in a place of public resort, no others being able to see it at that time, is

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C H A P T E R F I V E

THE FLOWERING OF 'PRIVATE' NUISANCE (1800-1900)

A. THE BACKGROUND

1. Introduction

In a previous chapter we have seen how it was that by the end of the seventeenth century the concept of nuisance

(258) (continued)

of too limited and transient a nature to amount to a common nuisance at common law, and is therefore not indictable But the ... cases do not seem to decide that a continuous personal exposure in the actual sight and view of several persons singly in succession does not amount to a common nuisance; nor that such an exposure in the sight and view of several persons singly in succession, even had only one of them actually seen it, would not be indictable. Such a doctrine was not necessary for the decision of either case, and seems not maintainable on principle or authority.

1. It seems difficult to see any reasonable distinction between a single transitory act in the sight and view of divers at one time, which is a nuisance even though actually seen only by one person; and a continuous act in the sight and view of all those same persons singly in succession. The publicity is the same; the mischief is the same; the animus of the offender perhaps worse. And if each of those persons in succession actually see it, the publicity and mischief are in effect far greater. The only assignable distinction between the two cases seems accidental and immaterial, viz.: that those members of the public were not all shocked, or ran the risk of being shocked at one and the same time. But it can be held that public decency will be protected wholesale but not in retail.

2. This view seems borne out by the analogy of other cases of nuisance. An act whereby a public highway, or a navigable stream is injured or obstructed is indictable, though it only happens to affect one person at one time, or even though no person is proved to have been actually affected by it. The law does not permit the public convenience or safety to be injured or even put in peril in detail, so too with regard to the public health; the law extends to it a measure of protection similar in kind though perhaps not equal in degree. A baker or a butcher would clearly be indictable for a nuisance at common law, for selling unwholesome provisions to divers persons in succession. So a person with a contagious disorder, would scarcely be permitted with impunity to place himself for a length of time in a thoroughfare, so as to be

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had been considerably elaborated and expounded under the regime of the Action on the Case.⁽¹⁾ In particular it

(285) (continued)

only able to touch each single passer by in succession; and yet the same man be held indictable if at noon he stood ten minutes at Charing Cross, though only proved to have actually touched one passer by. If then the public convenience, safety, and health are not with impunity to be injured in detail, why are the public morals and decency?

3. The only sound principle on which the exhibition of an indecent print, &c. in the sight and view of one person only in a public place is indictable as a common nuisance, seems to be that it has a continuous character, and may therefore outrage or corrupt divers persons in succession. A continuous personal exposure seems to be precisely the same in principle.

7. With regard to the point decided in the principal case, it seems that the law does not consider public decency to be represented by one person in a public thoroughfare. The presence of one person only is not deemed the presence of the public: and the possible presence of others is too remote a possibility for the law to recognise. But if others be actually present even though they do not see the offence committed, the law recognises the risk of their seeing it as sufficiently proximate to be dealt with as a reality. But in the matter of public convenience or safety the law treats as a reality that degree of possibility which in the case of decency it regards as too remote. Hence an obstruction to a public thoroughfare is deemed a common nuisance, though no one has actually been affected by it. The law in this instance regarding the possibility of the presence of divers as a sufficiently proximate possibility to be treated as a reality. It seems therefore that the law, in behalf of public safety or convenience creates a constructive public, but does not do so in behalf of public decency.

(1) Chapter Three above.

appeared how there emerged out of the medieval idea of nuisance as an interference with possession of real property the more refined idea of a nuisance as an interference with the amenities of domestic habitation.⁽²⁾ So also we saw the beginnings of the concept that a nuisance was a violation of the precept sic utere tuo ut alienum non laedas, a concept which in turn gave rise to the idea that nuisance was an interference with a 'natural' right of property.⁽³⁾

Remarkably enough these principles of common law were not much developed in the ensuing century and a half. They received some recognition and elucidation in Sir William Blackstone's pioneering Commentaries on the Laws of England first published in the mid-eighteenth century,⁽⁴⁾ and the

(2) Above 114ff.

(3) Above 136ff.

(4) Blackstone (3 Comm Chap 13) in fact provided the first systematic account of private nuisance since Bracton's tentative efforts in the thirteenth century. He classified nuisances as a 'species of real injuries to a man's lands and tenements' (op cit 216), defining 'nuisance, nocumentum, annoyance' as 'anything that worketh hurt, inconvenience or damage' (op cit *ibid*). Blackstone differentiated 'public or common nuisances from 'private nuisances', identifying the latter as 'anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another' (op cit *ibid*). A nuisance, he pointed out might be committed against both corporeal and incorporeal 'hereditaments' (thus tacitly distinguishing nuisances to 'natural rights' of property and nuisances to easements). In discussing nuisances to corporeal hereditaments Blackstone (op cit 217) treated especially of nuisances affecting 'a man's dwelling' writing that these comprehended the 'overhanging' of a man's house, the stopping of its 'ancient lights' and rendering 'the air unwholesome ... as it tends to deprive him of the use and benefit of his house'. A like injury was the carrying on of noxious trades 'for though these are lawful and necessary ... yet they should be exercised in remote places; for the rule is "sic utere tuo, ut alienum non laedas". Interferences with light and air, he adds, 'are two indispensable requisites to every dwelling. Prospect however is 'nothing really convenient or necessary' and thus its obstruction 'is no injury ... and ... therefore not an actionable nuisance'.

That which 'lends to the damage of another's property' (as the destruction of corn, grass or cattle) is likewise a nuisance. Likewise the stopping, diversion or pollution of a water-course (which Blackstone classifies as a corporeal hereditament) may constitute a nuisance (op cit 218).

process of differentiation of easements from the 'natural' rights of property was given impetus by the publication, in 1839, of Charles Gales's Treatise on the Law of Easements.⁽⁵⁾

(4) (continued)

Blackstone concluded his discussion of nuisances to corporeal hereditaments with the observation

'So closely does the law of England enforce that excellent rule of gospel-morality, of "doing to others, as we would they should do unto ourselves."'

The discussion of nuisances to incorporeal hereditaments is more basic, being little more than a recitation of the principle that the obstruction of a way constitutes a nuisance; a restatement of the medieval law concerning interferences with the franchises of markets, fairs and ferrys (op cit 218-9). The chapter concludes with a statement of the remedies for nuisances which Blackstone lists as self-help and an action on the case for damages (noting that the remedies by way of the Assize of Nuisance and the Writ Quod Permittat prosternere 'have long been out of use' (op cit 220-222)).

(5) Simpson Land Law 244-5 notes that 'until his book was written no attempt had been made to knit together a body of principle since Bracton Largely as a result of Gale's book the courts built up a body of law which owes a great deal to the Civil Law Thus the nature of an easement, and the salient differences between easements and other rights of a similar character, were settled in a series of cases'.

Gale distinguished what he called 'the ordinary rights of property, which are determined by the boundaries of a man's soil' from 'certain rights accessorial to those general rights'. The latter were easements: 'rights of way, and rights to the passage of light and air and water' (op cit 1). The 'ordinary' or 'natural' rights of property were: 'the right to receive a flow of water in a natural stream', (the right to interfere with the accustomed flow was however an easement) (op cit 130); the right to pure air (or, as Gale put it (op cit 198) the 'right ... to prevent his neighbour transmitting ... air ... in impure condition; this ... is one of the ordinary incidents of property, requiring no easement to support it, and can be countervailed only by the acquisition of an easement for that purpose by the party causing the nuisance'); the right to lateral support of land ('... an ordinary right of property, not ... an easement, as being necessarily and naturally attached to the soil' (op cit 216). Gale also drew attention (op cit 392) to the important fact that

'[t]here is a clear distinction as to the foundation of the right of action for a private nuisance, properly so called, and an action for the disturbance of an easement. No proof of any right, in addition to the ordinary right of property, is required in the case of the former: to maintain an action for a disturbance

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For the rest the law, and particularly the case law, is almost entirely devoid of any significant elucidations of the concept of private nuisance.⁽⁶⁾

However there were developments in another quarter which were to be of great import for the concept. About the middle of the eighteenth century the courts of equity came to be increasingly engaged in the business of suppressing nuisances through the instrument of the injunction.

2. Redress of Nuisances by Injunction

2.1. Introduction

We have seen that in the late sixteenth century the Court of Chancery had asserted the power to suppress nuisances by way of an injunction.⁽⁷⁾ Resort to this remedy was by no means common even in Blackstone's time.⁽⁸⁾ However towards

(5) (continued)

of an easement ... proof of the accessorial right must be given, but it is otherwise where an action is brought for corrupting the air, or establishing an offensive trade'.

(6) Gale in his treatise identified nuisance in these terms (op cit 275):

'The term nuisance is applied, in the English law, indiscriminately, both to disturbances of an easement already acquired, and infringements upon the natural rights of property, for which an action can be sustained. Strictly speaking, however, the term nuisance should be confined to the latter class of injuries only - those acts which, though originally tortious, as infringing the common law rights of property, may nevertheless, in the process of time, confer a prescriptive title by enjoyment'.

Elsewhere (at 292-3) he observed that it was 'by no means easy to define in general terms what precise amount of infringement of the general rights of property is requisite to confer an action [I]t appears to be in every instance a question of fact whether such a degree of annoyance exists as can be said to amount to a nuisance'.

(7) Above 106-7.

(8) In his account of private nuisance and the remedies therefor Blackstone (3 Comm 220-222) does not even mention the injunction as a remedy for nuisance.

the end of the eighteenth century there is an increasing incidence of applications to the Court of Chancery for the award of an injunction against some alleged nuisance.⁽⁹⁾

Initially the injunctions were sought to prevent or redress interferences with easements of light,⁽¹⁰⁾ though there are also cases where relief was sought against obstructions of prospect⁽¹¹⁾ and the discomfort caused by brick-burning,⁽¹²⁾ and a small-pox hospital.⁽¹³⁾

By the early decades of the nineteenth century the jurisdiction to restrain nuisances, while regarded as a novelty⁽¹⁴⁾ and approached with caution, was a recognised aspect of the jurisdiction of the courts of equity.

- (9) The reason probably being a gradual realisation of the inadequacies of the common law remedies as a means of obtaining abatement of a nuisance. Under the regime of the action on the Case the only effective method of abating a nuisance was self-help (cf above 101 and Blackstone's comment there cited (n 45)). Generally on the beginnings of the practice of enjoining private nuisances see Lewis 'Injunctions against Nuisances' (1908) 56 U of Penn LR 289; Walsh 'Equitable Relief against Nuisance' (1929) 7 New York University L QR 352 at 256ff.
- (10) East India Co v Vincent (1740) 2 Atk 84; Ryder v Bentham (1750) 1 Ves Snr 543; Fishmongers Co v East India Co (1752) Dick 164; Wynstanley v Lee (1818) 2 Swans 333.
- (11) Attorney-General, ex rel Gray's Inn Socy v Doughty (1752) 2 Ves Snr 454.
- (12) Grafton v Hilliard (1736) Amb 160 n (1).
- (13) Baines v Baker (1752) Amb 159. See also Coulson v White (1743) 3 Atk 21 where it is said that where a 'trespass' continues 'so long as a nuisance' the Court of Chancery 'will interfere and grant an injunction to restrain the person from committing it'.
- (14) Lord Eldon in 1811 in Attorney-General v Cleaver, 18 Ves 212 at 217, noted that

'The instances of intreprisation of this court upon the subject of nuisance ... [were] very confined and rare ...',

while even as late as 1835 Lord Brougham would comment (Ripon v Hobart 3 My & K 169 at 180)

'it is always to be borne in mind that the jurisdiction of this court over nuisance by injunction at all is of recent growth, has not till very lately been much exercised, and has at various times found great reluctance on the learned judges to use it'

(continued on the next page)

The Court of Chancery in asserting a power to enjoin nuisances, never developed anything in the nature of an 'equitable nuisance',⁽¹⁵⁾ and acted only in respect of those conditions or activities which were designated as nuisances by the Common Law.⁽¹⁶⁾

In the result the courts of equity seldom if ever attempted or proffered any definition of private nuisance nor did

(14) (continued)

It was in fact during Lord Eldon's tenure of office (1801-1806, 1807-1827) that the practice of issuing injunctions was developed. 'Before his time there are not more than half a dozen instances of each species of injunction, and in these relief was as often denied as granted. Now the injunction is, it is well known, the right arm of the Court Almost all the principles upon which this relief is granted or refused ... are to be found in Lord Eldon's judgments alone'. Turner LJ in Jenner v Morris (1861) 3 De G F & J 45 at 56. Cf. Holdsworth 13 HEL 633.

(15) As Kindersley VC pointed out in Soltau v De Held (1851) 2 Sim (NS) 133 at 151:

'... Equity will only interfere, in case of nuisance, where the thing complained of is a nuisance at law; there is no such thing as an equitable nuisance'.

(16) Largely as the result of a rule, adopted quite early on (see Anon (Baines v Baker) (1752) 3 Atk 750) that in order to obtain an injunction a plaintiff had to establish the existence of the nuisance complained of by an action at law. This rule was largely derived from the fact that the earliest cases involved nuisances to the easement of ancient lights and the chancery judges insisted that an applicant establish his title to the easement before they would act to enjoin any structure obscuring the lights (see Lewis op cit (n 8 above). Cf Walsh op cit (n 8 above) at 357). The rule itself was approved by Lord Eldon (Attorney-General v Cleaver (1811) 18 Ves 218 at 220; cf Elmhirst v Spencer (1849) 2 Mac & G 45 at 50) but was later qualified (see Ripon v Hobart (1834) 2 My & K 169 at 180-1). In 1857 Lord Cranworth stated (Broadbent v Imperial Gas Co 7 De G M & G 436 at 466) the rule thus:

'The ordinary rule is, not to issue an injunction to restrain a nuisance until the existence of the nuisance has been established by a trial at law.... [But] I cannot state it as a proposition of law, that this Court never will or can interfere to restrain a nuisance until it is established by law to be a nuisance; there may be cases in which it is so clear that this court does not want the assistance of a court of law'.

they make substantive decisions as to what could be said to be a nuisance.⁽¹⁷⁾ Nevertheless the rise of equity jurisdiction to enjoin nuisances was to have a profound effect upon the concept of nuisance. The courts of equity, for reasons to be explained,⁽¹⁸⁾ declined to grant injunctions upon mere proof of the existence of a nuisance. Accordingly they evolved a set of rules defining the circumstances in which injunction would issue.

What is remarkable, and significant, about these rules is that they constitute the first substantive attempt by English judges⁽¹⁹⁾ to define the precise nature of the interference with the proprietary rights of another which would render the interference redemiable as a nuisance. Admittedly the rules did not purport to indicate what made a nuisance actionable at common law⁽²⁰⁾ but, as we shall see,⁽²¹⁾ when the common law judges came to consider this question they largely adopted the doctrines of equity as the basis for their exposition.

(17) But cf Baines v Baker (1752) Amb 158 (also reported sub nom Anon 3 Atk 750) where Lord Hardwicke LC refused to hold a small-pox hospital to be a nuisance since 'the fears of mankind ... will not create a nuisance'.

(18) Below 236,240

(19) The Common Law judges had not been compelled to undertake this task since the question whether an alleged nuisance was actionable tended to be approached as a question of fact to be decided by a jury (see above 42-3, 186 n 110 and Gale, cited n 5 above).

(20) The Courts of Equity of course at the beginning were only concerned with the question whether or not to enjoin that which had already been found to be an actionable nuisance (cf n 16 above). It was only after 1854 (see n 55 below) that they were empowered to make the substantive decision whether a given state of affairs could be characterized as a nuisance in law.

(21) Below 243

2.2. The Rules for the award of an Injunction against Nuisances

The jurisdiction to issue injunctions had its origin in the fact that there existed no common law remedy to redress a particular wrong or that such remedies as existed were either imperfect or inadequate.⁽²²⁾ In relation to nuisances these principles translated into a doctrine that equity would enjoin a nuisance in order to prevent irreparable mischief or to put an end to an injury which was continuous.⁽²³⁾ In other words, as Story puts it,⁽²⁴⁾ it was not 'every case, which will furnish a right of action against a party for a nuisance, which will justify the interposition of courts of equity to redress the injury or remove the annoyance. But there must be such an injury, as from its nature is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented but by an injunction'.

(22) Story 2 Equity Jurisprudence 61.

(23) Cf Page Wood LJ in A-G v Cambridge Consumers Gas Co (1868) 4 Ch App 71 at 80:

'Where the court intervenes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two grounds, which are of a totally distinct character : one is that the injury is irreparable, as in the case of cutting down trees; the other, that the injury is continuous, as so continuous that the court ... restrains the repeated acts which could only result in incessant actions, the continuous character of the wrong making it grievous and intolerable.'

For cases concerning the award of the injunction on the ground of a continuing nuisance, see Coulson v White (1743) 3 Atk 22; Hopkins v Caddick (1851) 18 LT (OS) 236; Attorney-General v Birmingham Borough Council (1858) 4 K & J 528; Clowes v Staffordshire Potteries Waterworks Co (1872) LR 8 Ch App 125. For the award of the injunction on the ground of irreparable injury see below 236.

(24) Op cit 105.

From the beginning the courts of equity approached the remedy by way of injunction with much care. Some 'caution is necessary', Lord Eldon pointed out in 1811⁽²⁵⁾ 'before the Court should interpose to suspend, which might destroy concerns ... that cannot be established without immense expenditure'. In Crowder v Tinkler⁽²⁶⁾ he repeated 'that great caution is required in granting an injunction ... where the effect will be to stop a large concern in a lucrative trade'. Lord Brougham in Ripon v Hobart⁽²⁷⁾ (1834) expressed a similar concern thus:

'... the soundness of that discretion seems undeniable which would be very slow to interfere where the thing to be stopped, while it is highly beneficial to one party, may very possibly be prejudicial to none. The great fitness of pausing much before we interrupt men in those modes of enjoying or improving their property which are prima facie harmless, or even praiseworthy, is equally manifest....'

This attitude that led the courts of equity to state with particular precision the scope of the concept of 'irreparable harm' as a ground for the award of an injunction and to develop a doctrine of the 'balancing of conveniences'.

Irreparable harm

In the context of nuisance cases, the principle that nuisances would be enjoined only where they caused irreparable injury seems to have been first laid down by Lord Hardwicke in 1752 in Fishmongers Co v East India Co⁽²⁸⁾ where he refused to enjoin the erection of a wall which would obscure ancient lights saying

'As to the necessity of this case there is no ground for an injunction there being no mischief likely to ensue....'

(25) Attorney-General v Cleaver (1811) 18 Ves 211 at 217.

(26) (1816) 19 Ves 617 at 622.

(27) (1834) 3 My P & 169 at 180.

(28) (1752) 1 Dick 163.

Some years later in the cognate circumstance of ploughing up of meadows the courts speaks of 'irremediable injury' as the ground of interposition of courts of equity.⁽²⁹⁾ In Attorney-General v Nichol⁽³⁰⁾ (1809), an action for injunction against disturbance of ancient lights, Sir Samuel Romilly arguendo used the phrase 'irreperable injury'. Lord Eldon in this case observed⁽³¹⁾ that the foundation of the jurisdiction of the Court of Equity

'is that head of mischief alluded to by Lord Hardwicke [in the Fishmonger's case] that sort of material injury to the comfort of the existence of those who dwell in the neighbouring house'

Wynstanley v Lee⁽³²⁾ (1818) was also a case of ancient lights. Plumer MR observed that a court of equity would intervene if it saw that

'the injury might be irreperable, as where the loss of health, the loss of trade, destruction of the means of existence, might ensue from erecting a building'⁽³³⁾

'Irreperable' harm is of course a relative concept and the courts of equity were thus obliged, by adopting this standard, to engage in processes of comparative evaluation of the injuriae suffered by plaintiffs.

Thus as early as 1818 Plumer MR in Wynstanley v Lee⁽³⁴⁾ is reported as observing that in certain circumstances

'a court of equity will not interpose by injunction; the nature or degree of injury not being such as to require that extraordinary relief....'

(29) Johnson v Goldswaine (1796) 3 Anst 749.

(30) (1809) 16 Ves 338 at 340.

(31) At 340.

(32) (1818) 2 Swans 333.

(33) At 335-6.

(34) (Supra) at 336.

he same theme was expounded by Kindersley VC in Wood v Sutcliffe⁽³⁵⁾ (1851) when he observed

'... Whenever a Court of Equity is asked for an injunction in cases of such a nature as this [i.e. pollution of waters], it must have regard not only to the dry strict rights of the Plaintiff and Defendant, but also to the surrounding circumstances, to the rights or interests of other persons which may be more or less involved....'

'The question ... which we have to consider' Turner LJ said in Attorney-General v Sheffield Gas Consumers Co⁽³⁶⁾ (1853) 'appears to me'

'to be whether this is a case in which the remedy at law is to inadequate that the Court ought to interfere, having regard to the legal remedy, the rights and interests of the parties, and the consequences of this Court's interference.

The Chancellor, Lord Cranworth, formulated⁽³⁷⁾ the task of the court in similar terms

'It appears to me that ... it is a question of degree whether this court will interfere or not. If that be the right view ... then the question is, whether or not such a probability of substantial injury to the rights of the public passing along the streets ... has been made out as to make it a reasonable exercise of the jurisdiction of this court to interfere by granting an injunction.'

In applying this principle to the facts of the case, Lord Cranworth provided an excellent illustration of the dialectical process which the court applied:

'Is the evil of such a nature as to justify the court in interfering?.... One must look at the quantum of evil at each particular place and at each particular moment of time, to determine whether this injunction ought to be granted.... [C]ases of nuisance or no nuisance arising from particular acts must, from the nature of things, be governed by particular circumstances.... Each case must be governed by its particular circumstances. The particular place or object in view must be regarded. I take it that all these questions are of this nature, "are you using that which is the subject matter of inquiry in a reasonable way and according to the uses for which it was intended?"'⁽³⁸⁾

(35) (1851) 2 Sim (NS) 163 at 165.

(36) (1853) 3 De G M & G 304 at 321.

(37) At 336.

(38) At 336-340.

Particular circumstances of individual cases also tended to oblige the courts to develop specific tests for comparative evaluation of the type of injury complained of. A seminal example occurs in Walter v Selfe⁽³⁹⁾ (1851) where Knight Bruce VC found it necessary to formulate some principle by which the courts could fix the degree of inconvenience to physical comfort and well-being which would justify the award of an injunction:

'... ought this inconvenience be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people.'

Considerations such as these tended to spawn further rules. At a relatively early stage the equity judges found it necessary to adopt some specific yardstick as to the measure of harm that would determine whether an injury was irreparable. Lord Eldon in Attorney-General v Nichol⁽⁴⁰⁾ (1809) had spoken of jurisdiction founded on 'material injury'. In Wood v Sutcliffe⁽⁴¹⁾ (1851) Kindersley VC had observed that an injunction would not issue 'if the right be infringed ever so minutely' and in Walter v Selfe⁽⁴²⁾ (1851) Knight Bruce VC had issued the injunction because he found that the effect of the nuisance was to 'abridge and diminish seriously and materially' the comfort of the plaintiff or, as he also put it, 'to cause substantial inconvenience and material discomfort'. The case of the Attorney-General v Sheffield Gas Consumers Co⁽⁴³⁾ (1853) introduced a more precisely formulated criterion. The case arose from the activities of the defendant company in tearing up streets and roads for purposes of laying gas mains. The injunction sought to restrain this nuisance was refused, the court holding in effect that the injury involved was so slight as not to justify the award of an injunction. Then in Swaine v The Great Northern Railway Co⁽⁴⁴⁾ (1864) an injunction was

(39) (1851) 4 De G & Sm 315 at 322.

(40) (1809) 16 Ves 338 at 342.

(41) (1851) 2 Sim (NS) 163 at 166.

(42) Supra (n 38) at 323.

(43) Supra (n 35).

(44) (1864) 4 De G J & Sm 211.

sought to restrain the defendants from dumping at irregular intervals and for comparatively short periods of time, loads of manure whose stench interfered with the plaintiff's comfort. Turner LJ refused the application for reasons which he found in the Sheffield case:

'... adhering to the opinion expressed by both Lord Cranworth and myself in the case of The Attorney-General v The Sheffield Gas Company, that it is not in every case of nuisance that the court will interfere by injunction; and holding that occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction except in extreme cases, there is not in my judgment here a sufficient case for such interference.'⁽⁴⁵⁾

In Goldsmith v Tunbridge Wells Improvement Commissioners⁽⁴⁶⁾ (1866) Turner LJ formulated the rule in the Sheffield case in these terms

'This brings us to the question whether the nature and extent of the nuisance in this case is such that this court ought to interfere by injunction to prevent it ... I adhere to the opinion which was expressed by me and the Lord Chancellor in the Attorney-General v The Sheffield Gas Consumers Company, that it is not in every case of nuisance that this court will interfere. I think it ought not to do so in cases in which the injury is merely temporary and trifling, but I think it ought to do so in cases in which the injury is permanent and serious; and, in determining whether the injury is serious or not, I think regard must be had to all the consequences which may flow from it'.

The doctrine of balancing of interests

An injunction has the effect of permanently abating a nuisance. To this extent the award of an injunction can significantly affect the right of a landowner to use and enjoy his property. The Chancery judges at a relatively early stage displayed an acute awareness of this consequence. Thus in Wynstanley v Lee⁽⁴⁷⁾ (1818) Plumer MR refused to enjoin a building as a nuisance to ancient lights, remarking that

'The injury of postponing a building which the party is entitled to erect, may not, in every instance, be equal to the injury of permitting him to proceed with one which is a nuisance.'

(45) At 215-6. Emphasis supplied.

(46) (1866) LR 1 Ch App 349 at 354.

(47) (1818) 2 Swans 333 at 335.

So too, in Wood v Sutcliffe⁽⁴⁸⁾ (1851) the Vice-Chancellor refused to enjoin the pollution of a stream because, inter alia, he found that

'to some considerable extent, the pollution of this stream is inevitable. Not all the Courts of law and Equity in the kingdom can prevent it.... Therefore, if this injunction were granted, it would not have the effect of restoring [the purity of the water]

On the other hand, to grant the injunction would have the effect of seriously injuring, if not ruining the Defendants. Weighing, then, the injury that may accrue to the one party or the other by granting or refusing the injunction, I think that ... I should be bound to refuse it.'

By the middle of the nineteenth century the idea that the courts of equity should balance the interests of parties had acquired something of the status of a formal principle of equity jurisprudence, and the courts can be seen to be undertaking a process of rationalisation of the nature and function of the principle.

The seminal example of this is perhaps the case of the Broadbent v The Imperial Gas Company (1856). The plaintiff in this case was a market gardener whose gardens adjoined the gas works of the defendant. The plaintiff claimed that the vapours and effluvia from the gas works were destroying the plants in his garden and, after establishing the fact of a nuisance at law, now sought an injunction. Before the Vice-Chancellor⁽⁴⁹⁾ it was argued inter alia that the defendants would suffer greater loss if the injunction were to issue than the plaintiff suffered by the nuisance and that, further, the public to whom the defendants supplied gas would be harmed if the defendants were enjoined.

Page-Wood VC in granting the injunction rejected these arguments holding (1) where there is no question of rivalry in trade, a court of equity is less disposed to balance the comparative inconvenience caused to the contending parties by granting or withholding the injunction, and to consider more

(48) (1851) 2 Sim (NS) 163 at 168.

(49) (1856) 2 Jurist (NS) 1132.

the fact that the plaintiff was subject to a nuisance; and (2) that the interest of the public could not be brought forward by a wrongdoer merely in order to maintain him in his wrong.

On appeal,⁽⁵⁰⁾ the decision of the Vice-Chancellor was upheld. 'It was argued before me' Lord Cranworth C said,⁽⁵¹⁾

'... that in issuing an injunction (whether interlocutorily or ... perpetually) [this court] ... will take into account, to some extent at least, the comparative injury that would result to the parties respectively from issuing or withholding the injunction.... I gave full attention to this argument ... with a view to satisfy myself as to the state of the law on the subject.... Now, attending to the principles laid down in ... [A-G v Sheffield Gas Consumers Co] I cannot come to the conclusion that there was anything there decided to warrant this court in withholding the relief of an injunction to a person seriously and constantly injured by unlawful acts.... I think the present is not a case in which this Court can go into the question of convenience or inconvenience, and say that where a party is substantially damaged, that he can only be compensated by bringing an action toties quoties. That would be a disgraceful state of the law, and I quite agree with the Vice-Chancellor, in holding that in such a case this Court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas.'

An appeal to the House of Lords also failed.⁽⁵²⁾ There Lord Kingsdown in particular considered the argument as to 'the balance of inconvenience' and found, as a fact, that no real inconvenience would result to the defendants by the issue of the injunction.

Broadbent's case established the doctrine of the 'balance of inconvenience' as a principle of equity jurisprudence. In 1863 Knight Bruce LJ, in Jacomb v Knight,⁽⁵³⁾ is seen refusing to enjoin a nuisance to lights 'considering the inconvenience on either side of granting or refusing the injunction' and in Lillywhite v Trimmer⁽⁵⁴⁾ (1867) Malins VC pronounced it

(50) (1857) 7 De G M & G 436.

(51) At 461.

(52) (1859) 7 HL Cas 600.

(53) (1863) 3 De G J & Sm 533 at 539.

(54) (1867) 36 LJ Ch 525 at 529.

'to be the doctrine of this Court that you must, in all these matters, have some regard to the balance of inconvenience; and if the extent of the inconvenience sustained by the plaintiff is of a trifling nature, such as may be readily compensated in money, you cannot and ought not to interfere with the rights of others....'

3. 2.3. Equity's influence upon the Common Law

The doctrines evolved by the courts of equity concerning the circumstances in which an injunction would issue against a nuisance significantly influenced the common law judges when, in the second part of the nineteenth century, they came to expatiate upon the nature of the private nuisance at common law. The infiltration of the doctrines of equity was an almost imperceptible process more a matter of osmosis than formal recognition.⁽⁵⁵⁾ The nature of the process is however usefully illustrated by the approach of the common lawyers in the early decades of the nineteenth century to the matter of nuisance by way of an interference with 'ancient lights'.

The right to the amenity of natural light, we have seen, was recognised in the seventeenth century, when the judges characterized it not as a 'natural' right of property but rather as an easement to be acquired by grant or prescription.⁽⁵⁶⁾ The common lawyers of the nineteenth century having adopted this doctrine⁽⁵⁷⁾ were then faced with the question of what entitled the holder of this easement to successfully sue for an interference with his right.

(55) It is perhaps worth noting that at least one judge - Robert Monsey Rolfe, from 1839-1850 a baron in Exchequer, from 1850 (under the title Lord Cranworth) a lord justice in equity and in 1853-1858 and 1865-1868 Lord Chancellor - participated in most of the leading cases arising both in equity and at common law which influenced the evolution of the law of nuisance at this time. There can be little doubt that a man so placed would have applied a basic dialectic to dealing with cases both in equity and law. Cf Pluncknett Concise History 211 who refers to 'the gradual introduction into common law courts [in the eighteenth and nineteenth centuries] of procedures and doctrines which were originally the peculiar province of Chancery.... This tendency was carried much further by the Common Law Procedure Act 1854....'

(56) Above 121-2.

(57) 'The right to the reception of light and air in a lateral direction,' Gale wrote in 1839 (Easements 191), 'is an easement'.

In practice an action on the case brought for an interference with lights, in effect, amounted to an action to vindicate the proprietary right which was the easement of light.⁽⁵⁸⁾ Theoretically all that it was necessary to prove was that the right had been infringed in order to entitle the plaintiff to succeed in the action.⁽⁵⁹⁾

The courts of equity at an early stage had enjoined structures which obscured ancient lights,⁽⁶⁰⁾ the award of the injunction of course being governed by the principles regulating the award of injunctions.

In the Fishmongers Co v East Indian Co⁽⁶¹⁾ (1752) Lord Hardwicke LC expressed the opinion that an injunction would not issue where the effect of the structure would 'alter' the plaintiff's lights, since such alteration was 'not a nuisance contrary to law.' In Attorney-General v Nichol⁽⁶²⁾ (1809) Lord Eldon LC approved this view. The ground upon which a court of equity would interfere by injunction was, he said, that of 'material injury to the comfort of the existence'⁽⁶³⁾ of the dominant owner. 'There is little doubt' he continued⁽⁶⁴⁾

'that this court will not interpose upon every degree of darkening ancient lights and windows. There are many obvious cases of new buildings, darkening those opposite to them, but not in such a degree that an injunction could be maintained....'

(58) Cf Parker v Smith (1832) 5 C & P 438 where Tindal CJ, in charging a jury in an action on the case for nuisance by obstruction of lights, informed the jury that if it considered that the lights were diminished by the structures complained of 'then you will find for the plaintiff with nominal damages; and your verdict will have no other effect, than that of a notice to the defendants, that they must pull down the building of which the plaintiff complains'.

(59) In other words, as the Common Lawyers expressed it, the plaintiff was entitled to succeed without proof of actual damage, notwithstanding the fact that actual damage was the gist of an action on the case. See Nicholls v Ely Beet Sugar Factory [1936] Ch 343 at 349, cf Glanville Williams and Hepple Foundations of Tort 55.

(60) See above 232

(61) (1752) 1 Dick 163.

(62) (1809) 16 Ves 338.

(63) At 342.

(64) At 343.

Now of course all that this meant was that a court of equity would not act to enjoin an interference with an easement of light except where the interference was so substantial or material as to justify the award of an injunction.⁽⁶⁵⁾ Certainly the dictum in Nichol's case could not be construed to mean that an interference with the easement of light was only actionable as a nuisance at common law where the interference was material. Yet it is exactly this rule that was propounded by the Courts of Common Law when plaintiffs began to bring actions on the case for nuisance by interference with ancient lights.

Back v Stacey⁽⁶⁶⁾ (1826) seems to have initiated this development. The plaintiff in this case had sought an injunction to restrain obstruction of his lights. The Court of Chancery granted the injunction ex parte⁽⁶⁷⁾ and ordered the question whether the plaintiff's lights were in fact interfered with to be tried by a jury. The evidence showed that there had been a substantial diminution of light and the plaintiff then moved for a verdict in his favour arguing that 'any obstruction of ancient lights [was] ... wrongful and illegal.' The Chief Justice of the Court of Common Pleas then instructed the jury⁽⁶⁸⁾ that

'It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before.... In order to give a right of action, and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable.... [T]he jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises.'

Then in Parker v Smith (1832) which was an action on the case for damages (in effect an action to vindicate the plaintiff's right to light by obliging the defendant to demolish

(65) Cf above 236-7.

(66) (1826) 2 C & P 465.

(67) (1826) 2 Russ 121.

(68) 2 C & P 465.

the obstructing erection⁽⁶⁹⁾) the test formulated in Back v Stacey was adopted. 'It is not every possible, every speculative exclusion of light which is the ground of an action' Tindal CJ instructed the jury⁽⁷⁰⁾

'but that which the law recognises, is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of buisness....'

In Wells v Ody⁽⁷¹⁾ (1836), an action on the case for obstructing lights, Parke B 'entirely adopt[ed]' the view stated in Parker v Smith. The question for the jury the baron said was thus

'whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation'.

In the same year Lord Denman CJ in Pringle v Wernham⁽⁷²⁾ (1836) held that in an action on the case for darkening lights 'the merely taking off a ray or two will not be sufficient' and that to sustain the action 'there must have been a considerable obstruction of light'.

In this way the Courts of Common Law not only made the holder of an easement of lights right to an action depend upon proof of the fact that he had suffered a 'nuisance'⁽⁷³⁾ but they also incorporated into the concept of a nuisance notions developed in the courts of equity as to the nature of a nuisance.

(69) (1832) 5 C & P 438. Cf n 57 above.

(70) At 439.

(71) (1836) 7 C & P 410 at 411-2.

(72) (1836) 7 C & P 377.

(73) See Colls v Home and Colonial Stores Ltd [1904] AC 179, especially the remark of Lord Davey (at 204) that the 'test of the right is ... whether the obstruction complained of is a nuisance'. See also the observations of Farwell J in Higgins v Betts [1905] LR 2 Ch 210 at 215:

'Any substantial interference with ... [a householder's] comfortable use and enjoyment of his house according to the usages of ordinary persons in that locality, is actionable as a nuisance at common law.

B. THE IMPACT OF THE INDUSTRIAL REVOLUTION

1. Introduction

The elaboration upon the concept of a nuisance in the form of an interference with ancient lights which occurred in the early decades of the nineteenth century foreshadowed a more fundamental and extensive revision of the common law concept of nuisance which was to be undertaken in the latter part of the century. This process, which was to profoundly transform the idea of nuisance, had as its immediate context the right to salubritas aeris and was initiated by the advent of the Industrial Revolution.

One of the most striking consequences of the transformation of England into an industrial society was the massive amount of atmospheric pollution caused by the invention of the steam-engine and the growth and spread of the manufacturing industries. Almost every contemporary observer of the English landscape in the early nineteenth century mentions the palls of smoke that permanently over-hung the great manufacturing towns, the grimy and blackened houses and the soot-laden air. (74)

(73) (continued)

His neighbour's brick burning or fried fish shop may be a nuisance in respect of smell ... and in a like manner his neighbour's new building may be a nuisance in respect of interference with light. The difference between the right to light and the right to freedom from smell and noise is that the former has to be acquired as an easement ... before it can be enforced, the latter two are ab initio incident to the right of property. But the wrong done is in both cases the same, namely, the disturbance of the owner in his enjoyment of his house.'

See generally Radcliffe 'The Easement of Light and Air' and its Limitations under English Law' (1908) 24 LQR 120.

(74) As early as 1724 Daniel Defore noted that in the manufacturing town of Sheffield the houses were 'dark and black, occasioned by the continued smoke of the forges, which are always at work' and that the town of Barnsley 'looks as black and smoaky as if they were all smiths that lived in it'. (A Tour through the Whole Island of Great Britain (1724) (ii) 183). Alexis de Tocqueville, the French statesman, visited Manchester in 1835 and described how a 'sort of black smoke covers the city. The sun seen through it is a disc without rays. Under

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Industry also defiled the atmosphere with noxious chemical vapours which harmed and destroyed all living things. (75)

(74) (continued)

This half daylight 300 000 human beings ... work' Journeys to England and Ireland (cited Ward The Age of Change 102) Charles Dickens caught the effect of the steam engine on the primordial domestic amenities of life in a passage in The Old Curiosity Shop (1841).

'On every side, and as far as the eye could see into the heavy distance, tall chimneys, crowding on each other, and presenting that endless repetition of the same dull, ugly form, which is the horror of oppressive dreams, poured out their plague of smoke, obscured the light, and made foul the melancholy air.'

A railway guide of 1844 give a vivid description of the industrial landscape:

'... furnaces, chimney, forges, and iron works, beds of burning coal, coal pits with their engines The whole is constantly enveloped in the gloom of one perpetual cloud of smoke, which bedims and darkens the country for miles around. By night the country is lit up by fires. On all sides the blazes of the furnaces, forges, coal pits, coke beds, and lime kilns, are seen terrifically glaring through the awful darkness. The rushing and roaring of the blasts of the furnaces, the clankings and crashings of the steam engines ... the rattling and rumbling of the rolling mills ... give the stranger the most fearful and awful notions of the place'.

(Cited J W Dodds The Age of Paradox 221-2).

(75) The most remarkable example of this occurred in what Hoskins (The Making of the English Landscape 222) says was 'to be the most appalling town of all,' St Helens. There glass manufactories were established in 1773 and in 1780 'a most extensive copper-work' was erected. In a short time 'the atmosphere was being poisoned, every green thing blighted, and every stream fouled with chemical fumes and waste' (ibid). A parliamentary select committee on noxious vapours (House of Lords Select committee on Noxious Vapours (Brit Parl Pap (1826) 14)) reported that in 1862 there were at least six alkali and six copper smelting works in St Helens as well as a large number of collieries, glass works and other manufactories. 600 000 tons of coal were consumed annually in the district. The vapours emanating from the works resulted in farms with 'now neither tree nor hedge alive; whole fields of corn are destroyed in a single night ... orchards and gardens ... have not a fruit tree left alive; pastures are so deteriorated that graziers refuse to place stock upon them.' (op cit at iv). The chief source of harm was the hydrochloric acid gas produced by alkali works. As early as 1827 there were complaints of the 'volumes of sulphurous smoke' which

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The common law concept of nuisance, committed as it was to preserving the amenity of salubritas aeris, stood as the sole,⁽⁷⁶⁾ frail shield of society against these deprivations of industry.⁽⁷⁷⁾

(75) (continued)

'darken the whole atmosphere' and produce 'a scent [which] is almost insufferable'. (Barker & Harris St Helens 226). There was regular nuisance litigation for the harm caused by these works (op cit 238-9). The gases caused workers' teeth to decay and 'vomiting and fainting' were brought on by the inhalation of 'a more than usual quantity of gas'. (op cit 283). Other chemical manufacturing processes produced sulphuretted hydrogen so that the air 'was filled with the foul smell of rotten eggs' (op cit 353). The Select Committee on Noxious Vapours (supra) was appointed as a direct result of complaints about conditions in the St Helens area (see Barker & Harris op cit 349-352).

(76) The Legislature made only half-hearted attempts to deal with industrial pollution of the atmosphere. In 1819 a Parliamentary Select Committee enquired into the use of steam engines and furnaces in industry and reported that they could be so operated as not to cause smoke nuisances (Parl Pap (1819)(574) viii 271; (1820)(244) ii 235). The result was a statute (1 & 2 Geo 4 c 41) to 'facilitate prosecutions of nuisances arising from furnaces' which afforded special redress against nuisances caused by the improper construction or negligent working of the furnaces of certain classes of steam engines. A further Parliamentary Select Committee appointed in 1843 recommended the introduction of a Bill dealing with smoke nuisances from furnaces and steam engines. The result was the inclusion in the Railway Clauses Consolidation Act 1845 (8 & 9 Vict c 20) of a clause requiring locomotive engines to consume their own smoke (Steer The Law of Smoke Nuisances 10). Later a similar provision relating to industrial fire-places and furnaces was included in the Public Health Act 1875 (cf above 207).

(77) In 1793 an entrepreneur seeking to introduce a steam engine into his works was warned that 'we whose names are hereunto subscribed shall, if the same be found a nuisance, seek such redress as the law will give' (cited Mantoux The Industrial Revolution in the Eighteenth Century 342 n 5). As early as 1812 a successful prosecution was directed against a steam engine in 'smoke-involved' Sheffield, the charge being that it produced 'divers noisome and unwholesome smokes and smells ... so that the air was greatly corrupted and infected' (R v Dewsnap (1812) 16 East 194.) In 1832 the locomotive steam engines used on the earliest passenger railway service were indicted because the 'divers large quantities of coke, coal, charcoal, wood' they consumed 'corrupted the air and caused noisome smokes etc', escaping condemnation only because they were authorized by an

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The seventeenth century judges, as we have seen, had rigidly asserted the right to salubritas aeris, even as against lawful industries which they suppressed or drove into uninhabited places rather than deprive men of their right to breathe pure air.⁽⁷⁸⁾ But the ethos of the nineteenth century was different. Industry was a preferred activity⁽⁷⁹⁾ and its effect upon the atmosphere tended to be regarded as

(77) (continued)

Act of Parliament (R v Pease: (1832) 4 B & Ad 30. The courts leet too acted against the smoke nuisance. The court leet of Manchester in 1802 'presented eleven owners of factories for not consuming their smoke' (Webb Manor & Borough 105 n 3). The Webbs note (op cit 110) that at the beginning of the nineteenth century 'the most common of all nuisances punished at this date [by the Manchester Leet] was the emitting of large quantities of smoke by the new steam engines'. The Salford leet in 1828 presented 'a manufactory for making sol ammoniac next to the King's common highway ... which emits great quantities of noisome and noxious fumes and vapours to the great nuisance of all the King's subjects...' (op cit 55). In 1833 industrialists were presented for discharging the refuse of dye houses' which caused an 'intolerable' stench, 'the most intolerable nuisance in the neighbourhood'. (op cit *ibid*). In St Helens a local land owner regularly sued manufacturers for the nuisances caused by the noxious vapours and smoke discharged by their factories: in 1840 he obtained £1 000 in damages, in 1846 £1 700 in out of court settlements (Barker & Harris St Helens 239). For an analysis of the role of nuisance law in combating industrial pollution during the nineteenth century see Brenner 'Nuisance Law and the Industrial Revolution' 1 Jo Legal Studies 403.

(78) Above 125-6.

(79) Mumford The City in History 522 points out that in the industrial towns the 'factory became the nucleus of the new urban organism. Every other detail of life was subordinate to it'. Likewise manufacturers and workers were seen to be crusaders, subduing nature for the benefit of mankind and the progress of civilization: Houghton The Victorian Frame of Mind 198.

part of the natural order of things⁽⁸⁰⁾ and the price of progress.⁽⁸¹⁾ It was inevitable then that some adjustment should be made to the common law right of every landowner to enjoy salubritas aeris. The process was initiated in 1858 by Byles J⁽⁸²⁾ in charging a jury on the question whether the noxious vapours emanating from a brick-kiln could be considered to be a nuisance. After observing that, in principle, if the vapours rendered the plaintiff's home uncomfortable he was entitled to the verdict, Byles J went on to add this rider:

'it is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of noxious or offensive trade in the neighbourhood, that can bring an action. If that were so ... the neighbourhood of Birmingham and Wolverhampton and the other great manufacturing towns of England would be full of persons bringing actions for nuisances ... to the great injury of the manufacutring and social interests of the community.'

This dictum initiated a line of cases in which the judges in seeking to accommodate the right to pure air (and indeed other natural rights of property) to the claims of industrial enterprise to use and exploit the natural resources of air, water and light came to formulate more explicitly the exact circumstances in which it could be said that 'hurt, harm, inconvenience or damage' constituted a nuisance.

(80) In the City of Bradford 'men either liked their own smoke or made fun of it': Briggs Victorian Cities.

(81) A notion expressed in picturesque language by James LJ in Slavin v Northbrancepeth Coal Co (1874) LR 9 Ch App 709-10

'It would have been wrong, as it seems to me, for this court in the reign of Henry VI to have interfered with the further use of sea coal in London, because it had been ascertained ... that by the reign of Queen Victoria both white and red roses would have ceased to bloom in the Temple Gardens. If some picturesque haven opens its arms to invite the commerce of the world, it is not for this court to forbid the embrace, although the fruits of it should be the sights, and sounds and smells of a common seaport and shipbuilding town, which would drive the Dryads and their masters from their ancient solitudes.'

(82) In Hole v Barlow (1858) 4 CB (NS) 334; 27 LJ C P 207.

2. Theories of Property Rights

2.1. Introduction

The seventeenth century judges in recognizing a landowner's right to the amenity of pure air, conceived of the claim as a species of property right, as an incident of the right of landownership existing ex jure naturae.⁽⁸³⁾ In the nineteenth century consideration of the exact nature and extent of this right thus tended to take place within the context rights of property in land. In order therefore to trace the developments that occurred at this time it is necessary to begin with an examination of prevailing judicial attitudes towards the nature and origin of claims to proprietary rights in land and its amenities.

The Industrial Revolution converted an essentially rural and agrarian society into one which was essentially urban and industrial. This transformation was reflected in the changing role and function of real property. In the pre-industrial era the primary significance of land lay in its use as a source of most of the material products of society. Its value lay in its fertility and men tended to conceive of it in terms of its actual physical nature as soil and water. The Industrial Revolution changed much of this. The industrialist used the land as a platform for his machines, and valued land not so much for its fertility as for its location near sources of motive power for driving machinery and as a repository of the mineral resources which provided that power and the materials for manufacture and production.

This pattern of land exploitation meant that the industrialist made different claims to the manner in which he might use and enjoy the land. He demanded the right to dam and control flowing waters to drive

(83) See above 143.

his mills. He claimed the right to excavate the land to the fullest extent in order to win its mineral resources. And he claimed the right to use the ambient air and the flowing waters as dumping grounds for the wastes and residues of his manufacturing processes.

This new pattern of land use brought about an intensified situation of conflict between neighbours to the extent that adjoining landowners (and indeed the public at large) were exposed to the injurious consequences of atmospheric and water pollution, the loss of the benefits of a stream of water and the subsidence and collapse of land. The result of all of this was to bring into sharp focus the question of the nature of a landowner's proprietary rights both in relation to the natural elements of air, water, support and in relation to modes of enjoyment of these vis-a-vis other landowners.

At the advent of the Industrial Revolution the prevailing concept of the nature of the right of property was that classically expounded by Blackstone in characteristically vivid language: the right of property, he wrote,⁽⁸⁴⁾ was

'that sole and despotic dominion which a man claims and exercises of the external things of the world, in total exclusion of the right of any other individual in the universe!

Property as a Natural Right

Underlying this was the notion of the right of property as a natural right of man. As such, the property right was conceived to be not only inviolable as against government, but also as against other men. None might take, use or interfere with a man's use and enjoyment thereof. To this end the property right was supported by the maxim sic utere tuo ut alienum non laedas, a prescription which enable a landowner to

(84) Blackstone 2 Comm 2

demand that others abstain from using their land in a manner which might interfere with his use and enjoyment of his own.⁽⁸⁵⁾

That this conception of the property right contained an inherent contradiction - in that it necessarily circumscribed the right of other landowners to use and enjoy their land in accordance with their own absolute dominion - was not fully realised. It was concealed by the assumption that 'natural' meant 'agrarian' and by the doctrine of strict liability which tended to preclude any consideration of the balancing of conflicting interests (under the guise of a concept of negligence and the standard of the reasonable man).⁽⁸⁶⁾

The effect of this concept of the property right was thus to inhibit the use of land for industrial purposes. It did this by way of an invocation of the concept of natural rights of property so that a landowner relying upon, say, his 'natural' right to salubritas aeris, might suppress his neighbour's smelting, and smoke-producing, enterprise.

The Doctrine of Prior Appropriation

The Industrial Revolution was however attended by the emergence of a doctrine of economic freedom which proclaimed the twin tenets of the supreme value of individual liberty and the conviction that the individual in pursuing his own interest is promoting the welfare of all.⁽⁸⁷⁾ This concept was advanced by Adam Smith in his Wealth of Nations and gave rise to the doctrine of laissez faire.

(85) Cf Blackstone 3 Comm 217-8 '... if one erects a smelting house for lead so near the land of another, that the vapour and smoke kills his corn and grass, and damages his cattle ... [or] any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it is less offensive'.

(86) Cf Fleming Torts 8.

(87) Cf Toynbee Lectures on the Industrial Revolution 148.

As such it represented something of a departure from the theory of property as an absolute, inviolable natural right.⁽⁸⁸⁾ For the physiocrats property was an individual right to be protected, not regulated by the State. The implication, translated to the use of the land, was that the individual could develop it as he pleased and the public welfare would be served by the collective results of the individual's freedom of action.⁽⁸⁹⁾

One manifestation of this theory was the doctrine of prior appropriation as a basis of the property right in land. The doctrine was to the effect that he who first established a pattern of land use - by appropriating flowing water, or the ambient air or the natural sunlight - acquired a property right which he was entitled to enjoy even to the detriment of others claiming interests in the light, air or water.⁽⁹⁰⁾

(88) See F S Philbrick 'Changing Conceptions of Property in Law' (1938) 86 U of Pa LR 691 at 712: 'With Adam Smith the principle of economic freedom did not operate through the doctrine that property is natural and inviolable; doubtless because he was too much of a realist'.

(89) J E Cribbett 'Changing Concepts in the Law of Land Use' (1965) 50 Iowa LR 245 at 249.

(90) Blackstone (2 Comm 402-3) had provided the doctrinal sources for this theory in his exposition of the acquisition of ownership by occupatio. Among the things that might be acquired in this manner were, he said,

'... the benefit of the elements, the light, the air, the water, [which] can only be appropriated by occupancy. If I have an ancient window overlooking my neighbours ground, he may not erect a blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall; for there the first occupancy is rather in him than in me. If my neighbour make a tan yard, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue. If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbours prior mill or his meadow: for he hath by the first occupancy acquired a property in the current'.

A doctrine of prior appropriation was particularly applicable to the natural elements of light, air and water since these were regarded as being, in principle, res communes⁽⁹¹⁾ and thus liable to acquisition by persons who had need of them.⁽⁹²⁾

The doctrine itself seemed applicable in English law as an extension of the medieval doctrines by which rights in light air and water could be acquired by prescription.⁽⁹³⁾ The medieval doctrine of prescription was to the effect that a right or interest if enjoyed for a sufficient length of time could be regarded as having ripened into a form of proprietary interest which could be relied upon to exclude others from interfering with the interest.⁽⁹⁴⁾ This conception of prescription did not involve a requirement that the right should have been enjoyed adversely to the one against whom it operated; it was rather a case of the recognition of interests in res communes which had been

(91) See above 127n155 Blackstone states the principle thus (2 Comm 14):

'... there are some few things, which ... still unavoidably remain in common; being such wherein nothing but a usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences'.

(92) Cf Blackstone 2 Comm 394:

'Many things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these ... [which] admit only of a precarious and qualified ownership, which lasts so as they are in actual use and enjoyment, but no longer.

(93) Cf above 139.

(94) Cf Blackstone (2 Comm 394):

'If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows, corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he diverts an ancient water-course that used to run to the others mill or meadow; the law will animadvert hereon as an injury, and protect the party injured in his possession'.

enjoyed without hindrance for a sufficiently long period of time.⁽⁹⁵⁾ In this sense then the doctrine of prior occupation was merely a variant of the older doctrine of prescription, both concepts contemplating the acquisition of a right to restrain others from interfering with the enjoyment of res communes on the basis of an earlier enjoyment of light, air or water. On the face of it the doctrine of prior occupation was more consistent with the needs of a developing economy and consistent with the theory of laissez faire. It gave the entrepreneur the freedom to develop his land in the manner of his choice, conferring upon him title to the profitable exploitation of the natural elements. The possibly harmful effects to others of the exclusive interests to the resources of production so obtained could be overlooked on the ground that the prior occupant by so developing his land was promoting the welfare of all.⁽⁹⁶⁾

2.2. The Theories in practice: Property in Flowing Waters

During the early decades of the nineteenth century the English courts were required to determine the nature and extent of the proprietary rights of landowners in the natural elements whose exploitation had become a pertinent feature

(95) In this sense the medieval concept of prescription differed from the modern. The latter allowed a man to acquire an 'easement' of light air or water upon proof of an enjoyment of the right for the prescriptive period adversely to the interests of the owner of the praedium over which the easement existed. This concept of prescription only emerged in the later nineteenth century primarily as a result of the influence of Gale's Treatise on Easements.

(96) Cf Horwitz 'The Transformation in the Conception of Property in American Law, 1780-1860' (1972-3) 40 U Chi LR 248 at 250: '[The doctrine of prior appropriation was] justified by its power to promote economic development. In a capital scarce economy, its proponents urged, the first entrant takes the greatest risks; without the recognition of property in the first developer - and a concomitant power to exclude subsequent entrants - there cannot exist the legal and economic certainty necessary to induce investors into high-risk enterprise'.

of developing industries.⁽⁹⁷⁾ The trend of the decisions was that of experimentation with both the doctrines of natural rights and prior appropriation.⁽⁹⁸⁾ These experiments revealed deficiencies in both of these concepts with the result that the courts gradually came to adopt a new and relatively novel doctrine of 'reasonableness' as a determinant of the incidence of rights to use and enjoy water and air. This represented an incorporation into the conceptual structure of the law relating to property rights a standard of reasonableness (later much developed in the field of civil liability) and, as such, provided the key component for the evolution of a new concept of nuisance.

We have seen that in the seventeenth century it had been established, under the influence of the cujus est solum ejus est usque ad coelum maxim, that the owner of land owned the waters upon it, his title being conceived as being a natural right so that he could claim the waters without having to establish an easement acquired by grant or prescription.⁽⁹⁹⁾

The import of these sketchy principles became of matter of considerable importance with the advent of the Industrial Revolution. The motive power for machinery provided by a fall of flowing water made possible the development of manufactories even before the invention of the steam-engine. In this context the chief source of disputes concerning title to flowing waters arose when more than one riparian owner used the waters for the same purpose. Any

(97) The most immediately relevant issue was the right to exploit flowing waters as a source of motive power for industrial enterprise. This was closely followed by the issue of the nature of rights in the air (as a component of industrial processes) and air-space (as a repository for the waste products of industrial process. Questions relating to rights to lateral support become pertinent only later.

(98) The doctrines are inter-related in their consequences (see Horwitz *op cit* (n 93) at 249-51) and the courts, not always aware of this, tended to shuffle them around in the course of seeking satisfactory solutions.

(99) Above 138-143

diversion or damming of the water by the up-stream proprietor tended to deprive the lower proprietors of the head of water required to drive their machines.

The question which thus presented itself was whether the upper proprietor could be said to be entitled in law to appropriate whatever waters he desired regardless of the effect upon his lower neighbours or whether his right to appropriate the waters was limited by the claims of other riparian owners.

That the former was the position tended to be suggested by the conception that the owner of land owned the waters upon his land. On this basis the riparian owner would be free to take whatever waters he required as an exercise of his rights of dominion of land.⁽¹⁰⁰⁾ The same conclusion could be reached by applying the Blackstonian doctrine of prior occupancy. On this approach however the waters were to be regarded as a res nullius, title to which was acquired by the act of appropriation. In effect the theory meant that the first riparian owner to establish a manufactory and appropriate waters acquired the right to take as much water as he desired without concern for the interests of other, later, claimants to the use of the stream.⁽¹⁰¹⁾

The earliest case in which the question of the nature of proprietary rights in the flow of water came up for consideration at common law was Bealey v Shaw⁽¹⁰²⁾ (1805) which, interestingly enough, reveals the court as relying upon both theories to explain the nature of the right.

Prior to 1787 the defendants had established a mill upon the river Irwell from which they diverted waters by means of a weir. In 1787 the plaintiff had established down-stream

(100) Cf above 112.

(101) Cf Lauer 'The Common Law Background of the Riparian Doctrine' (1963) 28 Missouri LR 60 at 96-99.

(102) (1805) 6 East 208. See Robinson v Lord Byron (1785) 1 Bro Ch 588 where the Court of Chancery enjoined an interference with the flow of waters, apparently adopting the theory of prior occupation.

his own mill using the residual flow of water over the defendant's weir to drive it. In 1791 the defendants increased the size of their weir so diverting a greater quantity of water and substantially depriving the plaintiff of the waters needed to drive his mills.

At the trial Graham B instructed the jury that riparian owners 'had a right to the flow of the water in its natural stream, unless there existed before a right in others to enjoy or divert any part of it to their own use.' The jury found for the plaintiff holding that the defendants had acquired no right to divert the waters as flowing at the time the plaintiff erected his mill.

In refusing an application for a new trial the Court of King's Bench ruled that the direction and verdict were good.

Lord Ellenborough CJ adopted what was essentially the seventeenth century⁽¹⁰³⁾ natural right theory as to the nature of a landowner's dominion in flowing waters:

'The general rule of law as applied to this subject is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land without diminution or alteration. But an adverse right might exist on the occupation of another.'⁽¹⁰⁴⁾

The occupation of another could only diminish the owner's right if it was perfected by twenty year's enjoyment and this not being shown in the present case, the plaintiff was entitled to the flow enjoyed by him since 1791.

Grose J⁽¹⁰⁵⁾ followed Lord Ellenborough's approach, saying that the plaintiff

'had a right to all the water flowing over his estate, subject only to the easement which the defendants might have had

(103) None of the seventeenth century cases were in fact cited. Indeed the only case raised in argument was Prescott v Phillips (1798)(unreported) where the Chief Justice of Chester had ruled 'that nothing short of 20 years undisturbed possession of water diverted from the natural channel ... could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious.'

(104) At 214-5.

(105) At 216.

Le Banc J,⁽¹⁰⁶⁾ while agreeing, seemed to have rested his decision on a principle of prior appropriation:

'... the true rule is, that after the erection of the works and the appropriation by the owner of the land of a certain quantity of the water flowing over it, if a proprietor of other land afterwards takes what remains of the water before unappropriated, the first mentioned owner, however he might before such second appropriation have taken to himself so much more, cannot do so afterwards.'

Lawrence J,⁽¹⁰⁷⁾ while not attempting to formulate any rule of law to govern the matter, also regarded the matter as governed by the question of the priority of occupation:

'... the objection now made by the defendants to the plaintiff's claim is inconsistent with the ground upon which they attempt to rest their own case. For they contend that they had a right to appropriate as much of the water as they pleased from time to time to their own use; and yet they deny that same right to the plaintiff to appropriate to his own use what had not been appropriated before by any person. In this the defendants are wrong; for if the occupiers of their premises could before have appropriated to themselves any part of the water flowing through their own lands, by the same rule those through whose lands it afterwards flowed might appropriate so much as had not been appropriated before by others.'

The doctrine of prior appropriation adopted

In the next important case, Williams v Morland⁽¹⁰⁸⁾ (1824), the Court of King's Bench firmly enunciated a view that title to flowing waters was acquired by prior occupation.

Bayley J,⁽¹⁰⁹⁾ in adverting to 'the manner in which an exclusive right to [flowing water] is obtained', said:

'Flowing water is originally publici juris. So soon as it is appropriated by any individual, his right is co-extensive with the beneficial use to which he

(106) At 219.

(107) At 217-8.

(108) (1824) 2 B & C 910.

(109) At 913.

appropriates it. Subject to that all the rest of the water remains publici juris. The party who obtains a right to the exclusive enjoyment of the water does so in derogation of the primitive right of the public.'⁽¹¹⁰⁾

These principles were re-iterated in Liggins v Inge⁽¹¹¹⁾ (1831) some years later. There Tindal CJ said⁽¹¹²⁾ that

'Water flowing in a stream, it is well settled, by the law of England, is publici juris.... [By] the law of England, the person who first appropriates any part of the water flowing through his land to his own use, has the right to the use of so much as he thus appropriates, against any other.'

The doctrine of Natural Flow

Even as Williams v Morland was asserting a clear doctrine of prior appropriation as a source of proprietary rights in flowing waters, another theory, based on the conception of natural rights of property, was evolving.

In essence the theory adopted the concept that a landowner had as a natural incident of his ownership of real property a right to waters upon it. By extension, this principle was said to mean also that he had a natural right to receive the waters naturally flowing to his land. Any interference with the natural flow - by diversion or obstruction of the stream - was an interference with the natural right for which an action might lie.

This version of the nature of a landowner's rights in flowing waters emerged in the English law in an unexpected quarter. In 1823 in the case of Wright v Howard (1823)⁽¹¹³⁾ Sir John Leach, vic-chancellor, sitting in Chancery proclaimed

(110) Holmoyd J (at 914) expressed the view that there was no 'private property' in running water and that the title a landowner had to water lasted only so long as it remained on his soil. Littledale J (at 916-7) observed that a landowner's right to use the water upon his land 'does not give a party such a property in the new water constantly coming, as to make a diversion or obstruction of the water, per se, give him any right of action'. Water was publici juris and all the King's subjects could use it provided that in doing so they do not injure 'the rights already vested in another by the appropriation of the water'.

(111) (1831) 7 Bing 682.

(112) At 692.

(113) (1823) 1 Sim & Stu 190. The report of the case in (1823)
(continued on the next page)

that the 'right to the use of waters rests on clear and settled principles' ⁽¹¹⁴⁾ which he expounded as follows:

'Prima facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream, and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of the water, which would otherwise descend to the proprietors below, nor throw the water back on the proprietors above. ... [In order to be able to do either of these things a proprietor must] either prove an actual grant or licence by the proprietors affected by his operation, or must prove an uninterrupted enjoyment of twenty years. ⁽¹¹⁵⁾

The effect of this doctrine was thus to hold that a riparian landowner could not divert or obstruct the flow of a natural stream since this would be an infringement of the natural right of property in other riparian owners to receive the waters in their natural state. The only circumstance in which diversion or obstruction could be permitted was where the party could claim an easement (acquired by grant or prescription) to do so.

The American Contribution

In the United States of America the law relating to

(113) (continued)

1 LJ (OS) Ch 94 differs somewhat. Cf on this case Lauer op cit (n 101 above) at 101-2.

(114) In the Law Journal report he is stated as having said, 'The law on this subject is extremely simple and clear'.

(115) At 203. (Emphasis supplied). The Law Journal report gives a rather different version:

'Of the water itself, there is no separate ownership; being a moving and passing body, there can be no property in it. But each proprietor of the land on the banks has a right to use it; consequently, all the proprietors have an equal right: and therefore, no one of them can make such use of it, as will prevent any of the others having an equal use of the stream, when it reaches them His use of the stream must not interfere with the equal common right of his neighbours: he must not injure, either those whose lands be below him ... or ... above him' ((1813)1 LJ (OS) 94 at 99).

flowing waters had achieved a more precocious development.⁽¹¹⁶⁾ The natural flow doctrine had been articulated as early as 1795⁽¹¹⁷⁾ and by 1805 its premises were being challenged. In Palmer v Mulligan⁽¹¹⁸⁾ a New York judge argued that the doctrine had the effect of impeding industrial progress.⁽¹¹⁹⁾ The development of this sort of reasoning led to the emergence of the theory that proprietary interests in the flow of waters should be settled on a basis of mutual adjustment of conflicting interests.⁽¹²⁰⁾ This view was advanced in the influential opinion of the distinguished jurist Joseph Story in the case of Tyler v Wilkinson⁽¹²¹⁾ (1827).

(116) Joseph Angell had published his influential Treatise on the Law of Watercourses in 1824. See generally Weil 'Waters : American Law and French Authority' (1919-20) 33 Harvard LR 133.

(117) In Merrett v Parker (1795) 1 NJL 526 at 530 where it was said:

'... When a man purchases ... land through which a natural water-course flows, he has a right to make use of it in its natural state, but not to stop or divert it to the prejudice of another. Aqua currit, et debere currere is the language of the law.'

(118) (1805) 3 Cai R 307.

(119) The rule of natural flow Livingston J said (at 313-4) 'must be restrained within reasonable bounds so as not to deprive a man of the enjoyment of his property'. Otherwise he pointed out 'he who would first build a dam or mill ... would acquire an exclusive right, at least for some distance, ... for it would not be easy to build a second dam or mill in the same river on the same side ... without producing some mischief or detriment to the owner of the first.'

(120) The idea appears to have been first articulated in Platt v Johnson (1818) 15 Johns 213 at 218 where it was observed that

'[A]lthough some conflict may be produced in the use and enjoyment of such rights [in flowing water], it cannot be considered, in judgment of law, an infringement of right. If it becomes less useful to one, in consequence of the enjoyment by another, it is by accident and because it is dependent on the exercise of the equal rights of others.'

(121) (1827) 24 Fed Cas 472 (No 14,312).

Story's judgment begins with an affirmation of the traditional natural flow doctrine⁽¹²²⁾ which he immediately qualifies:

'I do not mean to be understood as holding the doctrine that there can be no diminution whatever, and no obstruction or impediment whatsoever, by a riparian proprietor, in the use of the water as it flows; for that would be to deny any valuable use of it.'

Accordingly, there

'may lie, and there must be allowed of that which is common to all, a reasonable use.... There may be a diminution in quantity, or a retardation or acceleration of the natural current indispensable for the general and valuable use of the water, perfectly consistent with the use of the common right.... The law here ... acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness subversive of common use, nor into an extravagant looseness which would destroy private rights.'⁽¹²³⁾

The demise of the doctrine of prior appropriation

Meanwhile the doctrine of prior appropriation advanced in Williams v Morland⁽¹²⁴⁾ was coming under attack. In Mason v Hill (1832) the plaintiff complained of an obstruction of the flow of a stream by the defendant, an upper proprietor, which deprived his mill of motive power. At the trial⁽¹²⁵⁾ defendant citing Williams v Morland claimed prior appropriation of the flow of waters and contended that he was thus 'not answerable for the diversion'. Bosanquet J 'acting upon that authority' directed a verdict for the defendants. In an

(122) 'The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of the river, the right being common to all the proprietors on the river; no one has the right to diminish the quantity which will according to the natural current, flow to a proprietor below, or throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among the proprietors of that which is common to all.' (at 474)

(123) At 474.

(124) Above n 108.

(125) Mason v Hill (1832) 3 B & Ad 304.

application for a new trial the Court of King's Bench, citing the 'perspicuous and comprehensive' judgment of Leach VC in Wright v Howard⁽¹²⁶⁾ and 'upon the authority of that decision and the reasoning of the learned judge' held that the defendants could not acquire a right to divert the waters by prior appropriation.

The matter was then tried again before a bench consisting of Denman CJ, Littledale and Parker JJ.⁽¹²⁷⁾

The question Lord Denman CJ said⁽¹²⁸⁾ was whether 'the first person who can get possession of [a] stream, and apply it to a useful purpose, has a good title to it against all the world, including the proprietor of the land below' even to the extent that he may 'altogether deprive him of the benefit of the water'.

The question so posed, Lord Denman went on to observe,⁽¹²⁹⁾ was in another sense the question

'whether he can take away from the owner of the land below, one of its natural advantages, which is capable of being applied to profitable purposes, and generally increases the fertility of the soil ... and deprive him of it altogether by anticipating him in its application to a useful purpose.'

If this were to be so, he pointed out, landowners would be deprived of a valuable asset 'in manufacturing districts particularly' where the value of an estate 'is much enhanced by the existence of an unappropriated stream of water with a fall....'

With this preface Lord Denman went on to express the view of the court that the proposition was untenable. It was based he said on a 'mistaken view of the principles' laid down in Bealey v Shaw, Williams v Morland, Blackstone and Liggins v Inge. After analysing these authorities Lord Denman concluded⁽¹³⁰⁾ that

(126) Above n 113.

(127) Mason v Hill (1833) 5 B & Ad 1.

(128) At 17.

(129) Ibid.

(130) At 23.

'None of these dicta, when properly understood with reference to the cases in which they were cited, and the original authorities in the Roman law, from which the position that water is publici juris is decided, ought to be considered as authorities, that the first occupier or first person who chooses to appropriate, a natural stream to a useful purpose, has a title against the owner of the land below, and may deprive him of the benefit of the natural flow of water.'

The adoption of the natural flow doctrine

The effect of Mason v Hill was thus to adopt a doctrine of natural flow in preference to that of prior appropriation.

In 1839 Gale in his newly-published treatise on easements, cited Story's decision in Tyler v Wilkinson and quoted from it at length. Gale himself regarded the law as expressed in Williams v Morland as based on a misconception⁽¹³¹⁾ and stated that Mason v Hill 'may be considered as having settled the law on this point'.⁽¹³²⁾

However the authority of Mason v Hill was not universally admitted. In 1839 the Court of Exchequer in Arkwright v Gell⁽¹³³⁾ refused to apply its doctrine to waters flowing in artificial channels. In the court of Common Pleas Tindal CJ (who it will be recalled applied the prior appropriation doctrine in Liggins v Inge⁽¹³⁴⁾) showed considerable scepticism about the principles stated in Mason v Hill. In Acton v Blundell⁽¹³⁵⁾ (1843) he implied that the origins of the Mason doctrine were at best obscure and, in the event, refused to apply it to the case of subterranean streams of water.

(131) Gale Easements 224: ... 'the right to the corporeal thing, the water itself, has been confounded with the incorporeal right to have the stream flow in its accustomed manner. Upon this a further error was founded - that the first appropriator of water had a right to continue to divert the stream to the extent of such appropriation, no matter how injurious such diversion might be to the rights of parties who should afterwards seek to use the stream'.

(132) Op cit 243.

(133) (1839) 5 M & W 203.

(134) Above n 111.

(135) (1843) 12 M & W 324.

But in 1849 the decision in Mason v Hill was vindicated in the judgment of Pollock CB in Wood v Waud.⁽¹³⁶⁾ In an elaborate judgment the chief baron cited with approval Kent's Commentaries⁽¹³⁷⁾ and Story's judgment in Tyler v Wilkinson and expressed the view that 'the principles which regulate the law as to natural streams' are 'placed on their right footing, in the case of Mason v Hill'⁽¹³⁸⁾ By 1851, when the leading case of Embrey v Owen came to be decided, the authority of Mason v Hill was beyond doubt. In Embrey v Owen⁽¹³⁹⁾ deference was again paid to American authorities: counsel cited American cases and Parke B quoted from Kent's Commentaries and Story's judgments. 'The law on flowing waters', the Baron observed⁽¹⁴⁰⁾ 'is now put on its right footing by a series of cases, beginning with that of Wright v Howard followed by Mason v Hill and ending with that of Wood v Waud and is fully settled in the American courts....'

The doctrine of reasonable user

Embrey v Owen⁽¹⁴¹⁾ in fact did more than support the proposition advanced in Mason v Hill that the doctrine of natural flow governed the law relating to flowing waters. The judgment of Parke B is replete with references to the doctrine of reasonable user developed by Story J in Tyler v Wilkinson and its entire tone and tenor suggests that the court was adopting the principles of that doctrine.

The case had been argued by the plaintiff on the basis that any abstraction of waters from a flowing stream was a

(136) (1849) 3 Exch 748.

(137) Kent Commentaries on American Law, a treatise which 'became an American counterpart of Blackstone' (Lauer (op cit (n 101 above) at 61). For the influence of Kent upon the development of American water-law see Lauer op cit 60-61; Weil (op cit (n 116 above).

(138) At 774.

(139) (1851) 6 Exch 353.

(140) At 368.

(141) Supra (n 139).

breach of a riparian owner's proprietary right for which an action might lie.⁽¹⁴²⁾ Relying upon Wright v Howard, Mason v Hill and Wood v Waud, Parke B enunciated the view that the right to water flowing past land

'is not an absolute and exclusive right to the flow of water in its natural state ... but it is a right only to the flow of the water, and the enjoyment of it, subject to the similar rights of all the proprietors ... to the reasonable enjoyment of the same gift of Providence.'⁽¹⁴³⁾

Accordingly, Parke B went on to say, an action will only lie for 'an unreasonable and unauthorized use of this common benefit.'⁽¹⁴⁴⁾ Whether a particular user was reasonable or not, Parke B added, 'must depend upon the circumstances of each case':

'It is entirely a question of degree, and it is very difficult, indeed impossible, to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application; but there is no difficulty in deciding whether a particular case falls within the permitted limits or not.'

(142) 'It was very ably argued before us ... that the plaintiff had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any obstruction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued would be the foundation of a claim of adverse right in that proprietor' per Parke B at 368.

(143) At 369.

(144) This proposition Baron Parke supported by citing a lengthy extract from Kent's Commentaries which was in essence a precis of the judgment of Story J in Tyler v Wilkinson. See at 370. The idea itself was of course not particularly novel having been advocated in relation to public nuisances by obstruction of the highways by Lord Ellenborough CJ in R v Cross (1812) 3 Camp 224 (see above 176) and by Holroyd J in R v Russell (1827) 6 B & C 566 (see above 190 n 123, 192 n 130).

3. The Right to Pure Air

3.1. Introduction

Since the decision in Aldred's case⁽¹⁴⁵⁾ (1610) the attitude of the common law had been that each landowner as of right was entitled to pure, wholesome air,⁽¹⁴⁶⁾ a principle which had had the effect of driving industrial enterprise into uninhabited areas⁽¹⁴⁷⁾ or causing enterprises to close down.⁽¹⁴⁸⁾

(145) See above 123.

(146) A principle elaborately re-iterated in equity in Walter v Selfe (1851) 4 De G & Sm 315. There Knight Bruce VC held (at 321) that a landowner was entitled

'to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family ... to have there for the ordinary purposes of breath and life an unpolluted and untainted atmosphere ... meaning by "untainted" and "unpolluted" not necessarily air ... fresh, free and pure ... but air not rendered to an important degree less compatible or at least not rendered incompatible, with the physical comfort of human existence....'

(147) Cf above 126 n 153. 'The new mills, factories and works tended to be in more or less remote places, partly because of the need to be near a falling stream ... and later to escape too close an inspection and regulation of their unhibited activities'. (Hoskins The Making of the English Landscape 216). The great Soho ironworks of Birmingham were established in 1795 on 'a barren heath, on the bleak summit of which stood a naked hut the inhabitation of a warrener'. (Mantoux The Industrial Revolution in the Eighteenth Century 332 n 4). Alkali manufacturers chose St Helens to establish their noxious works because it was 'a district where they were not likely for some time to be bothered by irate neighbours - apart from nearby farmers who could be kept quiet by small doles of money' (Barker & Harris St Helens 235). It was only with the invention of the steam engine that industry was liberated from its dependence upon water power. It then tended to shift to the urban areas.

(148) Cf R v White and Ward (1757) 1 Burr 333 where the manufacturers of spirits of sulphur, oil of vitriol and oil of aqua fortes were convicted of a common nuisance created by the 'noisome, offensive and stinking' by-products of their process. The accused were given only nominal fines upon 'it appearing that the nuisance was absolutely removed (the works being demolished, and the materials, utensils and instruments, all sold and parted with)'.

The conversion of England, during the nineteenth century, into an industrialized state had the effect of calling in question the extent to which men might assert their right to pure air at the cost of closing down some profitable industrial enterprise.⁽¹⁴⁹⁾ Essentially the question was that of determining on the one hand, the extent to which industry could exploit the ambient air as a receptacle for the waste products of the processes of manufacture and, on the other hand, that of determining the extent to which neighbouring landowners could seek to prevent the discharge of smoke, vapours and noxious matter into the ambient air by invoking their common law right to pure air.

3.2. Proprietary Rights in Air Space

The earlier decisions in this regard reflect a tendency to recognise a right in a landowner to be entitled to freely use the column of space above his land as a receptacle for smoke or other effluents. This principle was essentially derived from the principle cujus est solum ejus est usque ad coelum,⁽¹⁵⁰⁾ which, by implication at least⁽¹⁵¹⁾ was relied upon to justify and excuse the discharge of smoke or other

(149) The analagous question, we have seen, had been raised already in the related context of the extent of the public right of passage in the highways (cf above 180). R v Russell (1827) 6 B & C 566 contains the most vigorous assertion of the claims of industrial enterprise to be relieved of the strict constraints of the common law (cf above 189-194). Already in 1811, in Attorney-General v Cleaver 18 Ves 212, an application for an injunction against a soap manufactory, because of the nuisance caused by the 'vapours' emanating therefrom, was resisted with the argument that the 'application is really to abate this, which is called a nuisance, but is in truth a large trading concern, comprising property to a vast amount' (at 213).

(150) Cf above 111-3. The maxim, after its initial recognition in Bury v Pope (1586) Cro Eliz 118 was not mentioned in the case law again until the famous case of Pickering v Rudd (1815) 4 Camp 219 where it is cited by counsel as establishing that '[t]he space over the soil ... is the plaintiff's, like the minerals below, and an invasion of either is, in contemplation of the law, a breaking of his close'. Lord Ellenborough CJ was sceptical about the validity of this contention, saying 'I do not think it is a trespass to interfere with the column of air superincumbent on the close'. (at 221).

(151) This contention was seldom advanced explicitly. It

pollutants into the atmosphere on the basis that the landowner, as owner, was free to use the coelum above his land as he pleased. The claim was usually advanced in the form of a demand to be entitled to carry on some trade or enterprise which was a nuisance without incurring any liability for the harm or inconvenience suffered by adjoining or neighbouring owners. In the early decades of the nineteenth century this claim was asserted under the aegis of a version of the doctrine of prior appropriation of the right to use the air or air-space. (152)

(151) (continued)

appears however in the argument of counsel in Rich v Basterfield (1846) 2 Car & K 256 at 258 where it was asked, 'could you deprive a man of the right of the circumjacent air to let off his smoke?' Erle J is reported to have responded to this with 'a strong opinion as to the right each one possessed to the enjoyment of the air around his house which the law would not allow to be interrupted'. See further below 277-8

A similar contention is to be found in the American case of Pennoyer v Allen (1883) 42 Am Rep 540 where it was argued: 'The ownership of land carries with it the rightful use of the atmosphere while passing over it. Title to land gives to the owner the right to impregnate the air upon and over the same with such smoke, vapor, and smells as he desires....' Cf Laitos 'Continuities from the Past affecting Resource Use and Conservation Patterns' (1975) 28 Oklahoma LR 60 at 82: '... the hoary maxim, cujus est solum, ejus est usque ad coelum was occasionally invoked to ... establish a vested right in owners to use the atmosphere over their lands as a free waste receptacle. The cujus est solum doctrine was particularly useful to the infant industries of the nineteenth century....'

(152) Cf Blackstone 2 Comm 402-3, cited n 87 above. Already in 1824 it had been laid down that a landowner acquired his rights to 'light and air' by occupancy. This was said by two judges who in the same year adopted the doctrine of prior appropriation in relation to flowing waters in Williams v Morland (cf above nn 106-7). In Moore v Rawson (1824) 3 B & C 332 Littledale J said (at 339) that the right to light and air

'[t]he latter is acquired by mere occupancy Every man on his own land has a right to all the light and air which will come to him.... In order to make it lawful for him to appropriate to himself the use of the light, he does not require any consent from the owner of the adjoining land. He therefore begins to acquire the right to the enjoyment of the light by mere occupancy.'

Bayley J (at 336) expressed the same view rather more shortly: '[t]he right to light, air, or water, is acquired by enjoyment, and will ... continue so long as

(continued on the next page)

Enterprises involving the production of atmospheric pollutants tended to be originally established in remote or uninhabited locations.⁽¹⁵³⁾ In the course of time habitations came to be established in the vicinity and the new-comers tended to complain of the nuisance caused by the pollution. The response was to claim that the defendant polluter was entitled to carry on his activity by virtue of his earlier occupation of the locality.⁽¹⁵⁴⁾ Linked to this contention was the point that the new-comer, if entitled to succeed in an action for nuisance, would effectually interfere with the prior occupant's beneficial use of his land.⁽¹⁵⁵⁾

In R v Neville⁽¹⁵⁶⁾ (1791) Lord Kenyon CJ applied a version of the doctrine of prior appropriation to allow the business of 'a melter of kitchen stuff and other grease' to remain in a residential area, observing that

'in places where offensive trades have been long carried on they are not nuisances though they would be so in any of the squares, or other places where such trades have not been exercised.... Where manufactories have been borne within a neighbourhood for many years it will operate as a consent of the inhabitant to their being carried on, though the law may have considered them as nuisances, had they been objected to in time.

(152) (continued)

the party either continues the enjoyment or shows an intention to continue it.'

(153) See above n 147.

(154) The defence being that the plaintiff had 'come to the nuisance'. See for example the argument of counsel in Bliss v Hall (1838) 4 Bing (NC) 183 at 186:

'... the Defendant was the first occupier in the district. There must be some places in which such a business may be carried on; and when it is up before other houses are built, those who erect them must do so subject to the rights of the first occupier to carry on a lawful business'.

(155) Cf defendant's plea in Bliss v Hall (supra) at 184: '... that the defendant lawfully enjoyed his said premises ... before the plaintiff came to, occupied ... his said premises ... and of right ought still lawfully to enjoy the same without any interruption or suit of the plaintiff....'

(156) (1791) Peake 125.

In R v Cross⁽¹⁵⁷⁾ (1826) Abbott CJ recognised a principle that a prior occupation of a place might establish a good defence to a public nuisance.

'If a certain noxious trade is already established in a place remote from inhabitations ... and persons afterwards come and build houses within reach of its noxious effects ... the party would be entitled to continue his trade, because his trade was legal before the erection of the houses ...'

A claim to have acquired rights in the ambient air by prior occupation was raised, albeit tacitly, in Roberts v Macord (1832). The action was for trespass for breaking down a wall. The defence was that the defendant carried on the business of timber cutter and supplier and for this purpose, he required 'the admission of light and air'⁽¹⁵⁸⁾ to his tenement for the purpose of drying the timber. For more than twenty years there had been an open space adjoining his land which allowed access of air to the yard. The wall which was the subject of dispute had been erected by the plaintiff in this space thus obstructing the access of the air.

The matter was decided at nisi prius.⁽¹⁵⁹⁾ There Patterson J, in instructing the jury, observed that the claim was novel and could not be supported:

'If such a plea could be sustained, it would follow that a man might acquire an exclusive right to the light and air ... merely by reason of having been in the habit of laying out a few boards on his ground to dry. Such a rule would be very inconvenient and very unjust.'

This repudiation of this claim to title to air on the basis of prior appropriation was confirmed in the latter decision of Webb v Bird (1861).⁽¹⁶⁰⁾

(157) (1826) 2 C & P 485.

(158) The claim of a landowner to receive an unobstructed flow of air to his land had already been made in the seventeenth century by the owners of windmills and had been the subject of some confused and inconclusive judicial pronouncement. See above 124 n 134.

(159) (1832) 1 Mood & R 230.

(160) (1861) 10 CB (NS) 289.

The plaintiff, whose windmill had stood since 1829, sued the defendant for damages arising from the obstruction of access of wind to the mill as the result of a structure erected in the year 1860. Although counsel for the plaintiff argued valiantly for the proposition that his client was entitled to access of air relying upon the old⁽¹⁶¹⁾ and modern⁽¹⁶²⁾ cases, logic⁽¹⁶³⁾ and the theory of occupancy,⁽¹⁶⁴⁾ the court of Common Pleas on grounds both technical⁽¹⁶⁵⁾ and politic⁽¹⁶⁶⁾ dismissed the action, a decision subsequently confirmed by the Exchequer Chamber.⁽¹⁶⁷⁾

Already in Bliss v Hall (1838)⁽¹⁶⁸⁾ the Court of King's Bench had come to reject the claim to be entitled to pollute air on the ground of prior occupation. In so doing it relied upon a version of the doctrine of natural rights which had been employed in relation to flowing waters.⁽¹⁶⁹⁾ The defendant had carried on a candler's business upon his premises for some three years before the plaintiff acquired neighbouring premises and instituted an action in nuisance on the ground

(161) See above 124 n. 134.

(162) 'The whole reasoning in the judgement of Littledale J in Moore v Rawson in favour of the plaintiff here.'

(163) 'In Aldred's case, the stoppage of the wholesome air was held to give a right of action; a fortiori, then, will an action lie where the air is used for the purposes of trade' (at 276). 'If a man is entitled to wholesome air, why is he not equally entitled to useful air' (at 281).

(164) By implication mainly: 'The law has always favoured prescriptions for things of necessity and public utility' (at 276).

(165) Treating the matter as falling within the purview of the Prescription Act 1832 which, it was held, did not provide for the type of easement claimed by the plaintiff. The windmill had not stood long enough to establish prescription under the common law.

(166) 'A grant of such an easement as this would operate as a prohibition to a most formidable extent to the owners of the adjoining lands - especially in the neighbourhood of a growing town' (per Erle CJ at 284).

(167) Webb v Bird (1862) 13 CB (NS) 841.

(168) (1838) 7 LJ CP 122. The case is also reported in 4 Bing (NC) 183 but the report is not as full as that of the Law Journal. Cf above. See also Elliotson v Feetham (1835) 2 Bing (NC) 134 which presaged this new approach.

(169) Cf above 262.

of 'divers noisome, noxious and offensive vapours, fumes, smells, and stenchs.'

For the defendant it was argued that the plaintiff had come to the nuisance and thus could not complain.⁽¹⁷⁰⁾

The judges were unanimous in rejecting this argument. Tindall CJ observed⁽¹⁷¹⁾ of the argument that the defendant had carried on his trade prior to the plaintiff's acquisition of adjoining premises:

'This ... does not give a right against the owner of the adjoining house; neither does the fact of the trade being carried on before, furnish an answer in law to that which is admitted on the record to exist as a nuisance.'

The rule in this regard was rather that

'When a person become occupier of a house, he is entitled, by common law, to all reasonable rights, easements, and appurtenances, amongst which good wholesome air is of course included.'

So too, Parke J denied that the 'priority of possession' was relevant:

'... when a party purchases a house, he has ... a right to all the advantages of a comfortable habitation; and every exercise of a noxious trade is an infringement and encroachment upon this right.'

Bosanquet J invoked the sic utere principle saying that

'A man should enjoy his own property, so as not to injure that of his neighbour',

while Vaughan J followed the same theme observing that

'Nuisances of this description should be removed from the neighbourhood of human habitation, and be established in places, where, from the circumstances, they cannot be injurious or offensive.'

3.3. Modification

Neither of these approaches was however particularly satisfactory. The doctrine of prior appropriation effectively negated the right to pure air of those landowners who were

(170) Cf 154 above.

(171) At 123.

not the earliest occupants of an area while the doctrine, advanced in Bliss v Hall, effectively precluded industry from establishing any enterprise which would render the ambient air impure.

It is thus hardly surprising to find the courts casting about for another approach to the problem of reconciling claims to pure air with claims to carry on industrial processes productive of air pollutants. Nor is it particularly surprising to discover that the approach which was adopted was premised upon a principle of reasonableness similar to that adopted for flowing waters by Parke B in Embrey v Owen.⁽¹⁷²⁾

The first signs of this approach can be discerned in the proceedings at nisi prius in the case of Rich v Basterfield⁽¹⁷³⁾ (1846). The action was for the nuisance caused by smoke, emanating from a chimney. At the trial before Erle J,⁽¹⁷⁴⁾ Serjeant Byles for the defendant, pleaded the cujus est solum doctrine :

(172) (1851) 6 Exch 353. Indeed Baron Parke, in expounding the true nature of a landowner's right in flowing waters, let fall the remark (at 372-3) that a similar principle

'will be found to be applicable to the corresponding rights to air and light.'

These, he went on to say,

'also are bestowed by Providence for the common benefit of man; and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie.'

In relation to air the position was that

'A man cannot occupy a dwelling and consume fuel in it for domestic purposes, without its in some degree impairing the natural purity of the air ... but such small interruptions give no right of action; for they are necessary incidents to the common enjoyment by all.'

(173) (1846) 2 Car & K 257.

(174) The report states that the case was tried before Tindal CJ but, as Erle J himself pointed out later (Bamford v Turnley (1862) 3 B & S 67 at 72) the case was tried before him.

'The question ... turned upon this: could you deprive a man of the right to use the circumjacent air to let off his smoke? Every man had a right to make a chimney to his house, and use it in an ordinary and reasonable manner; and it would be against the analogy of the established doctrine, that an owner of land is entitled to dig up to his very boundaries, even if by so doing he should injure his neighbour's house, to contend that a man may not use the chimnies of his house because the smoke may inconvenience his neighbour.' (175)

To this Erle J made a portentous reply:

'No man may use his right so as to damage another; though on the other hand, every one has a right reasonably to use his property, even if he should thereby annoy his neighbour.' (176)

This proposition is next encountered in 1858 when Serjeant Byles, now Byles J, came to try the case of Hole v Barlow.

4. Hole v Barlow (1858)

Hole v Barlow is one of the epochal cases in the history of private nuisance. It initiated 'a radical departure from previous law' (177) and probably marks the beginning of the modern tendency to divorce the action for nuisance from its origins in the law of property and the assimilation of the concept with the law of torts. (178)

The case

In Hole v Barlow (179) Byles J had to try an action for nuisance arising from the burning of bricks. The setting of the action was a 'newly-formed' road on the outskirts of London. The plaintiff's house was on a piece of land

(175) At 258.

(176) Ibid.

(177) Brenner 'Nuisance Law and the Industrial Revolution' (1973) 3 Jo Legal Studies 403 at 411.

(178) Brenner suggests (ibid) that 'under Hole v Barlow, the successful plaintiff would probably have had to show that the defendant acted unreasonably in doing him damage, and the liability would have come to resemble negligence, as it does in America.'

(179) (1858) 4 CB (NS)334; 27 LJ CP 207; 4 Jurist (NS) 1019.

adjoining a field where the defendant 'preparatory to building certain houses thereon' had dug out clay, made bricks, and burnt these in 'clamps', one of which was within thirty feet of the plaintiff's house. There was abundant evidence that the plaintiff had suffered annoyance.

Byles J in instructing⁽¹⁸⁰⁾ the jury began by stating the law in conventional terms: it was not necessary that the annoyance complained of be injurious to health before an action could lie; it was sufficient if the vapours rendered 'the enjoyment of life and property uncomfortable and if this was proved,' that is sufficient to entitle the plaintiff to maintain this action.' Then, however, he proceeded to add an 'observation' that was to initiate a far-reaching revision of traditional nuisance law:

'Not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood that can bring an action... I apprehend the law to be this, that no action lies for the use, the reasonable use, of a lawful trade in a convenient and proper place, even though some one may suffer annoyance from its being so carried on ... It is therefore my duty to tell you that this action will not lie, although you should be of the opinion that the nuisance complained of is such as to render the plaintiff's enjoyment of life and property uncomfortable, if you should think that the place where the business is carried on was a convenient and proper place for the purpose.'

Byles J is so instructing the jury as to the law, had sought to explain the reason why the annoyance suffered by the plaintiff might not be actionable. If every annoyance were actionable, industrial progress would be severely impeded,⁽¹⁸¹⁾ and thus it was necessary to consider the locality in which the annoyance had occurred:

'... it would not be justifiable to place camps for brick-burning in the immediate vicinity of Berkley of Belgrave, or Eaton Squares. But that

(180) 4 CB (NS) 334 at 335; cf 27 LJ CP 207 at 208.

(181) Cf above 251.

is a very different thing to say that the mere temporary burning of bricks ... in a new neighbourhood in the outskirts of London, which no one could say was an inconvenient place for the purpose, though it might cause annoyance to one or two persons residing near, would afford a ground of action. If this were so, it would be exceedingly difficult to find any place within a reasonable distance at which this sort of trade could be exercised at all.'

Accordingly he instructed the jury that it should consider whether the place where the defendant had burnt bricks was 'a proper and convenient place for the purpose' bearing in mind 'all the circumstances'. If the jury found the place to be proper then 'although the plaintiff's enjoyment of his property may have been rendered uncomfortable, he cannot maintain the action.'⁽¹⁸²⁾

The jury entered its verdict for the defendant,⁽¹⁸³⁾ who then applied to the court of Common Pleas for an order directing a new trial on the grounds of a misdirection of the jury. In opposing the application⁽¹⁸⁴⁾ counsel for the defendant sought to support Byles J's statement of the law, arguing that authority for it could be found in a placitum in Comyn's Digest⁽¹⁸⁵⁾ and Rich v Basterfield.⁽¹⁸⁶⁾ The locality in which a nuisance had occurred, counsel contended, had always been a material factor in nuisance actions.⁽¹⁸⁷⁾

(182) 4 CB (NS) 334 at 336.

(183) To the surprise of Byles J who later said he 'rather expected the jury would find for the plaintiff' (4 CB (NS) at 337).

(184) 4 CB (NS) at 337-9.

(185) Comyns Digest 'Nuisance' (C)

'An action upon the case does not lie upon a thing done to inconvenience of another, as if a man erect a mill [etc]. So, it does not lie for a reasonable use of my right, though it lie to the annoyance of another; as, if a butcher, brewer etc use his trade in a convenient place, though it be to the annoyance of his neighbour'.

Comyn's cites no authority for this proposition. He probably derived it from Rankett's case (1606) 2 Rolle Abr 139 (cf above 125). Byles J confessed that he had this passage in mind when he instructed the jury (4 CB (NS) at 230).

(186) See above 277-8.

(187) Citing Jones v Powell (1628) Hut 135 above 135-6 R v Pierce (1683) 2 Show 327 (cf above 152). Baines v Baker (1752) 1 Amb 158: 'All these cases shew that the locality is a material ingredient on the enquiry of nuisance or no nuisance' (4 CB (NS) at 339).

The plaintiff's argument was constructed upon conventional lines derived from the principle laid down in the seventeenth century cases. Pure and undefiled air, he argued, is 'the common law right of every subject of Her Majesty, whether he resides in a hovel or a mansion',⁽¹⁸⁸⁾ a principle established by Aldred's case⁽¹⁸⁹⁾ and the authorities which held that even 'lawful and necessary' trades could not be carried on to the injury of that right⁽¹⁹⁰⁾ 'for the rule is sic utere tuo ut alienum non laedas.⁽¹⁹¹⁾ Byles J's formulation of the law was unacceptable because it implied that the convenience of the locality excused a nuisance '[n]o matter how injurious may be the thing complained of, or how much it may interfere with the comfortable enjoyment' of habitations.⁽¹⁹²⁾

The Court of Common Pleas (coram Crowder, Willes and Byles JJ) refused to grant the order, holding Byles J's direction to the jury to be correct.

Crowder J⁽¹⁹³⁾ cited the passage from Comyns, which Byles J had 'evidently' relied upon, and concluded that 'the direction of Brother Byles to the jury was consistent with all the authorities, and we should be in effect overruling several of them'⁽¹⁹⁴⁾ if the direction was not upheld.

Willes J agreed with Crowder J⁽¹⁹⁵⁾ and offered, further, his own version of the rule asserted by Byles J in the Court below:

(188) 4 CB (NS) at 340.

(189) 4 CB (NS) at 343. Counsel cited Walter v Selfe (1851) 4 De G & Sm 315 (cf above n 143) as supporting this principle.

(190) Cf above at 125-6 for these cases.

(191) 4 CB (NS) at 343.

(192) 4 CB (NS) at 340.

(193) 4 CB (NS) at 344.

(194) He did not say which.

(195) 4 CB (NS) 345.

'the common law right which every proprietor of a dwelling house has to have air uncontaminated and unpolluted is subject to this qualification, that necessities may arise for an interference with that right pro bono publico, to this extent, that such interference be in respect of matter essential to the business of life, and to be conducted in a reasonable and proper manner and in a reasonable place.'

Willes J cited no authority for this formula but observed that his rule 'was not without analogy', mentioning the defence of privilege in the law of defamation and the power to expropriate land for purposes of national defence. 'In these and such like cases, private convenience must yield to public necessity. It seems to me we shall only be acting upon that principle' in dismissing the plaintiff's application. (196)

Rise and demise

Two years later the rule enunciated in Hole v Barlow was applied in Bamford v Turnley, another action based on the nuisance caused by brick-burning. The case was first tried⁽¹⁹⁷⁾ by Cockburn CJ who instructed the jury that the case came within the principle laid down in Hole v Barlow and directed that if they thought the place where the bricks were burnt was 'convenient and proper' and the burning itself was 'under the circumstances, a reasonable use' by the defendant of his land, they should give their verdict for the defendant. The jury found for the defendant and the plaintiff sought an order setting aside the verdict.⁽¹⁹⁸⁾ The court of Queen's Bench (Cockburn CJ, Wrightman, Hill and Blackburn JJ) refused the rule, with leave to appeal against the decision.

In the same year the court of Exchequer was also called upon to apply the principle of Hole v Barlow. In Stockport Water Works v Potter⁽¹⁹⁹⁾ (1861) Channel B left it to a jury

(196) Byles J did not deliver a judgement.

(197) (1860) 2 F & F 231.

(198) Bamford v Turnley (1860) 3 B & S 62.

(199) (1861) 7 H & N 160.

to decide whether the acts of the defendants had been carried on 'for purposes necessary or useful for the community and carried on in a reasonable and proper place'. The jury finding for the plaintiffs, the defendants sought to have the verdict set aside. Before the Exchequer Chamber they cited Hole v Barlow and argued that their activities could not amount to a nuisance since they had been carried on in 'a proper manner and a proper place'.

The Exchequer Chamber refused the order on the ground that the defendant's activities in fact were not carried on in a proper place or reasonable manner. The authority of Hole v Barlow was not disputed but it was plain that the court had doubts as to the correctness of the principles enunciated in the case. (200)

The nature of these doubts was made plain when the same court came, in the same year, to decide the appeal against the decision of the Queen's Bench in Bamford v Turnley (1). (201) In Bamford v Turnley (2) (202) (1861) the majority of the court (Erle CJ, Wilde B, Williams and Keating JJ) held Hole v Barlow to be not 'well decided' while Bramwell B found it stood alone. Pollock CB however dissented from the view of the majority. (203) The effect of

(200) Martin B (at 169) expressed the strongest doubts about Hole v Barlow: 'There may be', he said 'expressions used by some of the judges in which we would not coincide, but we do not at all dispute the authority of that case'. Bramwell B (at 169) desired 'to avoid expressing any opinion on Hole v Barlow. Channell B preferred not 'to throw the least doubt on the decision in Hole v Barlow' (at 170). The decision in Hole v Barlow was also questioned in the same year in equity, in the case of Beardmore v Tredwell (1862) 3 Giff 683, Counsel for the defendants argued that Hole v Barlow 'in effect reversed' Walter v Selfe, to which counsel on the other side replied that the case was 'under review, and was not expected to be supported'. Stuart V-C while not expressly dissenting from the case, was plainly unhappy about following it, observing especially that Byles J's proposition that a trade was not a nuisance if carried on in a 'convenient and proper' place 'must be taken to subject to some qualification' (at 699).

(201) Above n 198.

(202) (1861) 3 B & S 67.

(203) For a discussion of the judgments in Bamford v Turnley (2) see below 287.

the decision of the court, it was said in Cavey v Ledbitter⁽²⁰⁴⁾ (1863), was in fact to have overruled Hole v Barlow.⁽²⁰⁵⁾

However Willes J continued to maintain the correctness of the doctrine enunciated in Hole v Barlow saying, in Wanstead Local Board of Health v Hill⁽²⁰⁶⁾ (1863), that the case had been 'mis-understood' and that it was still

'... an open question, which must one day be determined by the highest tribunal, whether one who carries on a business under reasonable circumstances of place, time, and otherwise, can be guilty of an actionable nuisance'.

The opportunity for the House of Lords to pronounce upon the question came in 1865 in the case of The St Helens Smelting Co v Tipping.⁽²⁰⁷⁾ The case was argued before the House of Lords for the appellants by the Attorney-General Sir Roundell Palmer (later Lord Selborne LC) on the basis that it involved the doctrine of Hole v Barlow.⁽²⁰⁸⁾ And although the court did not expressly consider that case, the tenor of its decision was to be taken to have established that Hole v Barlow had been overruled.⁽²⁰⁹⁾

Hole v Barlow evaluated

It has been said⁽²¹⁰⁾ of Hole v Barlow that it 'is hard to discover exactly what the judges in later cases objected to in Hole v Barlow, or why they regarded Bamford v Turnley as

(204) (1863) 13 CB (NS) 476.

(205) By Keating J (at 478). Erle CJ however observed (at 473) that he did not understand that in participating in the majority decision in Bamford v Turnley 'I was concurring to overruling of Hole v Barlow,' addint (at 477) that he thought that the judgment of Willes J in Hole v Barlow was 'sound'. Ironically, Byles J was a member of the court and concluded that the decision in Bamford v Turnley (2) was binding upon him.

(206) (1863) 13 CB (NS) 479 at 484.

(207) (1865) 11 HL Cas 642.

(208) See 11 HL Cas 642 at 645-6.

(209) See Shotts Iron Co v Inglis (1882) 7 AC 518 at 528; Reinhardt v Mentasi (1889) LR 42 Ch D 685 at 688.

(210) Winfield 'Nuisance as a Tort' (1930-2) 4 Camb LJ 189 at 200 n 68.

overruling it, or how much of Hole v Barlow is overruled.

In retrospect it seems that what was objected to in Hole v Barlow was not the principle there stated, but the manner in which it was stated. Byles J's proposition that that a nuisance was not actionable if carried out at a 'convenient and proper place' sought to express a principle that what constituted a nuisance should be determined by examining the circumstances in which it had occurred, and particularly, the circumstance of the locality. By this formula, Byles J was attempting to establish a technique for accommodating conflicting land-use activities (in casu the right of comfortable domestic habitation as against the right to carry on a trade or industry) and, to the extent that the Courts would subsequently evolve such a technique, his direction in Hole v Barlow can be seen to have pioneered this development.

The reasons for the subsequent disapproval of the direction thus lie not so much in the principle involved but the manner of its formulation. To some extent the force of Byles J invocation of the circumstance of locality was weakened by the fact that in Hole v Barlow the place where the defendant carried on his brick-burning could hardly be said to be a locality devoted to that purpose. The jury's decision that it was, seems to have been unexpected and wrong, something which probably suggested to the judges that it was undesirable to put the question of such a nature before a jury. Further, the later cases criticised the direction by Byles J as being expressed in ambiguous terms, especially on the grounds that the question of the significance of the locality as expressed in the formula of the place being a 'convenient and proper' place was not stated with the necessary precision,⁽²¹¹⁾ and

(211) This was the gist of the objection of the majority of the court in Bamford v Turnley (1861) 3 B & S 67 at 75 to the direction of Byles J:

'It may be observed that, in the language of this dictum [of Comyns as relied upon by Byles J] there is a want of precision, especially in the words "reasonable" and "convenient" which renders its meaning by no means clear. What is a "convenient place?" Does this expression mean,

(continued on the next page)

tended to suggest that the situation of the victim of a nuisance need not be considered,⁽²¹²⁾ thus establishing a principle of law which was dangerous and impolitic.⁽²¹³⁾

But for all its defects, Hole v Barlow is remarkable as the case which established the idea that a landowner's right to pure air was not an absolute right. It stated, albeit imperfectly, a principle that the right to pure air could be qualified, in appropriate circumstances, in such

(211) (continued)

as the Court understood it to mean ... the the place is proper and convenient for the purpose of carrying on the trade, or does it mean a place where a nuisance will be caused to another.'

Cf Bramwell B who said (at 87) he had 'a difficulty in putting a meaning on the words "convenient, reasonable and proper" as there used':

'"Convenient reasonable and proper" as regards the sufferer? No. "Convenient reasonable and proper" as regards the defendant? That cannot be, as that might place the nuisance close to the plaintiff to the entire loss of the power of dwelling in his house.'

(212) Cf the remarks of Stuart VC in Beardmore v Tredwell (1862) 3 Giff 683 at 699.

'In this [Byles J's] exposition of the law the words "convenient and proper" must be taken to subject to some qualification. Nobody will doubt that to the brick-burner the place may be convenient ... but it is clear that the mere circumstance of the place being convenient to one party is not enough to justify the continuance of the acts if they make the enjoyment of life and property uncomfortable to the other ... The words, therefore, "convenient and proper" must be used with reference to the situation of both parties.'

(213) In Bamford v Turnley 3 B & S 67 at 77 the majority of the Court said that the principle in Hole v Barlow

'would we think lead to great inconvenience and hardship because ... if the doctrine is to be maintained at all, it must be maintained to the extent that, however ruinous may be thd amount of the nuisance caused ... by carrying on an offensive trade, [a neighbour] is without redress if ... the place where the trade is carried on is a proper and convenient place for the purpose.'

Bramwell B too criticised Hole v Barlow on this ground saying (at 86) that since the decision 'claims have been made to poison and foul rivers, and to burn up and devastate land on the ground of public benefit. I am aware that the case did not decide so much, but I have a difficulty ... in saying that what has been so contended for does not follow from the principles enunciated in that case.'

a way as to allow a neighbouring landowner to use his property in a manner which diminished the purity of air without thereby becoming liable to an action for nuisance. In this it institutionalized what had been said two hundred and thirty years previously in Jones v Powell. To this end it applied a principle of reasonableness already developed in the case-law of nuisance, as the standard for determining the relative claims of landowners demanding, on the one hand, the right to carry on profitable trades upon their land and, on the other, the right to breathe pure, healthful air. All that remained was for the Victorian judges to extract from this principle the detailed rules necessary to elevate the principle into a technique and method for resolving the full range of endemic conflicts that arise from the condition of neighbourhood.

5. The Concept of Private Nuisance Re-formulated

5.1. In Bamford v Turnley (1862)

The decision of the Exchequer Chamber in Bamford v Turnley⁽²¹⁴⁾ did not consist merely in an over-ruling of Hole v Barlow. Rather the Court, in giving its reasons for not agreeing with the law as laid down in that case, took the occasion to expatiate on the concept of a private nuisance. In so doing the judges of the Exchequer Chamber presented a revision and re-formulation of the nuisance concept in terms which were to prove to be of seminal importance.

The seminal quality of Bamford v Turnley lies in the manner in which the judges adapted doctrines developed by the courts of equity to serve basic common law concepts relating to the nature of a landowner's natural rights of property. The pioneering character of the decision can be gathered from the fact that in only one of the three judgments delivered were any judicial precedents referred to and then the court found it necessary to only cite one case at common law and one in equity. For the rest the judgments consist in processes of ratiocination of first principles.

(214) (1861) 3 B & S 67.

The basic thrust of each of the judgments was to show that a landowner enjoyed no absolute natural right to salubritas aeris, but rather that the right (whose existence was not disputed) was qualified to a greater or lesser degree the extent of the limitation being determined empirically by means of a dialectical process which was essentially an adaptation of that developed in the courts of equity.

The judgment of the majority of the court

The judgment of Erle CJ, Keating, Williams JJ and Wilde B consisted mainly in an exegesis upon the placitum in Comyns' Digest relied upon by Byles J in Hole v Barlow.⁽²¹⁵⁾ The proposition there enunciated that it was no nuisance to carry on a trade in a 'convenient' place could be interpreted in two ways. One construction, and that which had been adopted in Hole v Barlow, was that a place 'may be "proper and convenient" for the carrying on of a trade, notwithstanding it is a place where the trade cannot be carried on without causing a nuisance to a neighbour'. Such a doctrine, the judgment observes, was untenable being both without authority⁽²¹⁶⁾ and contrary to policy.⁽²¹⁷⁾

On the other hand, the majority said,⁽²¹⁸⁾ if the placitum expressed a doctrine

'that a man may, without being liable to an action, exercise a lawful trade ... notwithstanding that it be carried on so near the house of another as to be an annoyance to him, in rendering his residence there less delectable or agreeable, provided the trade be so conducted that it does not cause what amounts, in point of law, to a nuisance to the neighbouring house',

(215) For which see n 185 above.

(216) 'This is a doctrine which has certainly never been judicially adopted in any case before that of Hole v Barlow and moreover ... it would be inconsistent with ... some of the cases ... especially ... Walter v Selfe' (at 76).

(217) Cf n 213 above.

(218) At 76.

then it established 'no more than what has long been settled law'. (219)

This dictum is noteworthy as the first explicit statement of a principle that a landowner might suffer interferences with his domestic comfort and convenience and yet not be entitled to succeed in an action for nuisance. (220) As such it is an adaptation of the Bractonian doctrine that certain nuisance harms were damnum sine injuria (221) to the case of interferences with a landowner's right to salubritas aeris. (222)

The judgment of Baron Bramwell

Bramwell B sided with the majority of the court in holding Hole v Barlow to have been incorrectly decided. His point of departure for this conclusion was the proposition that every landowner enjoyed a natural right of property to salubritas aeris, expressed and protected by the doctrine sic utere tuo ut alienum non laedas. (223) However the right was not absolute but subject to some exception. (224) These

(219) The 'settled law' was said to be found in Jones v Powell (1628) Hut 135 and a passage in Hawkins 1 Pleas of the Crown chap 75 s 10.

(220) The principle had been suggested in Jones v Powell (see the discussion of this case above 135-6) and it seems clear that the majority judgment was much influenced by that case.

(221) Cf above 42-4.

(222) The majority of the court did not advert to Bracton on the notion of damnum sine injuria. Their reference to Walter v Selfe (1851) 4 De G & Sm 315) and their obvious approval of that case suggests that the principle enunciated by them was probably a version of the equity doctrine that an injunction would not issue against a nuisance unless the nuisance was so substantial as to justify the interposition of a court of equity (cf above 239).

(223) 'The defendant has done that which ... would be actionable as being a nuisance to the plaintiff's habitation by causing sensible diminution of the comfortable enjoyment of it The plaintiff, then, has a prima facie case. The defendant has infringed the maxim sic utere tuo ut alienum non laedas' (at 82). Note the invocation of the criteria of equity in the words 'sensible diminution'.

(224) 'It is clear to my mind that there is some exception to the general application of the maxim mentioned' (at 83).

exceptions⁽²²⁵⁾ consisted in nuisances which were not actionable, and the point to be established was the reason why no action would lie.⁽²²⁶⁾

The relevant principle the learned Baron, significantly enough, 'deduced' to be, was that

'those acts necessary for the common and ordinary use and occupation of land and houses may be done, if conveniently done, without subjecting those who do them to an action.'⁽²²⁷⁾

He then explained the rationale of this principle in what is probably the most often-cited passage of any judgment in the modern law of nuisance:

'There is an obvious necessity for such a principle as I have mentioned. It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as a result of the ordinary use of his neighbour's land, he himself will create in the ordinary use of his own and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live.'⁽²²⁸⁾

(225) Bramwell B cited the cases of 'burning weeds, emptying cess-pools, making noises during repairs' as instances of such exceptions (at 83).

(226) 'The instances ... nevertheless may be lawfully done. It cannot be said that such acts are not nuisances, because, by the hypothesis, they are There must be, then, some principle on which such cases must be excepted' (ibid).

(227) Ibid. This principle, he went on to say,

'would comprehend all of the cases I have mentioned, but would not comprehend the present, where what has been done was not the using of land in a common and ordinary way, but in an exceptional manner - not unnatural or unusual, but not the common and ordinary use of land.'

(228) At 83-4. The idea that the rule might be characterized in terms of these homely maxims may have been suggested by Blackstone's characterization of the law of nuisance as applying the rule of 'gospel-morality, of "doing unto others, as we would they should do unto ourselves"' (cf above 230 n 4).

This classic formulation of a basic doctrine of modern nuisance law not only restates the principle (advanced in the judgment of the majority of the court) that certain nuisances to the comfort and convenience of habitations will be cases of damnum sine injuria but rationalises it on the basis of the reciprocal nature⁽²²⁹⁾ of the interferences which occur between neighbours. Perhaps more than anything else it is this dictum of Lord Bramwell that has made explicit the character of the nuisance concept as the law's device for regulating relationships between neighbours.

The judgment of Chief Baron Pollock

Pollock CB dissented from the opinion of the rest of the court that Hole v Barlow was wrongly decided. The gist of his judgment was that it was a proper approach to the question whether a nuisance existed to enquire whether what was done was done in a convenient place and was a reasonable use of land. The propriety of this approach rested upon empirical considerations which the chief baron formulated in language redolent of the dialecticism of any equity decision:

'I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances - the place where, the time when, the alleged nuisance, what, the mode of committing it, how, and the duration of it, whether temporary or permanent, occasional or continual - as to make it impossible to lay down any rule of law applicable to every case....'(230)

From this it followed, he went on,⁽²³¹⁾ that it cannot be said as a general proposition that anything which under any circumstances lessens comfort or endangers health or safety 'must necessarily be an actionable nuisance':

(229) The model for this perception of the character of nuisance harm was the equitable doctrine of the 'balancing of interests' in enjoining nuisances (see above 240). For an analysis of the reciprocal nature of nuisances see below 428 n 45.

(230) At 79. Cf the emphasis on the need for a consideration of the 'circumstances' of a nuisance for purposes of deciding whether it was enjoinable by Lord Cranworth in Attorney-General v Sheffield Gas Consumers Co (1853) (cited above 238).

(231) Ibid.

'That may be a nuisance in Grosvenor Square which would be none in Smithfield market,⁽²³²⁾ that may be a nuisance at midday which would not be so at midnight, that may be a nuisance which is permanent and continual which would be no nuisance if temporary or occasional only.'

What all of this implied, the Chief Baron continued, was recognition of the fact that the law of nuisance must involve recognition of a system of compromises. As he put it:⁽²³³⁾

'The compromises that belong to social life, and upon which the peace and comfort of many depend, furnish an indefinite number of examples where some natural right is invaded, or some enjoyment abridge, to provide for the more general convenience or necessities of the whole community.'

Having so formulated a general doctrine of the concept of nuisance, Pollock CB turned to the question of the principle of reasonable use of land as a defence against an allegation of nuisance. He rejected⁽²³⁴⁾ the construction placed upon this concept by the majority of the court:

'If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and be a reasonable exercise of some apparent right, or a reasonable use of the land, house or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained....'

The test of whether a user of land was reasonable, he went on,⁽²³⁵⁾ meant no more than that a jury would be required to find

'that it was reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done'.

(232) It may be worth noting that this classic form of allusion to the doctrine of locality in nuisance law was anticipated by Byles J in Hole v Barlow where in the course of argument he put it to counsel that (4 CB (NS) 334 at 340)

'A swine-stye might not be considered a nuisance in Rethnal Gree : but it certainly would be so in Grosvenor Square'.

(233) At 80.

(234) At 80-1.

(235) At 81.

This eliminated the difficulty raised in the judgment of the majority of the court

'because it cannot be supposed that a jury would find that to be a reasonable act by a person which produces any ruinous effect upon his neighbours'.

Chief Baron Pollock, while differing from the rest of the court on the specific question of the correctness of the decision in Hole v Barlow, supplemented the views of his brethren as to the true nature of the nuisance concept. His particular contribution was the articulation of the principle that the decision whether a nuisance was actionable (in the sense postulated in the other judgments) fell to be determined by the proper evaluation of a set of factual elements, the 'circumstances' of the case. In due course the courts evolved from this principle a dialectical technique for answering the basic question of whether, in given circumstances, a landowner should succeed in his action for nuisance or not.

5.2. St Helens Smelting Co v Tipping (1865)

Introduction

Said to be 'arguably the most important nuisance case of the [industrial] era',⁽²³⁶⁾ the decision of the House of Lords in The St Helens Smelting Co v Tipping approved, elaborated and institutionalized the concept of private nuisance formulated in Bamford v Turnley.

Appropriately in a case of this strategic importance in the development of the nuisance concept, there were elements in its facts which symbolised the forces which had driven the judges of the mid-Victorian era to revise traditional concepts of nuisance law. The setting was the archetypal industrial town, the appalling St Helens whose poisoned atmosphere, polluted waters and blighted vegetation were even then the subject of a parliamentary enquiry.⁽²³⁷⁾ The defendant company carried

(236) Brenner op cit (n 177 above) 413.

(237) See above 248 n 75.

on activities of a type which were a prime cause of this state of affairs.⁽²³⁸⁾ The plaintiff⁽²³⁹⁾ represented the older agrigarian order, being the owner of a country estate, a remnant of what was once the holding of the local lords of the manor.⁽²⁴⁰⁾

The nuisance complained of was the large quantities of 'offensive, noxious, poisonous and unwholesome smokes, stinks, stenchses gases and other vapours and noxious matters' issuing from the smelting works which 'spread and diffused themselves over, upon, into, through and about' the plaintiff's property, destroying the 'hedges, trees, shrubs, fruits, crops and herbage', and causing the plaintiff his servants, cattle and livestock to become 'disordered and sick', thus preventing the plaintiff's 'beneficial and healthy' use and occupation of the premises.

Tipping instituted his action in the court of Queen's Bench in 1863. The action⁽²⁴¹⁾ was tried by Mellor J before a jury who found there to be a nuisance and awarded damages to the sum of £361 18 1½. The defendants sought a new trial on the grounds of a misdirecton to the jury. The Court of Queen's Bench (Cockburn CJ, Wightman, Blackburn and Mellor JJ) refused the rule, with leave to appeal.⁽²⁴²⁾ The defendant appealed to the court of Exchequer Chamber (coram Erle CJ, Pollock CB, Channell, Bramwell and Pigott BB, Byles, Keating JJ) which affirmed the decision of the Queen's Bench.⁽²⁴³⁾

(238) The St Helens Smelting Co was the first copper factory to be established in the district after 1854. Like the others already there it produced highly acidic vapours, containing sulphur dioxide. See Barker and Harris St Helens 345.

(239) William Whitaker Tipping, 'a successful manufacturere from Wigan' (Barker & Harris op cit 346).

(240) Tipping's estate 'Bold Hall' consisted of a 'mansion' and 1300 acres. The Bolds of Bold had been lords of the manor and were one of the great families of the district. Tipping bought Bold Hall, a remnant of the original estate (Barker & Harris op cit 346) in 1860 (see Tipping v St Helens Smelting Co (1866) LR 1 Ch App 66).

(241) Tipping v St Helens Smelting Co (1863) 4 B & S 608 at 610; 35 LJ QB 66.

(242) Tipping v St Helens Smelting Co (1863) 4 B & S 608; 35 LJ QB 70.

(243) Tipping v St Helens Smelting Co (1864) 4 B & S 616; 35 LJ QB 71.

The defendants then appealed to the House of Lords.⁽²⁴⁴⁾ The judges were summoned to attend the hearing, Blackburn, Shee, Willes and Keating JJ, Martin and Pigott BB being present. After hearing the Attorney-General, Sir Roundell Palmer, for the defendant, they advised that the direction of Mellor J at nisi prius was correct. The House then affirmed the decisions of the courts below, Lords Westbury LC, Cranworth and Wensleydale each delivering a judgment.

Five days later Tipping filed a bill in chancery for an injunction to restrain the defendants from using their works so as to injure his estate, which was granted. An application by the defendants to have the bill discharged was later refused.⁽²⁴⁵⁾

The company thereupon closed down the works, moving their operations to a new locality.⁽²⁴⁶⁾ Ironically the abandoned works were later to be used for the manufacture of 'patent manure'.⁽²⁴⁷⁾

The judgments in the St Helens Case

(1) At Nisi Prius

The various stages of the litigation of the St Helens case turned essentially on the question whether Mellor J had correctly expounded the law of private nuisance to the jury which found the defendants' works to be an actionable nuisance.

In his direction to the jury Mellor J had deliberately refrained from stating the law in terms of the principles laid down in Hole v Barlow⁽²⁴⁸⁾ and purported to state the law in

(244) St Helens Smelting Co v Tipping (1865) 11 HL Cas 642; 35 LJ QB 71.

(245) Tipping v St Helens Smelting Co (1866) LR 1 Ch App 66.

(246) Barker & Harris op cit 346.

(247) Barker & Harris op cit 346 n 8.

(248) At the trial counsel for the defendants had sought to persuade him to direct the jury in accordance with the judgment of Pollock CB in Bamford v Turnley. Since this as we have seen (above 291) substantially upheld the decision in Hole v Barlow, the effect of counsel's contention seems to have been to seek to persuade the judge to apply Hole v Barlow. See Tipping v St Helens Smelting Co (1863) 4 B & S 608 at 610.

accordance with the decision of the majority of the court of Exchequer Chamber in Bamford v Turnley.⁽²⁴⁹⁾ Since his direction was consistently and expressly approved by each of the courts that considered it, it has a particular significance as an exposition of the professional understanding of the version of nuisance law laid down in Bamford v Turnley.

Mellor J began by observing that a landowner has 'certain rights of property, and within the limits of those rights he may do any act which is not unlawful'.⁽²⁵⁰⁾ He then equated the unlawfulness of land-use activity with it 'convenience',⁽²⁵¹⁾ and added that 'convenient' meant

'that it must be plain that he will not do an actionable injury to another, because a man may not use his own property so as to injure his neighbour.'⁽²⁵²⁾

This being so, he went on, it followed that

'if a man by an act ... sends over his neighbour's land that which is noxious and hurtful to an extent which sensibly diminishes the comfort and existence of the property, that is an actionable injury'.⁽²⁵³⁾

That being the law, he went on, when the jury came to 'the question of facts' there was 'no doubt [that] you must take into consideration a variety of circumstances':⁽²⁵⁴⁾

'In considering whether or not a man's property has been sensibly injured by the actions of another person on his own land, of course you will consider the place, the circumstances, and the whole nature of the thing.'⁽²⁵⁵⁾

(249) See 4 B & S 608 at 610.

(250) (1866) 35 LJ QB 66 at 67.

(251) 'When I say unlawful, I mean any act which is not wrong: he may erect a lime-kiln if it is in a convenient place....' (ibid).

(252) Ibid. In this connection he also pointed out to the jury that a landowner whose smoke, odours or vapours came upon a neighbour's land 'is not doing an act on his own property only, but he is doing an act on his neighbour's property also, because every man by common law has a right to pure air....'

(253) At 68.

(254) At 68.

(255) Ibid.

Thus the jury should consider the degree to which the noxious fumes have come upon the plaintiff's lands and whether they emanated from the defendant's works. In considering this he said, citing authorities,⁽²⁵⁶⁾ they should consider the 'locality' the 'work'. The significance of these considerations he explained to the jury in words which were to receive explicit approval by Lord Wensleydale in the House of Lords⁽²⁵⁷⁾

'The defendants say, If you do not mind you will stop the progress of works of this description. I agree that this is so because, no doubt, in the county of Lancaster, above all other counties, where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so. Everything must be looked at from a reasonable point of view; therefore the law does not regard trifling and small inconveniences, but only regards sensible inconveniences, injuries which sensibly diminish the comfort, enjoyment or value of the property which is affected.'

The judge then adverted to the nature of the St Helens locality and the evidence of the large scale destruction of the vegetation thereabouts as a result of the atmospheric pollution caused by the manufactories in the area, and concluded by instructing the jury to decide whether the plaintiff's property had been sensibly damaged and whether that damage was attributable to the defendant's works.

(2) Queen's Bench and Exchequer Chamber

The defendants' application for a new trial was based on the contention that Mellor J had misdirected the jury, especially in relation to the significance of the locality

(256) These were a note in a 'very admirable book', which he did not identify, and a judgment of Erle CJ also not identified. These stated, respectively, 'whether a nuisance has been caused by the defendant at all, the nature of the locality, the work, and every other fact in the case, must be taken into consideration'; and, 'The time, the locality and so on, are all circumstances to be taken into consideration upon the question of fact whether an actionable injury has been occasioned....'

(257) See below 300.

as establishing that the defendants were entitled to carry on their trade in an area such as St Helens.

The court of Queen's Bench rejected these contentions, citing Bamford v Turnley, and holding that in terms of that decision it would have been a misdirection to put it to the jury whether the defendant's activities had been carried on in a suitable and convenient place. The court of Exchequer Chamber too rejected the defendant's arguments as to the misdirection without giving particular reasons. (258)

(3) The judgments in the House of Lords

Like the decision of the Exchequer Chamber in Bamford v Turnley, the decision of the House of Lords is remarkable for the fact that none of the earlier cases in nuisance were cited or discussed, Lord Westbury LC in particular being content to base his decision upon first principles and, indeed, upon principles formulated for the first time by him. He began (259) his judgment by expounding a proposition not previously advanced in any nuisance case. There was, he said, a distinction to be made between actions brought for nuisance on the ground that there had been a 'material injury to property' and one brought on the ground that the nuisance caused 'sensible personal discomfort'.

In the latter case, he went on, the position was that if

'a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce; also for the enjoyment of property, and for the benefit of the inhabitants of the town and the public at large'.

(258) Pollock CB however took the opportunity to make it plain that he adhered to the dissenting views expressed by him in Bamford v Turnley and that, in concurring in the present decision, he was doing so only out of deference to authority: 'I am compelled to say that which I now pronounce to be the law, not entertaining that opinion' (35 LJ QB 71).

(259) (1865) 11 HL Cas 642 at 650.

A man, he added 'has no ground for complaint' where a trade is carried on next door to him 'in a fair and reasonable way' even if 'there may arise much discomfort from the trade....'

But, his lordship continued, where the nuisance complained of caused 'material injury' very different considerations arose. In such a case

'the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours would not apply to the circumstances and immediate result of which is sensible injury to the value of the property'.

Lord Westbury then turned⁽²⁶⁰⁾ to apply the principles so formulated by him to the facts of the present case. The defendant's case was, he said, that their works were carried on in a neighbourhood more or less devoted to manufacturing purposes of a similar kind and thus could not be said to be a nuisance since they were carried on in 'a fit place'. This contention he rejected, obviously having the principle enunciated by Byles J in Hole v Barlow in mind; the defendant's argument meant, he said, that their works could be 'carried on with impunity, although the result may be the utter destruction, or the very considerable diminution of the value of the Plaintiff's property':

'My Lords, I apprehend that that is not the meaning of the word "suitable" or the meaning of the word "convenient" which has been used as applicable to the subject. The word "suitable" unquestionably cannot carry with it this consequence; that a trade may be carried on in a particular locality, the consequence of which trade may be injury and destruction to the neighbouring property'.

For this reason he held that the decisions of the courts not to grant a new trial were correct and should be affirmed.

Lord Cranworth⁽²⁶¹⁾ concurred. In a short judgment he quoted with approval a passage from the direction of Mellor J, cited in an unreported case tried by him when in the court of Exchequer⁽²⁶²⁾ and uttered the following dictum (which seems

(260) At 651.

(261) At 652.

(262) For which see 338 n 131.

tacitly to approve the principle enunciated by Pollock CB in Bamford v Turnley :

'... it is extremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort and enjoyment of property'.

Lord Wensleydale agreed 'in opinion' with both of the previous judgments.⁽²⁶³⁾ He cited a passage⁽²⁶⁴⁾ from the direction of Mellor J to the effect that everything must be looked at from a reasonable point of view in which, he said, 'everything is included' and could not have been 'more correctly laid down'. He thus agreed that the appeal ought to be dismissed.

Evaluation

The decision of the House of Lords in the St Helens case was significant in two respects. In the first place, through its approval of Mellor J's statement of the law it implicitly gave its imprimatur to the formulation of the concept of nuisance enunciated in Bamford v Turnley. In the second place, it added to that formulation. The principle enunciated by Lord Westbury that there was a distinction between nuisance actions involving material harm to property and those involving sensible personal discomfort was novel and without precedent. It introduced into the concept of private nuisance a structural component which not only divided nocumenta into two main categories but which also postulated different rules for determining their actionability. Nuisances involving material harm to property were actionable, as it were, on the doctrine of res ipsa loquitur;⁽²⁶⁵⁾ those involving personable discomfort were actionable only if found to be unreasonable according to contextual considerations of the type enunciated by Pollock CB in Bamford v Turnley.⁽²⁶⁶⁾

(263) At 653.

(264) See above 297.

(265) See below 327 n 92.

(266) See, further, below 327-8.

Expressed another way, what Lord Westbury did in the St Helens case was to devise a compromise between the older concept that, in nuisance actions, once damage was proved liability followed, and the newer concept, first advanced in Hole v Barlow,⁽²⁶⁷⁾ that a landowner might be without an action even though he had suffered what was technically a nuisance. Where the nuisance affected proprietary interests liability followed according to the old principle;⁽²⁶⁸⁾ where it affected merely the personal sensibilities of the landowner (as opposed to his proprietary interests) liability followed according to the new principle.⁽²⁶⁹⁾

(267) Cf Brenner's remark (op cit (n 177) 415) that what 'the Lords did in the St Helens case was not to bury Hole v Barlow, as they seemed to be doing, but rather to apply it discriminatorily'.

(268) Because, as McLaren ('Nuisance in Canada' Studies in Canadian Tort Law 347) suggests the 'stark fact of actual material loss is, in the judges' minds, sufficient to outweigh the relevance of other factors'.

(269) Whose less absolute standards as to the degree of harm which was required before a nuisance became actionable at law, allowed for industrial and commercial progress at the price of sensible personal comfort of human beings, especially those living in industrial localities.

CHAPTER SIX

THE REVISED CONCEPT OF PRIVATE NUISANCE (1865-1900)

I THE REVISED CONCEPT

1. Introduction

The law of private nuisance originated in attempts to ensure to landowners the convenience of the amenities of landholding. Its realm was the somewhat elusive area falling between assured physical occupation of land (protected by analogous remedies derived from the Assize of Novel Disseisin) and the freedom from physical invasions of the land (protected by the trespass action). The private nuisance concept evolved here mainly by way of an elaboration upon the amenities of landownership, focusing particularly on those attached to the use of land for domestic residential purposes.

By the dawn of the nineteenth century it had become apparent that this pre-occupation of private nuisance law was tending to inhibit the development of land for other purposes, notably those of industry and commerce. While earlier generations of English lawyers had regarded this consequence with indifference, the ethos of Victorian England no longer permitted this luxury. The Victorian judges were ineluctably driven to seeking some method by which they could sustain the claim of a landowner to enjoy the amenities of his habitation while at the same time permitting his neighbour to devote his land to other and different uses of a lawful and proper nature. In Hole v Barlow, Bamford v Turnley and the St Helens case they devised such a method, predicated upon a principle of mutual and reciprocal limitation of the rights to claim particular amenities of land holding.

In this guise the private nuisance concept came to be a central feature of the system for regulating and controlling the use of land in the interests of the social and economic advancement of English society.⁽¹⁾ It fulfilled this role

(1) The other major component of the system was the public nuisance concept, particularly as elaborated by the

for something like eighty years before being supplanted in the early decades of the twentieth century by a new, more vigorous system of land-use controls implemented through the administrative agencies of the State.⁽²⁾

This chapter is devoted to an examination of the concept of private nuisance in this period, seeking particularly to reveal how the nuisance concept had been revised and adapted by the Victorian judges so as to serve as an instrument for controlling the land use activities of adjoining landowners.

2. The Rationale of the Revised Concept of Private Nuisance

The major contribution of the Victorian judges to the evolution of the concept of private nuisance was their perception of the nature of the relationship which the fact of physical neighbourhood imposed upon adjoining landowners,⁽³⁾ and their adoption of the nuisance concept in a way which recognised and gave effect to the implications and consequences of this relationship.

(1) (continued)

Nuisance Removal and Public Health Acts of the first half of the nineteenth century (see 195ff) which represent the sources of state intervention in the field of land-use regulation and controls. See generally McAuslan Land, Law and Planning 33ff.

(2) For this development, see below 417-8.

(3) The nature of this relationship is examined below at 428. Its main features may be said to be the fact that by reason of the physical vicinity of neighbouring land units, the use-activities carried out on each unit have a tendency to 'spill-over' onto the adjoining units so affecting and influencing the manner in which the individual landowners can in fact use and enjoy their land. Because adjoining land units are in the state of physical neighbourhood these 'spill-over' effects are reciprocal in their impact thus leading to the consequence that to attempt to regulate the activities of one owner is to affect the activities of the other. The concept of private nuisance regulated land-use activities especially by way of the enforcement of the maxim sic utere tuo ut alienum non laedas. The Victorian judges perceived that this maxim operated only unilaterally (ie to the advantage of the landowner invoking it); the revised concept of private nuisance evolved by them operated bilaterally, seeking to regulate the reciprocating spill-over effects in a way which simultaneously gave due recognition to the interests of neighbouring landowners.

It is fair to say that the exact nature of the neighbour relationship was only vaguely perceived by the Victorian judges. They appreciated that a landowner in using his land in a sense was also using that of his neighbour.⁽⁴⁾ They saw also that, as a result, the nuisance remedy by enabling one landowner to complain of and suppress the activities of his neighbour was an instrument by which he could control the uses to which the neighbour might put his land.⁽⁵⁾

These perceptions led them to a pragmatic statement of the nature of the neighbour relationship as a social phenomenon, a consequence and feature of the nature of human existence in a social order. They spoke of the 'compromises that belong to social life',⁽⁶⁾ of the fact that 'the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort'.⁽⁷⁾ These compromises created 'a rule

(4) Cf Mellor J in Tipping v St Helens Smelting Co (1865) 33 LJ QB 66 at 67:

'When [a landowner] sends on the property of his neighbour noxious smells, or smoke or vapours, then he is not doing an act on his own property only, but he is doing an act on his neighbour's property also, because every man by common law has a right to the pure air....'

(5) Cf Knight Bruce VC in Walter v Selfe (1851) 4 De G & Sm 315 at 324:

'[There are] notorious instances of various kinds in which the rights of a neighbouring occupier ... prevent a man from using his own land, as, but for those rights, he profitably and usefully and lawfully might. Nothing is better recognised than that a man may be disabled from building on his own land as he may wish by reason of his neighbour's rights'.

See too Cresswell J in Smith v Kenrick (1849) 7 CB 515 at 565.

(6) See Pollock CB in Bamford v Turnley (1862) 3 B & S 67 at 80:

'The compromises that belong to social life, and upon which the peace and comfort of it mainly depend, furnish an indefinite number of examples where some apparent natural right is invaded, or some enjoyment abridged, to provide for the more general convenience or necessities of the whole community'.

(7) See Erle CJ in Cavey v Ledbitter (1863) 14 CB (NS) 471 at 476:

'the affairs of life in a dense neighbourhood cannot be carried on without mutual sacrifices of comfort;

of give and take, live and let live,⁽⁸⁾ whose justification was the public advantage, the need to advance the enjoyment of property,⁽⁹⁾ trade and industry.⁽¹⁰⁾

Given these premisses the judges in Hole v Barlow, Bamford v Turnley and the St Helens case sought to express the nuisance concept in terms which not only explicitly recognised the reciprocal nature of neighbour relations but which provided the conceptual framework for applying the law of nuisance in a way which gave effect to the principle of evaluating the reciprocal interests of both parties in a nuisance action.

To this end they had before them the model of the calculus of the balancing of conveniences developed by the courts of equity. But, as judges of common law, their task was to describe this model in terms suited to the methodology of the common law and in a way which preserved the integrity of the historic origins of the nuisance concept in the Assize of Nuisance and the action on the case for Nuisance.

(7) (continued)

and that, in all actions for discomfort, the law must regard the principle of mutual adjustment....'

In Brand v Hammersmith and City Railway Co (1866) LR 2 QB 223 at 247 the same judge spoke of the fact that between neighbours 'proximity necessitates mutual forbearance'.

(8) See Bramwell B in Bamford v Turnley (supra) at 84 (cited above 290).

(9) See especially the reasoning of Bramwell B in the passage cited in the previous note.

(10) Cf Willes J in Hole v Barlow (1858) 4 CB (NS) 334 at 345:

'The common-law right which every proprietor of a dwelling-house has to have the air uncontaminated and unpolluted, is subject to this qualification, that necessities may arise for an interference with that right pro bono publico, to this extent, that such interference be in respect of a matter essential to the business life'.

See too Lord Westbury in the St Helens case (1865) 11 HL Cas 642 at 650:

'If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property and for the benefit of the town and of the public at large'.

Possibly the most successful effort at producing an appropriate formulation of the nuisance concept was provided in the famous undelivered judgment prepared by Sir William Erle in the case of Brand v Hammersmith and City Railway Co ⁽¹¹⁾ (1867). The case involved the question whether the applicant was entitled to compensation for the 'injurious affectation' of his premises by the noise, smoke and vibration caused by the defendant's railway. In order to succeed it was necessary for the plaintiff to establish that the noise etc amounted to a nuisance actionable at law. In considering whether that had been established Erle CJ dilated upon the nature of the concept of nuisance, obviously having in mind the implications of the decisions in Hole v Barlow; Bamford v Turnley and the St Helens case. ⁽¹²⁾

Erle CJ began ⁽¹³⁾ by formulating 'the usual rights of property' between 'adjoining owners':

'Each owner, as against his neighbour, has a right to cause some noise, smoke and vibration on his own land, and is not liable to an action if part of such noise, smoke and vibration extends to his neighbour's land'. ⁽¹⁴⁾

(11) As Erle CJ he presided at the hearing of the case. However before the decision of the court was announced he resigned his position, with the result that his judgment did not form part of the formal record of the case. It is however reproduced as an appendix to the judgments delivered. See (1867) LR 2 QB 233 at 246. Pollock CB too was a member of the court but delivered no judgment.

(12) He noted (at 248) that the plaintiff 'had to maintain the same point as the plaintiff maintained in Hole v Barlow'. He also referred specifically to that decision 'and the cases in sequel thereto' as exemplifying what he had to say (see at 247). Cf the judgment of Channell B (at 236) who treated the harm as an actionable nuisance 'within the ordinary definition and the rule to be deduced from the recent case of Bamford v Turnley, reviewing the decision in Hole v Barlow'. Montague Smith J too regarded the facts as establishing an actionable nuisance on the authority 'not only of the old cases, but in the following recent decisions: Bamford v Turnley; St Helens Smelting Co v Tipping' (at 240).

(13) At 247.

(14) Cf the observation of the majority of the court in Bamford v Turnley that 'a man may, without being liable to an action, exercise a lawful trade ... notwithstanding it be carried on so ... as to be an annoyance ... provided the trade be so conducted that it does not cause what

The neighbour's cause of action where his land was so invaded would lie, if at all

'in the excess of the damage beyond what is considered reasonable, after taking into account the circumstances of time and place, and quantity of annoyance, and the relation of adjoining properties to each other'.

This formula contains three main components. The first is the element of damage which had a dual function. It served, in the first place, to mark off those instances in which a landowner suffered some effect upon his own interests brought about by an activity of a neighbour which was of such a type or character as not to deserve the redress of the law. In other words it indicated those harms which were damnum sine injuria. Although expressed so as to emphasise the matter of the harm caused, the element necessarily tended to put in issue the question of the nature of the act causing the harm and required a determination whether the act was unlawful or not. In the second place the damage element came to serve as one of the considerations to be taken into account in considering whether the conduct of the defendant was unreasonable.

The second component in the formula is the test of reasonableness. In essence it called upon the judicial officer to determine the social costs of the activities which had brought about the damage and to consider which of these activities should be preferred in terms of the broad social interests involved. In particular it called for an evaluation of the harm suffered by the plaintiff and a balancing of this against the utility and propriety of the conduct of the defendant which had brought about the harm.

The third component in this formula is the factor of the 'circumstances of the case'. This factor seeks to identify

(14) (continued)

amounts, in point of law, to a nuisance....' (see above 288). Cf also the dictum of Erle CJ in Smith v Thackerah (1866) LR 1 CP 564 that a person 'may build a chimney ... and the smoke from it may annoy you, or he may carry on a trade next door ... the noise of which may be inconvenient; but unless the smoke or noise be such as to do you appreciable damage, you have no right of action against him for what is a lawful act'.

and elaborate the particular considerations which were to be thrown onto the balance established by the test of reasonableness.

2. The Components

2.1. Damage

Historically the award of a nuisance remedy had always been dependant upon proof that the plaintiff had suffered damage of some sort or another.⁽¹⁵⁾ Since Bracton's time it had been equally clear that it was not damage per se which entitled the plaintiff to his remedy but rather damage of a certain kind or character.⁽¹⁶⁾ This latter principle of course enabled the Victorian judges to propound and justify their idea that the actionability of a nuisance was to be determined by the rule of give and take, live and let live, insofar as it held that a landowner was required to endure certain types of damage as part of the cost of social and economic advancement.

(a) Unlawful Damage

In essence, the principle relied upon in Bamford v Turnley and the St Helens case was that a plaintiff could only succeed in a nuisance action where the damage suffered by him was of a type which the law judged to be unlawful.⁽¹⁷⁾

Damnum Sine injuria

In principle the lawfulness or otherwise of nuisance damage fell to be determined by considerations of policy. The

(15) See above 40.

(16) See above 42.

(17) Cf the remarks of Erle J in Bonomi v Backhouse (1859) EB & E 622 at 643:

'As a general principle, it is difficult to conceive a cause of action from damage when no right has been violated, and no wrong has been done. The maxim sic utere tuo ut alienum non laedas is mere verbiage. A party may damage the property of another where the law permits; and he may not where the law prohibits...'

question of policy of course was that of the extent to which the courts should regard the external effects of land-use activities as being the subject of actions for nuisance. To a large extent the basic policy of the law had been laid down in the seventeenth century in the form of decisions that a landowner could not complain of damage in the form of interferences with privacy or prospect or other matters of 'delight'.⁽¹⁸⁾

De Minimis non curat lex

General legal policy also required that persons should not complain of injuries which were slight or trivial. This doctrine was expressed by the maxim de minimis non curat lex, and there is evidence that the courts had applied this principle in relation to nuisance actions.⁽¹⁹⁾ It is found expressed in early cases of nuisances to navigation⁽²⁰⁾ and in the comic case of Evans v Lisle⁽²¹⁾ (1836) where Lord Denman observed that

'There are many nuisances which the law will not recognise; as by building so as slightly to obstruct another's light, or shut out his view of a fine prospect, and the like. You must be satisfied that the plaintiff has sustained some substantial damage'.

'Material' harm

The courts of equity had applied an analagous principle in considering the award of injunctions, holding that the injunction would not issue unless the plaintiff had suffered

(18) Cf above 117. For the attitude of the nineteenth century judges to these matters see below 408, 410.

(19) See Brenner 'Nuisance Law and the Industrial Revolution' (1974) 3 Jo Legal Studies 403 at 415: 'There has been an informal rule in English law from earliest times, and it is a rule of utterly unimpeachable wisdom, that petty and inconsequential grievances be summarily dismissed should some ill-advised and overly litigious plaintiff carry his complaint to court'.

(20) See above 189 n 119.

(21) (1836) 7 Car & P 562.

'material' harm.⁽²²⁾ The common law judges in Bamford v Turnley and the cases descended therefrom enunciated a similar doctrine to the effect that nuisance harm was actionable only if it were shown to be material,⁽²³⁾ justifying this principle by way of a tacit appeal to the de minimis principle.⁽²⁴⁾

In fact the proposition that only 'material' nuisance harm gave a cause of action amounted to a principle that a landowner who suffered an invasion of his natural rights of property could not rely upon the mere fact of the invasion of his right as a basis for seeking redress.⁽²⁵⁾ Rather, the

(22) See above 236-7.

(23) See Mellor J in the St Helens case (cited above 296); Erle CJ in Smith v Thackerah (1866) LR 1 CP 564 at 566, Brand v Hammersmith and City Railway Co (1866) LR 1 QB 223 at 246. Cf Blackburn J in Scott v Firth (1864) 4 F & F 349 where he told a jury that noise and vibrations would be a nuisance if they produced 'not merely a nominal, but ... a sensible and real damage'.

(24) The classic exposition of the significance of the notion of materiality of the harm in cases of common law nuisance was provided in Fleming v Hislop (1886) 11 AC 686. There Lord Selborne LC observed (at 690) that the

'word "material" is of great importance there - it excludes any sentimental, speculative, trivial discomfort or personal annoyance of that kind, a thing which the law may be said to take notice of and have no care for'.

Lord Bramwell (at 694) (as he then was) explained its role as being

'to explain to a jury what it is which would constitute a nuisance as distinguished from something that which might, indeed, be perceptible, but not of such a substantial character as to justify the interference of the court or allow the maintenance of an action'.

(25) There was clear authority in the earlier cases that a plaintiff could succeed in a nuisance action on proof of a mere invasion of his common law rights without having to prove actual damage suffered (see Baten's case (1610) 9 Co Rep 53b), Fay v Prentice (1845) 1 CB 828), the law presuming the damage from the violation of the right (Embrey v Owen (1851) 6 Exch 353 at 368). In actions for interferences with easements this continued to be the rule in order to guard against prescriptive abrogation of the easement, see Harrop v Hirst (1868) LR 4 Exch 43.

rule was now that in addition to the breach of right he had to show that he had suffered harm or damage which was of a character or degree that justified the award of a nuisance remedy.⁽²⁶⁾ Such an approach was of course consistent with the basic rationale of the revised concept of a nuisance, enabling the courts to look to the rule of give and take, live and let live as determining whether a nuisance was actionable rather than having to hold that a nuisance existed merely because a right had been violated, however slightly.

Further, it seems plain that the judges conceived of the materiality of the harm as a flexible concept to be used in arriving at value judgments on the conflicting claims between neighbours. Certainly the idea of what constituted a 'material' harm was sufficiently vague to allow it to be used this way⁽²⁷⁾ and, as a reading of the cases shows, the courts applied the materiality test in a way which considerably exceeded the limits suggested by the de minimis doctrine.⁽²⁸⁾

(b) Lawful Harm

The question of the lawfulness of nuisance damage sometimes fell to be considered in the light of an argument that the plaintiff had no cause of action since the defendant was lawfully entitled to inflict harm upon the plaintiff. This argument took two forms: (i) that the nuisance damage was authorized by statute⁽²⁹⁾ or (ii) that the defendant had acquired a prescriptive right to inflict the harm upon the plaintiff.

(26) The question of exactly what type of damage would so qualify fell to be determined under the test of reasonableness. See below 329.

(27) As Sir William Erle pointed out in Brand's case (1866) LR 2 QB 223 at 247 when he noted that 'there is no standard by which to measure degrees of annoyance ... [T]he degree of tolerance to be required is measured by the sensibility to feelings of delicacy of the tribunal which has to decide the case, and cannot be foreseen till that decision is given'.

(28) See Brenner op cit (n 19) at 415ff who by examining the nature and extent of the pollution of the industrialized localities suggests that the courts tolerated interferences with landowners' rights to a healthy environment that went far beyond the sort of limits envisaged by the de minimis principle.

(29) And hence rendered not unlawful: see below.
(continued on the next page)

(i) Statutory authorization

According to notions of constitutional government prevailing at the time, the only manner in which entrepreneurs could set about developing the new modes of transportation - canals, railways, tramways - or other utilities - gas-works, electricity - was by parliamentary sanction granted by way of a private act.⁽³⁰⁾ Of related importance were the private 'Improvement' Acts which, as we have seen, became the usual method of suppressing public nuisances in towns or localities. The purpose of this type of legislation was to empower local authorities or private entrepreneurs to undertake the works and activities specified in the act. Since these operations, in the nature of things, touched upon or interfered with private rights the question soon arose whether the owner of private property had recourse in law for injuries suffered as a result of acts done under the enabling legislation.

In the field of nuisance law this question first arose⁽³¹⁾ crisply in relation to the nuisances caused by railways. The seminal case was R v Pease (1832) concerning, appropriately enough, nuisances perpetrated by the owners of the world's first passenger railway service in carrying on their enterprise.⁽³²⁾ Pease's case, which was a case of public nuisance, was relied upon in Vaughan v Taff Vale Railway Co (1860) in

(29) (continued)

Cf Channell B in Stockport Waterworks Co v Potter (1861) 1 H & N 160 at 167:

'In R v Pease what was complained of was a legalized nuisance'.

(30) Cf Holdsworth 11 HEL 615-6, and, generally, Clifford A History of Private Bill Legislation. See too Linden 'Strict Liability, Nuisance and Legislative Authorization' (1966) 4 Osgoode Hall LJ 196.

(31) The matter had arisen earlier in a related area in connection with interferences with private property in the course of works undertaken in terms of local improvement acts: Leader v Moxton (1773) 3 Wils KB 461, British Cast Plate Manufacturers v Meredith (1792) 4 TR 794.

(32) (1832) 4 B & Ad 30. For the facts of the case see above 172 n 62. The court construed the enabling act as contemplating that, by authorizing the use of locomotive engines on the railway, some inconvenience would be caused to users of the adjoining highway 'for the sake of the greater good to be obtained by other parts of the public for the more speedy conveyance of merchandize along the new railroad'.

enunciating a general rule that there could be no liability for injuries arising from activities sanctioned by the legislature.⁽³³⁾ Vaughan's case was applied to private nuisances in the Brand v Hammersmith and City Railway Co. There the question was whether the plaintiff could obtain compensation for the 'injurious affectation' of his property by the noise and vibration of the working of a railway. The 'affectation' was in the nature of a nuisance and, in considering the plaintiff's rights, the judges had occasion to consider the question whether the plaintiff would have succeeded in an action for nuisance. Since the railway operated under the authority of a private act the question thus arose whether any common law right of action he might have had was affected by the fact of the legislative authorization for the working of the railway. In the court of Queen's Bench⁽³⁴⁾ it was held that the plaintiff had no right to compensation, Mellor J intimating that the damage he had suffered, by reason of the statutory authorization, had to be regarded as damnum absque injuria.⁽³⁵⁾ The court of Exchequer Chamber⁽³⁶⁾ in deciding an appeal against

(33) The action in this case was brought in negligence for damage caused by fires ignited by sparks from locomotive engines plying along the defendant's railway line. In the court of Exchequer the defendants were held liable, the defence of statutory authorization being brushed aside (see Vaughan v Taff Vale Railway Co (1858) 3 H & N 743). The decision was reversed in the court of Exchequer Chamber (5 H & N 769), it being held that R v Pease 'has settled that when the legislature has sanctioned the use of a locomotive engine, there is no liability for injury caused by using it, so long as every precaution is taken consistent with its use' (per Blackburn J at 688).

(34) (1866) LR 1 QB 130.

(35) The plaintiff he said (at 143) had to show that in terms of the legislation he was entitled to compensation for the sort of injury which he had sustained 'and that it is not damnum absque injuria'. The reason why the legislature might have designated damage in these circumstances as not unlawful, he suggested, was that otherwise railway companies would be subject 'to claims from a multitude of persons' with the result that it would be 'almost impossible to construct a railway near a large town.... [T]he legislature may have thought that so important an undertaking ought not to be sacrificed to their [land-owners] convenience'.

(36) Brand v Hammersmith and City Railway Co (1866) LR 2 QB 223; (1867) 36 LJ (NS) QB 133.

the decision of the Queen's Bench, considered especially the matter of the actionability of the nuisance suffered by the plaintiff. Baron Bramwell, in holding the plaintiffs entitled to compensation was inclined to question the correctness of R v Pease and Vaughan's case.⁽³⁷⁾ Channell B, in dissenting from the opinion of the other members of the court, held that the plaintiffs' right of action at common law which, he pointed out, was established by Bamford v Turnley, had to be regarded as being 'taken away' by parliament, relying for this proposition on Vaughan's case.⁽³⁸⁾ Montague Smith J though differing from Channel B on the question of compensation, agreed on this point. The plaintiffs, he held, had in terms of Bamford v Turnley and the St Helens case suffered a nuisance which was not excusable on the ground that the defendant company was carrying on a lawful trade in a proper place. The question, however, was

'whether parliament which, by legalizing the acts of the company, has taken away from the owners of the land their right to recover damages for what would otherwise have been an actionable wrong ... [The company's] acts having been (as I agree) authorised by statute, and thereby rendered lawful, the injury, however great, is without remedy'.⁽³⁹⁾

The decision of the Exchequer Chamber, that the plaintiffs were entitled to compensation, was appealed to the House of Lords where the decision of the Queen's Bench was restored.⁽⁴⁰⁾ There the judges, having been summoned to advise the House, said that the plaintiff was not entitled to compensation. Blackburn J considered especially the matter of statutory authorization of nuisances, taking it to be agreed that the Legislature might authorise acts which would otherwise be

(37) At 230-5. See also his express holding to this effect in Hammersmith and City Railway Co v Brand (1869) (below n 40).

(38) At 236.

(39) At 240-1.

(40) Hammersmith and City Railway Co v Brand (1869) LR 4 HL 171; (1869) 38 LJ QB 265; [1861-73] ALL ER Rep 60.

wrongful,⁽⁴¹⁾ and holding that such was the position in the instant case.⁽⁴²⁾

Baron Bramwell, on the other hand, entered a vigorous dissent, holding Pease and Vaughan's cases to be wrongly decided.⁽⁴³⁾

The House of Lords did not agree with Bramwell B. Lord Chelmsford dealt with his argument by saying that parliament by authorizing the use of locomotive engines must be taken, 'upon the principle of law, that cuicumque aliquis quid concedit concedere videtur et id sine quo res ipsa esse non potuit', to have authorized their use in a way which caused

- (41) He seems however to have entertained some doubts about this principle, observing that if the House were to over-rule R v Pease and Vaughan's case 'the consequence would follow that any owner of a house or field so adjacent to a railway that the inevitable consequence from the working of the line amounted to a nuisance ... might stop the working of the line. So large an amount has been invested in the belief that trains might be run, even though some mischief to others was inevitable, that I think your lordships will hold that, even if the principle of R v Pease was originally an error, it has long become communis error, and ought to have been held to have made the law' (38 LJ QB 265 at 273).
- (42) 'I come ... to the conclusion that but for the statutes the plaintiffs would have had a right of action for the vibration ... and that the statutes have taken away that right of action' (at 274).
- (43) '... I think those cases clearly wrong, and that they have proceeded on an inadvertent misapprehension of the object and effect of the clauses in question' (at 269). His lengthy judgment is devoted to establishing these contentions. His reasoning may be summed up in this way: the enabling acts do not contain any express provision legalizing or allowing nuisances. The power granted to use locomotive engines could not be construed as legalizing the nuisances caused by them since a citizen did not require parliamentary sanction to operate a locomotive. The citizen however may not operate such an engine as to be a nuisance to others and if parliament had intended to so authorize him it would be expected to say so in express terms (38 LJ QB 265 at 269ff).

nuisances to others. To adopt any other view would 'soon put a stop to the use of railways'.⁽⁴⁴⁾ Lord Cairns agreed with this proposition, holding that the effect of 'the legislation on this subject is to take away entirely any right of action on the part of the landowner against the railway company for damage that the landowner has sustained'.⁽⁴⁵⁾

The Brand case thus clearly established a principle that nuisance damage could be regarded as being not unlawful where the act causing the damage was sanctioned by parliament.⁽⁴⁶⁾ The principle may be seen to be derived from a judicial concern to protect infant industries and local authorities⁽⁴⁷⁾ by preserving them from the consequences of activities carried on without negligence and for the public advantage. To the extent that this policy led the courts into establishing a general rule that nuisances were not actionable if they enjoyed statutory sanction, they tended to qualify the rule in

(44) [1861-73] All ER Rep 60 at 65.

(45) Lord Cairns reasoned that parliament intended the railway to be used, and if it could not be used without causing vibration which damaged adjoining landowners it was illogical to hold that the landowner retained his common law right of action to proceed against such damage:

'... if it was intended to preserve to the adjacent landowner his right of action, the consequence would be that action after action would be maintainable against the railway company ... [and that] the Court of Chancery would interfere by injunction and would prevent the railway from being worked, which of course is a reductio ad absurdum, and would defeat the intention of the legislature' ([1861-73] All ER Rep 60 at 72).

(46) Cf R v Bradford Navigation Co (1865) 6 B & S 631 where the principle was recognised in relation to public nuisances. Cockburn CJ there held that R v Pease (supra (n 32)) established that that which amounted to a nuisance, and would have been 'actionable or indictable' as such, when authorized by the legislature 'the criminal or unlawful character of the act was taken away'. Cases which followed the Brand decision include Dungey v London Corp (1869) 38 LJ CP 298; Smith v London & S W Rwy Co (1870) 6 CP 14; City of Glasgow Union Rwy Co v Hunter (1870) LR 2 Sc & Div 78; Metropolitan Asylum District v Hill (1881) 6 AC 193 at 201, 203, 211.

(47) Cf British Cast Plate Glass Co v Meredith (1792) 4 TR 794: 'If this action were allowed every Turnpike Act, Paving Act and Navigation Act would give rise to an infinity of actions'. See also Dungey v London Corporation (supra).

circumstances where the issues of policy were not such as to justify this blanket authorization of nuisance harms to the private citizen. Thus we find, after the Brand case, decisions holding that a nuisance caused by a sewer⁽⁴⁸⁾ or the discharge of sewerage,⁽⁴⁹⁾ by the maintenance of stables⁽⁵⁰⁾ or a small-pox hospital;⁽⁵¹⁾ by polluted waters in a canal,⁽⁵²⁾ or the diversion of a stream,⁽⁵³⁾ although ostensibly sanctioned by statute, was actionable.

This restriction of the general principle was achieved by a tendency to adopt a strict interpretation of the enabling statute⁽⁵⁴⁾ or to find that the legislature granted only premissive powers⁽⁵⁵⁾ or to find that the legislature did not intend the establishment of an enterprise in a residential locality.⁽⁵⁶⁾ Another method employed to restrict

(48) Attorney-General v Leeds Corporation (1870) 5 Ch App 583.

(49) Attorney-General v Colney Hatch Lunatic Asylum (1869) 4 Ch App 146.

(50) Rapier v London Tramways [1893] 2 Ch 588.

(51) Metropolitan Asylum District v Hill (1881) 6 AC 193.

(52) R v Bradford Navigation Co (1865) 6 B & S 631.

(53) C P R v Parke [1899] AC 535.

(54) See Attorney-General v Leeds Corporation (supra), Attorney-General v Colney Hatch Lunatic Asylum (supra), Metropolitan Asylum District v Hill (supra). It is noteworthy that in Pease's, Vaughan's and Brand's cases the courts were prepared to imply the intention of the legislature to authorize nuisances in the absence of express wording to this effect. In fact cases in which this approach has been adopted are now in a minority, the more usual approach being to apply the rule of strict interpretation.

(55) See Metropolitan Asylum District v Hill (supra) at 213: '... where the terms of the statute are not imperative but permissive ... the fair inference is that the legislature intended that the discretion be exercised in strict conformity with private rights'. See also R v Bradford Navigation (supra), where R v Pease is distinguished.

(56) See Metropolitan Asylum District v Hill (supra); Rapier v London Tramway Co (supra). See too Mudge v Penge U C (1917) 86 LJ Ch 126.

the operation of the general principle was for the courts to adopt a special meaning for the word 'negligence' in connection with the rider to the rule that statutory authority only covered those acts done without negligence.⁽⁵⁷⁾ The effect of this approach was to hold that an act done under statutory authorization was negligent if it in fact caused damage to others.⁽⁵⁸⁾ There can be little doubt that these various techniques for limiting the immunity afforded by the general principle were based on a concern for the damage suffered by those who were the victims of the activity for which immunity was claimed.⁽⁵⁹⁾

It is also worth noting that the courts in applying the principle of statutory authorization were alert to the nature of the harm caused and suffered and seem to have been prepared to grant immunity only where the harm was of a comparatively trivial nature.⁽⁶⁰⁾

(ii) Prescription

Throughout the nineteenth century there prevailed a theory that nuisance damage might be rendered not unlawful by reason of the operation of the doctrine of prescription.

(57) See above.

(58) See Geddis v Bann Reservoir Proprietors (1878) 3 AC 430 at 455 per Lord Blackburn:

'If by a reasonable exercise of the powers ... given by statute ... the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their power'.

(59) The Courts were more inclined to allow the claim of statutory authorization where the plaintiff was in any event entitled to compensation for the harm suffered. See Metropolitan Asylum District v Hill (1881) 6 AC 193 at 201. Cf Price's Patent Candle Co v London CC [1908] 2 Ch 526:

'Certain general principles have been laid down in cases of nuisance. First, there is a presumption that a public body, whether a trading body or not, is not authorized to create a nuisance ... unless compensation is provided. Secondly, this presumption must yield where the language of the statute is sufficiently clear to authorize the nuisance without compensation'.

(60) In Brand's case the harm was in the nature of 'sensible personal discomfort' involving vibrations and air

Essentially this theory held that it was possible for a landowner to acquire, by prescription, an easement to use his land in a way which perpetrated what was a nuisance upon his neighbour. By reason of the existence of such an easement the nuisance, it was said, was 'legalized' and thus not actionable.

The Concept

Established principles of English law held that proprietary rights over land could be said to have been acquired by way of long-established use or, in other words, the lapse of time.⁽⁶¹⁾ We have seen that this idea had been relied upon in the seventeenth century to confer upon landowners' rights to receive lateral light for their habitations and as a basis for the acquisition of rights in flowing waters.⁽⁶²⁾ We have seen too that rights acquired in this way were conventionally designated as easements and, as such, were distinguished from the so-called 'natural' rights of property. The idea that a landowner might acquire a right in alieno solo by prescription, not surprisingly, led to the theory that among the rights capable of being so acquired was the right to perpetrate upon a neighbouring landowner that which the common law would designate as a nuisance. The thinking here was that as a nuisance amounted to a diminution of a landowner's natural rights of property it could be seen as being analagous to an easement and as such could be acquired prescriptively as could

(60) (continued)

pollution. As we have seen (above 300) this type of injury was less liable to be protected by the courts than that involving material harm to property. It is thus significant that Jones v Festinog Rwy Co (1868) LR 3 QB 733; Gas, Light Co v St Mary's (1885) 15 QB D 1 (CA); CPR v Parke [1899] AC 535, which were cases in which immunity was not allowed, all involved damage in the form of material harm to property. See generally Linden op cit (n 27) at 217.

(61) Holdsworth 7 HEL 343ff.

(62) Above 122-3, 139-40.

an easement. Conversely this principle suggested the idea that a landowner, relying on long established use, could resist the claims of neighbours that his land-use activities amounted to an actionable nuisance. Such an idea gained support from the doctrine of prior occupation. That doctrine, as we have seen, suggested that a land use activity by the priority of its establishment was to prevail over other, later-established and conflicting, uses.⁽⁶³⁾ The doctrine of prescriptive legalization of nuisances was variant of this idea in that it laid down that such previously established activities were immune if they had existed for a pre-determined period of time.⁽⁶⁴⁾

Development:

The idea that a landowner might prescriptively acquire the right to inflict a nuisance upon his neighbours had some tacit and obscure recognition in the earlier law.⁽⁶⁵⁾ It also received express recognition in the nineteenth century in relation to nuisances against water rights, particularly the landowner's right to receive waters in an unpolluted condition.⁽⁶⁶⁾ However up until 1838 there was no clear authority on the question whether the right to perpetrate a nuisance to the personal sensibilities of a neighbour (by pollution of the atmosphere, noise, vibration etc) could be acquired by prescription. In that year the important case of Bliss v Hall⁽⁶⁷⁾ was decided.

(63) Above 254.

(64) Above 256.

(65) The authorities usually dwell on the question whether the nuisance in question was of 'ancient' origin or not, implying that things anciently established were not liable to suppression as a nuisance (see above 122 n 128, 139 n 60). Cf Viner Abr Nuisance, G pl 18 who offered the proposition that an 'ancient brew house time out of mind' would not be regarded as nuisance, adding 'contra if a brew-house should be new erected'.

(66) See Wright v Williams (1836) 1 M & W 177; Wood v Waud (1849) 3 Exch 748.

(67) (1838) 4 Bing (NC) 183; 7 LJ CP 122; 5 Scott 500; 2 Jur 110.

This case was of strategic significance in this connection.⁽⁶⁸⁾ It represents the demise of the judicial romance with the doctrine of prior occupation.⁽⁶⁹⁾ On the other hand, in rejecting that doctrine, it really went no further than asserting that priority of occupation could not be pleaded if it had not existed for a prescriptive period of twenty years.⁽⁷⁰⁾

(68) See also above 275-6.

(69) Ibid.

(70) Tindal CJ is reported (in 4 Bing (NC) 185 at 186) to have said, 'Unless the Defendant shews a prescriptive right to carry on his business in the particular place, the Plaintiff is entitled to succeed'. In the Law Journal report of the case (7 LJ CP 122 at 123) a rather different version of his words is given: '... a trade or avocation similar to that now complained of, which has existed for so long a time as to lead to the conclusion that the party who carries it on has purchased the right from his neighbour'. In Scott's report (6 Scott 500) he is reported to have said that the nuisance was actionable 'unless the business which creates the nuisance has been carried on there for so great a length of time that the law will presume a grant from his neighbours in favour of the party who causes it'.

Park J observed that 'Twenty years may ... legalize the nuisance ...', citing Elliotson v Feetham (1835) 2 Bing (NC) 139 where a claim to be entitled to continue a nuisance on the basis that the plaintiff had 'come to' it, was required to be supported by proof of occupation by the defendant 'of twenty years duration'.

See too the judgment of Bosanquet J (as reported in the Law Journal)

'A man should enjoy his own property, so as not to injure that of his neighbour, unless the party shews an exercise of that which is complained of for such time as may establish a right'.

In Scott's report he is quoted as saying:

'It is clearly not enough in such a case as this for the defendant to show a short possession and exercise of the plaintiff's possession. Nothing less than a twenty year's use will afford a defence'.

In the result, Bliss v Hall, in repudiating the doctrine of prior occupation, gave weight to the theory that a landowner might be legally entitled to inflict a nuisance upon his neighbours in the form of a prescriptively acquired easement.⁽⁷¹⁾ But although the proposition received some uncritical judicial approval, notably in the St Helens case⁽⁷²⁾ and Crump v Lambert,⁽⁷³⁾ it was apparent that the courts were in fact

(71) Gale's Treatise on Easements, first published a year after the decision in Bliss v Hall, approved this principle, saying that nuisances may be 'legalized by time' (at 275), illustrating the proposition in these terms (citing Elliotson v Feetham (supra) and Bliss v Hall):

'Thus the right not to receive impure air is an incident of property and for any interference with this right an action may be maintained; but by an easement acquired, a man may, it appears, be compelled to receive air from him in a corrupted state, as by the admixture of smoke or noisome smells, or submit to noises caused by the carrying on of certain trades'.

Significantly he queried some 'ancient authorities' which 'appear to have recognised a species of right' to inflict nuisances 'by an enjoyment, however short', having in mind the doctrine of prior occupation as expressed by the doctrine of the defence of coming to a nuisance (at 276). 'These dicta', he concluded (at 279) 'appear to be opposed to principle, and the general current of authority, both ancient and modern'.

(72) See Mellor J in the St Helens case (1866) 35 LJ QB 66 at 68:

'If a man for twenty one years or more has carried on in a particular district a work which is noxious to his neighbours, and has for a period of time sent noxious smells and impure air over the neighbourhood, and that, has been submitted to for twenty years, he gets in time what is called a prescriptive right to do what he has done'.

So too Lord Westbury LC in the House of Lords, (11 HL Cas 642 at 652) in rejecting the proposition that a landowner could be entitled to inflict nuisance harm on a neighbour, excepted 'cases where a prescriptive right has been acquired by a lengthened user of the place'.

(73) (1867) LR 3 Eq 409 at 413 (per Romilly MR):

'The owner of one tenement cannot cause or permit to pass over, or flow into, his neighbour's tenement any one or more of these things in such a way as materially to interfere with the ordinary comfort of the occupier of the neighbouring tenement, or so as to injure his property. It is true that, by lapse of time, if the owner of the adjoining tenement, which, in case of light or water, is usually called the servient tenement, has not resisted for a period of twenty years, then the owner of the dominant tenement has acquired the

reluctant to apply it in substantive form in relation to nuisances to personal sensibilities. Indeed as early as 1839 in the case of Flight v Thomas⁽⁷⁴⁾ this reluctance was apparent. The case involved a nuisance created by the odours emanating from a mixen which, the defendant was able to show, had existed for the prescriptive period of twenty years. His attempts to rely upon this fact as excusing the nuisance were met with much judicial resistance,⁽⁷⁵⁾ the court finally taking refuge in the technicality that it had not been proved that the odours from the mixen had actually crossed the boundary between the adjoining tenements.⁽⁷⁶⁾ The somewhat scrambling attempts of the court in Flight v Thomas to find reasons why the lapse of time could not be said to establish a prescriptive right to perpetuate a nuisance were overshadowed in subsequent years by a series of decisions relating to the acquisition of prescriptive rights in relation to flowing waters⁽⁷⁷⁾ and the passage

(73)(continued)

right of discharging the gases or fluid, or sending smoke or noise from his tenement over the tenement of his neighbour; but until that time has elapsed, the owner of the adjoining or neighbouring tenement, whether he has or has not previously occupied it, - in other words, whether he comes to the nuisance or the nuisance comes to him, - retains his right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water.'

(74) (1839) 10 Ad & E 590; 3 Jurist 822; 8 LJ (OS) QB 337.

(75) This can be gleaned from the reports which consist mainly in a record of the colloquy between counsel for the defendant and the Bench. Thus Coleridge J harassed counsel with remarks such as 'It is not stated in the plea, that the smells had for twenty years passed into or over the adjoining soil'; 'The plea does not state that the smells have gone beyond the boundary of the defendant's land'; 'You do not allege a right to make the smell on the plaintiff's premises, but only to keep a mixen, whereby smells arose'.

(76) Per Lord Denman CJ: 'The nuisance may never have passed beyond the limits of the defendant's own land' (10 Ad & E 590 at 592). In the Jurist report, he is said to have rejected the plea on the ground that it did 'not even say that the plaintiff had any knowledge of the existence of the dung-heap'.

(77) See Chasemore v Richards (1859) 8 HL Cas 349 at 386.

of a stream of air⁽⁷⁸⁾ which developed and expounded the principle that prescriptive acquisition of rights required proof of an adverse use on the part of the claimant. This principle required that the defendant should establish that the plaintiff was aware of the invasion of his rights and had either acquiesced therein or negligently failed to resist the invasion.⁽⁷⁹⁾ This of course was a rather different proposition to the earlier principle which had regarded the mere lapse of time as creating the right (on the fiction of a lost grant). Thus when the question next arose, in Ball v Ray⁽⁸⁰⁾ (1873), of the acquisition by prescription of a right to perpetuate a nuisance causing personal inconvenience, Mellish LJ disposed of it with greater confidence by holding the defendant to be under a burden of proving, in effect, that his use had been adverse.⁽⁸¹⁾ And in Sturges v Bridgman⁽⁸²⁾ (1879) the court citing Chasemore v Richards and Webb v Bird, held

(78) Webb v Bird (1861) 10 CB (NS) 268 (on this case see also above 274-5).

(79) See Chasemore v Richards (supra) at 370 (per Wightman J): 'The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant'. (see too at 386 per Lord Wensleydale); Webb v Bird (supra) at 285 per Wille J:

'In general, a man cannot establish a right by lapse of time and acquiescence against his neighbour, unless he shews that the party against whom the right is acquired might have brought an action or done some act to put a stop to the claim....'

(80) (1873) LR 8 Ch App 467.

(81) 'When this house was first turned into a stable it was in all probability a great inconvenience, and caused annoyance to the owners of the neighbouring houses; but until it became a nuisance, and an actionable nuisance, they would have had no remedy on account of that inconvenience. No doubt the owner of the next house is, under such circumstances, in a position of great difficulty as to when he should commence his legal proceeding. If he commence them too early, when an actionable nuisance cannot be proved, he loses, and all the costs will be thrown upon him. He therefore naturally waits until there really is a nuisance which he can prove beyond all question; and then the Defendant may plead that the nuisance has gone on for twenty years. It appears, therefore, to be quite correct to throw upon the Defendant the burden of proving very clearly that the nuisance has really continued during twenty years'.
In the event the lord justices found that the defendant had not discharged this onus, and found for the plaintiff.

(82) (1879) LR 11 Ch D 852.

that the defendant could only succeed upon proof that there had been an adverse use of the plaintiff's premises. Indeed Jessell MR thought it 'impossible' for the defendant to establish the easement in the light of the circumstances that the nuisance complained of was noise.⁽⁸³⁾ In the Court of Appeal⁽⁸⁴⁾ Thesiger LJ adopted a similar view. The defendant's claim to have acquired an easement to send noise upon the plaintiff's land 'was in its nature such that it could not be physically interrupted; it could not at the same time be put a stop to by action'. This being so the question became whether 'use which is neither preventible nor actionable [could] found an easement?' The answer was, Thesiger LJ said, in the negative.⁽⁸⁵⁾

The simple fact is that the nineteenth century judges while conceding the theoretical possibility of the acquisition of a prescriptive right to cause a nuisance to the personal sensibilities of a neighbour were not prepared to give practical application to the theory.⁽⁸⁶⁾ They severely

(83) 'The noise was made on the Defendant's own premises - in his kitchen. Of course you could not go into his kitchen without being a trespasser. You could not interrupt it there, nor could you interrupt it on your own land, because you had no control over the waves of sound; nor could you have interrupted it by action, because there was originally no actionable nuisance' (at 856).

(84) (1879) LR 11 Ch D at 862.

(85) See at 863: '... the laws governing the acquisition of easements by user stands thus: Consent or acquiescence of the owner of the servient tenement lies at the root of prescription, and of the fiction of a lost grant, and hence the acts or user, which go to the proof of either the one or the other, must be, in the language of the civil law, nec vi nec clam nec precario; for a man cannot, as a general rule, be said to consent to or acquiesce in the acquisition by his neighbour of an easement through an enjoyment of which he has no knowledge, actual or constructive, or which he contests and endeavours to interrupt, or which he temporarily licenses. It is a mere extension of the same notion, or rather it is a principle into which by strict analysis it may be resolved, to hold, that an enjoyment which a man cannot prevent raises no presumption of consent or acquiescence'.

(86) H G Wood, the American author of the first treatise on nuisance law, in surveying the state of the law towards the end of the nineteenth century could find only two cases in which the claim to an easement 'to send a polluted atmosphere over another's premises ... has been sustained'

restricted the operation of the principle by insisting upon proof of adverse use and adopting a rigid approach to proof of other essentialia.⁽⁸⁷⁾ It seems fair to say that this attitude was predicated upon their revulsion for the idea that a man might by mere lapse of time impose nuisance harms upon his neighbours. They had rejected the idea in its guise of a doctrine of prior appropriation;⁽⁸⁸⁾ their reluctance to implement the theory of prescriptive acquisition of rights to cause nuisances was an extension of this policy. At its deepest level this policy may be seen to represent an attempt to remove the restraints upon economic development of land that were implicit in the doctrine of prior occupation.⁽⁸⁹⁾

(86) (continued)

(2 Nuisances s. 712 at 917). The cases cited were Scottish, Charity v Riddle (1808) 31 M 6 and Duncan v Moray (1809) FC. Cf the American decision of Matthews v Stillwater Gas & E L Co (1896) 65 NW 947 where it was said 'the right is more theoretical than practical, because of the inherent difficulties in establishing such a right by proof'.

(87) Cf Powell's remark: 'Practically, prescription plays a very limited role in the law of nuisance, because of the difficulty of establishing the requisite "adverse use" (5 Real Property s. 706 at 339). Cf Wood (op cit (n 82) at 918):

'Proof that he has polluted the air is not enough; he must show that for the requisite period he has sent over the land an atmosphere so impure and polluted as to operate as an actual invasion of the rights of those owning the premises affected and in such a manner that the owner might have maintained an action therefor. Less that that is insufficient'.

(88) See Flight v Thomas (supra 323); Roberts v Clarke (1868) 18 LT (NS) 49.

(89) Cf Powell op cit (supra n 83) *ibid*: 'By stiff requirements as to what constitutes a nuisance, the beginning of the running of the prescriptive period is delayed and a too-early fixation of the character of a developing neighbourhood is prevented'. Cf Sturges v Bridgman (1879) LR 11 Ch D 852 where the court justified its rejection of a claim to have acquired an easement to perpetuate a nuisance by observing (at 865) that it would be 'from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law give no power to prevent ... [Recognition of the easement] would ... produce a prejudicial effect upon the development of land for residential purposes'. For a discussion of the stifling effects of the doctrine of prescription upon trade and economic development generally, see Horwitz The Transformation of American Law 43ff.

(c) The types of harm

In the St Helens ⁽⁹⁰⁾ case Lord Westbury LC said he considered it

'a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort'.

This distinction of course reflects a tacit recognition of the fact that the nuisance concept had come to protect not only proprietary interests in land but also interests of personality of the occupier of real property.⁽⁹¹⁾ Lord Westbury's object in making the distinction was however to establish separate sets of rules for determining whether a nuisance could be said to have existed.⁽⁹²⁾

In essence the effect of Lord Westbury's doctrine seems to be that where a nuisance causes material injury to property, the fact of material injury establishes the unlawfulness of the harm and thus there is no need for a consideration of whether the harm was 'reasonable' according to the circumstances

(90) (1865) 11 HL Cas 642 at 650. Cf above 298-9.

(91) Cf above 126 n 154.

(92) Cf the analysis of Furlong CJ in Kent v Dominion Steel and Coal Corp Ltd (1965) 49 DLR 241 at 248:

'In general there are two classes of acts which may constitute nuisance, the first causing material injury to property, and the second where personal inconvenience or discomfort in the use and enjoyment of property is caused. As to the first class of acts, it is fair to say that any material injury to property is a nuisance without reference to the circumstances; without enquiring as to the character of the activities carried out or the manner in which they are being carried out, or the neighbourhood or the reasonableness of use and so on. But these are factors to which regard must be had in consideration of the class of acts which result only in discomfort or inconvenience ... [where material injury to property is in point it] is as though the Westbury proposition had imported into the law of nuisance a doctrine closely akin to res ipsa loquitur in the law of negligence'.

Cf above 300-1.

On the other hand where the injury is to personal comfort the mere fact that a plaintiff has suffered harm will not per se establish a cause of action and it is necessary to consider further whether the harm is unreasonable in the light of the circumstances.⁽⁹³⁾

Curiously enough the decisions following the St Helens case made little of these elementary principles. There was some consideration of what constituted 'material injury to property' for purposes of the Westbury rule,⁽⁹⁴⁾ but for the rest the courts did not find it necessary to expatiate on the rule⁽⁹⁵⁾ and, indeed, in some cases seemed to have ignored or overlooked it.⁽⁹⁶⁾

(93) Cf the analysis in Kent's case (n 92 above). See also Halsey v Esso Petroleum Co [1961] 2 All ER 145. Cf Street Torts 216, 226.

(94) In Gaunt v Fynney (1872) LR 8 Ch App 8 Lord Selborne C seemed to suggest that material damage consisted in 'the demonstrable effect of a visible or tangible cause ... producing deleterious physical changes which science law trace and explain'. In Salvin v North Brancepeth Coal Co (1874) LR 9 Ch App 705 Jessell MR, in discussing the St Helens decision, took it to have established that the injury 'must be visible' and appears to have disagreed with Lord Selborne's view by observing that the damage was not to be established 'by getting a scientific man to say that, by the use of scientific appliances' that damage had occurred. On appeal James LJ approved this, saying that what Lord Wensleydale meant in the St Helens case was that there should be damage of the type described by Jessell MR: 'A present injury visible to ordinary persons conversant with the subject matter...'

These dicta indicate that the injury, in addition to being 'material' (cf Halsey v Esso Petroleum Co (supra) at 151F) must be of a sort that is visible or tangible. This would seem to preclude damage in the sense of depreciation in value or other economic loss (cf Street Torts 217).

(95) There has been, for instance, no discussion of what constitutes 'property' for the purposes of the rule. See Street Torts 217.

(96) See below 352 n 182.

2.2. The Element of Reasonableness

Perhaps the most significant and in many ways the most radical modification to the traditional nuisance concept effected by the Victorian judges was their insertion to it of a test and standard of reasonableness. This flowed from their premiss that the law of nuisance was predicated upon a principle of the mutual limitation of rights of landownership demanded by the social fact of neighbourhood. In seeking to express this idea in juridically significant terms they opted for the expression 'reasonable'. By it they wished to express the notion of proportionality⁽⁹⁷⁾ by which the activities of neighbours had to be judged.

Whether the judges were wise in employing so ambiguous a term to express such a specialised operation is perhaps questionable. Certainly their choice caused the law of private nuisance to develop areas of obscurity. On the other hand their selection of the term must be seen in the context of the era and in the light of the need to preserve the historic continuity of the law.

The word 'reasonable' had been invoked in nuisance law to express a principle of proportionality as far back as 1628.⁽⁹⁸⁾ Baron Comyns⁽⁹⁹⁾ used it in this sense in the eighteenth century and, as we have seen,⁽¹⁰⁰⁾ it was similarly relied upon in the highway nuisance cases of the early nineteenth century. In 1851 Parke B employed it in Embrey v Owen to describe the nature of riparian owners' rights in flowing waters.⁽¹⁰¹⁾ Erle J, in Rich v Basterfield,⁽¹⁰²⁾ Byles J in Hole v Barlow, then employed it to express the nature of a landowner's right to pure air.⁽¹⁰³⁾

(97) See Powell 'The Unreasonableness of the Reasonable Man' 1957 Current Legal Problems 104, at 111.

(98) In Jones v Powell (1628) Hut 135. See above 135-6.

(99) See Comyns Digest Acton on the Case for Nuisance (C) (quoted above 280 n 185).

(100) See above 269 n 144.

(101) See above 269.

(102) See above 278.

(103) See above 279.

The propriety of the use of the term for these purposes was questioned in the judgment of the majority of the court in Bamford v Turnley who appear to have understood the test to involve an enquiry whether a reasonable man would have established and conducted a trade in the manner that the defendant had done. If this was to be the enquiry, and the conclusion that the trade had been so conducted were to serve as a sufficient defence, the majority repudiated it since it would mean that 'however ruinous may be the amount of nuisance caused to a neighbour's property ... he is without redress if a jury shall ... find that the place where the trade is carried on' was 'reasonable'.⁽¹⁰⁴⁾ On the other hand use of the word reasonable in this connection was approved by Willes J⁽¹⁰⁵⁾ and Pollock CB⁽¹⁰⁶⁾ both of whom appreciated that it might be used to establish a principle of mutual limitation of rights

(104) Bamford v Turnley (1862) 3 B & S 67 at 77. The words quoted above were actually directed at the proposition that the trade was not a nuisance if carried on in a 'convenient' place. That this was also the essence of their objection to the reasonableness standard is however suggested by the fact that Pollock CB (at 80) in arguing for the standard, took the occasion to say that a jury would never 'find that to be a reasonable act by a person which produces any ruinous effect upon his neighbours', a fact which, he said 'gets rid of the difficulty suggested in the judgment [of the majority of the court]'. A further indication of the approach of the majority is that in considering specifically the appropriateness of the test of a reasonable use of land as adopted by Cockburn CJ in Hole v Barlow (see supra 282) they noted that if the 'true doctrine' was that a nuisance was determined by the degree of harm caused, then it would be improper to ask the jury whether the nuisance was caused by a reasonable use of the land. This suggests that they saw the test of reasonableness as being related to the conduct of the defendant rather than to the question whether it was reasonable that the plaintiff should endure the harm which the nuisance caused (as suggested by Pollock CB (supra 292)).

(105) In Hole v Barlow (1858) 4 CB (NS) 334 at 345 where he observed that the 'common law right which every proprietor of a dwelling house to have the air uncontaminated and unpolluted' was qualified by the necessities of business life 'conducted in a reasonable and proper manner, and in a reasonable and proper place'.

(106) In Bamford v Turnley (1862) 3 B & S 67 at 80-1 where he said that

'If the act complained of be done in a convenient manner, so as to give no unnecessary annoyance, and

in the ambient air. In Tipping v The St Helens Smelting Co Mellor J, while avoiding directing the jury in accordance with the principles enunciated in Hole v Barlow, and repudiated in Bamford v Turnley, nevertheless found it appropriate to introduce a test of reasonableness into his formulation of the law in the form of a dictum that '[e]verything must be looked at from a reasonable point of view'.⁽¹⁰⁷⁾ In the House of Lords this dictum was cited with express approval by Lord Wensleydale⁽¹⁰⁸⁾ (the quondam Parke B of Embrey v Owen) while Lord Westbury LC also found it right to invoke the reasonableness of a defendant's conduct as a potential justification of a nuisance.⁽¹⁰⁹⁾

In Brand v Hammersmith and City Railway Co (1867) Sir William Erle also used the term reasonableness in formulating the nuisance concept, as a criterion for determining the materiality of the harm suffered,⁽¹¹⁰⁾ while Lord Selborne in Gaunt v Fynney⁽¹¹¹⁾ (1872) used it in a similar sense as denoting a measure of the degree of damage suffered by the plaintiff.

Perhaps inevitably the presence of the word 'reasonable' in the terminology of the revised nuisance concept created a certain amount of confusion. The word had, coincidentally,

(106) (continued)

be a reasonable exercise of some apparent right, or a reasonable use of the land, house or property of the party under all the circumstances, in which I include the degree of inconvenience it will produce, then I think no action can be sustained, if the jury find that it was reasonable....'

(107) See the passage from his judgment quoted at 297 above.

(108) Cf above 300.

(109) Saying that a landowner had no complaint if a neighbour's trade was "carried on in a fair and reasonably way"...'
(11 HL Cas 642 at 650).

(110) See above at 307.

(111) (1872) LR 8 Ch App 8 at 12 : 'A nuisance by noise ... is emphatically a question of degree ... [Noises], to offend against the law, must be done in such a manner which, beyond fair controversy, ought to be regarded as exceptive and unreasonable'.

come at this time to be used in the tort of negligence as a measure of the culpability of conduct and there thus emerged a belief that in nuisance law the question was whether the defendant had acted as a reasonable man. This view, which was usually raised as a defence to the plaintiff's contention that the defendant had caused him harm, was quickly repudiated by the judges,⁽¹¹²⁾ thereby making it clear that the question in nuisance cases was not whether the defendant had acted negligently.⁽¹¹³⁾

(112) Jessell MR in Broder v Saillard (1876) LR 2 Ch D 692 at 701:

'[It is] no answer to say that the Defendant is only making a reasonable use of his property, for there are many trades and many occupations which are not only reasonable, but necessary to be followed, and which cannot be allowed in the proximity of dwelling houses, so as to interfere with the comfort of their inhabitants'.

Cf Kekewitch J in Reinhardt v Mentasti (1889) LR 42 Ch D 685 at

'[Nuisance] does not depend on the question whether the defendant is using his own reasonably or otherwise. The real question is, does he injure his neighbour?'

See too the remark of the same judge in Attorney-General v Cole & Son (1901) 1 Ch D 205

'Can a man reasonably create a nuisance?.. I think the answer to be derived from the case of Bamford v Turnley from which, so far as I am aware, there has never been any departure at all, is that he cannot. If he commits a nuisance, then he cannot say he is acting reasonably. The two things are self-contradictory'.

(113) Cf Winfield 'Nuisance as a Tort' (1930-2) 4 Camb LJ 189 at 199:

'[In nuisance] "reasonable" means something more than merely "taking proper care". It signifies what is legally right as between the parties taking into account all the circumstances of the case.... Knocking a man down carelessly is a tort simpliciter; making a noise is a tort only sub modo. Thus it must often be a pure gamble whether I act lawfully in opening a particular business in a street. If I make an error of judgment in deciding whether the business is offensive or not, I shall not escape liability by proving I took all reasonable care to prevent the business from being a nuisance'.

The clue to the sense in which the judges understood and used the term 'reasonable' as a component of the nuisance concept is found in the way in which they coupled the term to references to the 'circumstances' of the case,⁽¹¹⁴⁾ emphasising that the reasonableness of a land-use activity had to be determined by way of a consideration of these circumstances.⁽¹¹⁵⁾

In other words the test of reasonableness did not, as in negligence, relate exclusively to the nature of the defendant's conduct. Rather it related to, and had to be applied to, both the position of the plaintiff and the defendant.⁽¹¹⁶⁾ This of course follows from the fact that, in nuisance, the central question is the nature and extent of the restraints imposed by vicinage upon a landowner's notionally full rights to use and enjoy his property. Since in the nature of things enjoyment of these rights is predicated upon mutual limitation - Baron Bramwell's rule of give and take, live and let live - it is the court's function to determine in each given case, exactly the extent of the limitations that can be justified by this principle. To this end the test of reasonableness was employed as expressing both the need for limitation and the need to restrict the limitation.

(114) Eg Mellor J (above at 297) Erle CJ (above at 307). Cf Lord Cranworth in Attorney-General v Sheffield Gas Consumers Co (1853) (cited above at 238).

(115) This principle is well expressed in the judgment of Andrew CJ in the American case of Booth v Rome, W & O Terminal Rwy Co (1893) 140 NY 267:

'The test ... is not whether the use or act causes injury to his neighbour's property, or that the injury was the natural consequence, or that the act was in the nature of a nuisance; but the inquiry is, was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property, having regard to all the interests affected - his own and those of his neighbours - and having in view also public policy'.

(116) Cf Pollock CB in Bamford v Turnley (1862) 3 B & S 67 at 81:

'... was [it] reasonable that the defendant should be allowed to do what he did, and reasonable that the plaintiff should submit to the inconvenience occasioned by what was done'.

2.3. The Circumstances

What the Victorian judges called the 'circumstances' of nuisance actions were relevant to the application of the test of reasonableness as the determinant of the actionability of an alleged nuisance. As such they constituted the raw data from which the court constructed its finding as to whether the 'nuisance' fell within the limits of toleration postulated by the principle of mutual limitation of property rights imposed upon adjoining landowners by the fact of vicinage.

It follows from this that the circumstances did not simply consist in the facts which made up the contextual scene in which the 'nuisance' occurred. Rather they expressed the factual basis upon which the respective claims of the parties were based to be able to use their land. On the part of the plaintiff, the pertinent 'circumstances' were those factors which indicated that the nuisance harm inflicted upon him were such as to indicate that he could not be expected to endure it in terms of the rule of give and take, live and let live.⁽¹¹⁷⁾ From the point of view of the defendant the pertinent circumstances were those factors which indicated that in terms of the rule, he was entitled to inflict nuisance harm of the type in question upon the plaintiff.⁽¹¹⁸⁾

The idea that in nuisance actions the courts should examine and evaluate the circumstances was first advanced in the courts of equity.⁽¹¹⁹⁾ Byles J had sought to apply the same idea in a rudimentary way in common law when, in Hole v Barlow, he instructed a jury that it should take into consideration the question of the place where the alleged nuisance had occurred.⁽¹²⁰⁾ The idea received more explicit and rational

(117) Cf the discussion of the circumstance of 'time' below 348.

(118) Cf the discussion of the circumstance of 'locality' below 342.

(119) Notably in Wood v Sutcliffe (1851)(see above 238) and Attorney-General v Sheffield Gas Consumers Co (1853) (see above 238).

(120) See above 280.

expression in the judgment of Pollock CB in Bamford v Turnley.⁽¹²¹⁾ Mellor J in his subsequently approved direction to the jury in the St Helens case required the jury to consider the various circumstances of the case,⁽¹²²⁾ and Sir William Erle set the principle in its relation to the other elements of the nuisance concept in Brand v Hammersmith and Railway Co.⁽¹²³⁾

(a) Locality

In evaluating the harm suffered by a plaintiff in a nuisance action the context or physical milieu in which the harm occurred was seen by the Victorian judges to be an ingredient of the test of reasonableness⁽¹²⁴⁾ by which the actionability of the plaintiff's complaint fell to be determined.

The emergence of the doctrine

Recognition of the significance of the locality in which a nuisance occurs is first apparent in English law⁽¹²⁵⁾ in public nuisance cases.

(121) See above 291.

(122) See above 296.

(123) See above at 307. Cf his earlier formulation of the relevance of the 'circumstances' in Cavey v Ledbitter (1863) 13 CB (NS) 476 at 477:

'... the notion that the degree of discomfort which might sustain an action under some circumstances must therefore do so under all circumstances, is as untenable as the notion that, if the act complained of was done in a convenient time and place, it must therefore be justified, whatever the degree of annoyance that was occasioned thereby'.

(124) Cf the rationalisation of the circumstance of locality put forward by counsel (later Lush J) in Bamford v Turnley (1862) 3 B & S 67 at 71:

'There is no proposition of law that every person has an absolute right to pure unadulterated air under all circumstances: on the contrary every person must enjoy his own property subject to the inconvenience necessarily resulting from the reasonable use by his neighbour of his own land. That explains the dicta that what is a nuisance in one place may not be so in another, and whether a thing is a nuisance or not depends on the state of the neighbourhood'.

(125) Interestingly, the doctrine had received earlier and more (continued on the next page)

In R v Neville⁽¹²⁶⁾ (1791) the accused was charged with perpetrating a public nuisance by the conduct of his business of 'melter of kitchen stuff and other grease'. There was however evidence that 'there had been manufactories which emitted disagreeable and noxious smells carried on in this neighbourhood for many years' prior to the defendant establishing himself in the locality.

Lord Kenyon CJ in the course of the proceedings observed that

'certainly what is a nuisance in one situation is not so in another. In places where offensive trades have been long carried on they are not nuisances, though they may be so in any ... other places where such trades have not been exercised'.

The principle enunciated in Neville's case was cited and

(125) (continued)

sophisticated recognition in Scot's law in Kinloch v Robertson (1756) 31 Morison 13163 where the Court of Sessions, in holding a blacksmiths shop and forge situate in an urban area to be a nuisance, observed that

'The connection of close neighbourhood in a burgh introduces new duties among the inhabitants. Neighbours in towns must submit to ordinary inconveniences from each other; but they must be protected against extraordinary disturbances, such as may render their property useless to them.... Close neighbourhood introduces this temperament in equity, but not in such a manner as to deprive his neighbour of his property. The only difficulty in matters of this kind is to bring this temperament under a general rule'.

Cf Charity v Riddle (1808) 31 Morison 6; and see Trotter v Farnie (1830) 9 Sess Cas 144 where there are dicta that '[e]very nuisance depends on locality and degree' and '... everything depends on local situation, and the vicinity of other nuisances'.

(126) (1791) Peake 125.

applied by Lord Tenterden CJ⁽¹²⁷⁾ in R v Watts⁽¹²⁸⁾ (1826) when he observed

'that there was no doubt that this trade [that of 'horse-boiler'] was in its nature a nuisance, said that, considering the manner in which the neighbourhood had always been occupied, it would not be a nuisance unless it occasioned more inconvenience as it was carried on by the defendants than it had done before'.

The next occasion in which the significance of locality was adverted to was in the leading case on the doctrine of 'coming to a nuisance'. In Bliss v Hall⁽¹²⁹⁾ (1838) the plaintiff set up residence on premises adjoining a candle-maker who had carried on this business for some three years already. The court held that the defendant could not rely upon his prior occupation to excuse the nuisance caused to the plaintiff. It would seem however that Vaughan J at least would have been prepared to take a different view if the defendant had pleaded that the locality was one devoted to industrial enterprise. He is reported⁽¹³⁰⁾ to have said that

(127) Cf however the earlier case of R v Neil (1826) 2 C & P 485 where as Abbott CJ the same judge refused to concede that the fact that the defendant's varnish-making business was carried out in a neighbourhood which contained other noxious trades (slaughter-houses, a brewery, a gas manufactory, grease-melters, and a blood boiler) constituted a defence, saying that

'if there be smells offensive to the senses, that is enough, as the neighbourhood has a right to fresh and pure air. It has been proved that a number of other offensive trades are carried on near this place, knackers, melters of kitchen stuff etc. but the presence of other nuisances, will not justify any one of them....'

(128) (1826) 2 C & P 486.

(129) (1838) 4 Bing (NC) 183; 7 LJ CP 122; 2 Jur 110. Also on this case see above 275-6.

(130) (1838) 2 Jurist 110. There are different versions of the judgment of Vaughan J in this case. In 4 Bing (NC) 185 he is reported as making some remarks about prescription while in the Law Journal report he is recorded as reiterating the seventeenth century doctrine that trades should be carried on in open places (see above 276).

'A thing may be a nuisance or not, according to the place in which it is situated...'

adding that in this case 'any defence' arising 'out of such a state of circumstances' ought to have been specially pleaded.

The real beginnings of the principle that locality might serve as a criterion for determining the reasonableness of defendant's conduct in relation to the question whether a nuisance existed are to be found in a dictum of Lord Cranworth LC⁽¹³¹⁾ in Attorney-General v Sheffield Gas Consumers Co (1853).⁽¹³²⁾ In considering whether the digging up of a public highway could be regarded as a public nuisance, he observed that

'All these cases of nuisance or no nuisance arising from particular acts, must, from the nature of things, be governed by particular circumstances. If a carriage were to drive up in Belgrave Square, and stand half the day at the door of a house ... I do not think that that could be made out to be a nuisance. Suppose, however, the same thing happened in a narrow part of the street that runs from Covent Garden to St Martins Lane, I do not know that that would not be a nuisance.'

The propriety of employing locality as a factor in considering whether or not a plaintiff had suffered a nuisance was crisply put in issue by Byles J in Hole v Barlow.⁽¹³³⁾ In that case, it will be recalled, he put it to a jury that no nuisance was committed where an activity was carried on in a 'convenient and proper place'.⁽¹³⁴⁾ That he had the factor of locality in mind appears from the following passage⁽¹³⁵⁾ in

(131) This was not apparently the first time he had considered the significance of the locality of a nuisance. In the St Helens case (1865) 11 HL Cas 642 at 652 he recalled that when (as Parke B) he was in the court of Exchequer he had tried a case of smoke nuisance in the town of Shields, and had instructed the jury that although the smoke was 'in some degree' a nuisance to the plaintiff, yet

'I said "You must look at it not with a view to the question whether, abstractedly, that quantity of smoke was a nuisance, but whether it was a nuisance to a person living in the town of Shields"'.⁽¹³⁵⁾

(132) (1853) 3 De G M & G 304 at

(133) (1858) 4 CB NS 334.

(134) See above 278-9.

(135) 27 LJ CB 207 at 208.

his direction in which he sought to explain to the jury what he meant by 'convenient and proper place':

'Suppose the brick-burning was carried on ... in St James Park, or in the middle of Berkley Square, or in the grounds of the Marquis of Lansdowne close by, where the wind would carry the effluvia from the clamp over Berkley Square, that clearly is not a proper place.... But suppose a new neighbourhood, where houses are just beginning to be built, on the outskirts of London ... and one or two people in the neighbourhood are annoyed, you would probably say that it was a reasonable and proper place in which to carry on the business, for it must be carried on somewhere. (136)

In Bamford v Turnley,⁽¹³⁷⁾ the majority of the court of Exchequer Chamber, in repudiating the decision in Hole v Barlow, seemed also to repudiate⁽¹³⁸⁾ the idea that locality was a relevant factor in considering whether a nuisance had been perpetrated.⁽¹³⁹⁾ And although the question of locality was very much in issue in the St Helens case, Mellor J was careful not to invoke the concept in the form suggested by Byles J in Hole v Barlow.⁽¹⁴⁰⁾

(136) In the court of Common Pleas Byles J expressed the idea of locality more crisply in the sort of epigram that was to become the traditional judicial method of stating the significance of locality:

'A swine-stye might not be a nuisance in Bethnal Green. It certainly would be in Grosvenor Square'.

Hole v Barlow (1858) 4 CB (NS) 334 at 340.

(137) (1861) 3 B & S 67.

(138) See at 77 where the court seems to suggest that under what it called the 'true doctrine' an action would lie 'whatever the locality may be'.

(139) Cf however the dissenting judgment of Pollock CB who, in advancing his view that not one thing which caused discomfort or inconvenience was necessarily a nuisance, illustrated his meaning by observing (at 79)

'That may be a nuisance in Grosvenor Square, which would be none in Smithfield Market'.

(140) (1866) 35 LJ QB 66. While mentioning that locality was a factor to be taken into account (see above 297 n 256) Mellor J did not directly put it to the jury that since St Helens was a manufacturing district the standard of comfort which a landowner could expect in such a locality differed from that which he might expect to enjoy in a residential district. Cf the contention of the defendants that Mellor J had misdirected the jury because he

(continued on the next page)

However in the House of Lords the propriety of having consideration for the locality was confirmed, by Lord Cranworth⁽¹⁴¹⁾ and Lord Westbury,⁽¹⁴²⁾ the latter however restricting its role to the case of nuisances involving sensible personal discomfort.⁽¹⁴³⁾

With this imprimatur the relevance of locality in nuisance cases was assured and it became standard practice for the courts to invoke and apply it as a criterion for determining whether a nuisance existed.⁽¹⁴⁴⁾

(140) (continued)

had told the jury that a nuisance was that which caused sensible personal discomfort 'without, at the same time, directing them as to the ... existence of the works at the time of purchase, the character of the locality' and that he had not directed the jury that 'having reference to the character of the locality and the trade ... the same was carried on in a proper place', (33 LJ QB 66 at 69-70).

(141) Who ((1865) 11 HL Cas 642 at 652) mentioned that he had applied it in a case tried by him in the town of Shields, noting that he had told the jury that they were to consider whether the nuisance was a nuisance in such a locality (see above n 131).

(142) (1865) 11 HL Cas 642 at 650:

'If a man lives in a town, of necessity he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade or commerce'.

(143) See above 298.

(144) See Clark v Clarke (1865) 1 Ch App 15 (per Lord Cranworth) Sturges v Bridgman (1879) 11 Ch D 852. In the latter case Thesiger LJ (at 865) formulated the doctrine in these terms:

'... what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on ... in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding ... that the trade or manufacture so carried on in that locality is not a private or actionable wrong.'

Rationale

The acceptance by the Victorian judges of the concept of locality as a pertinent factor in the determination of whether an actionable nuisance had been perpetuated, was in part a consequence of their tacit decision to depart from the traditional policy of rigid enforcement of landowners' claims to the domestic amenities of their habitations at the cost of industrial development.⁽¹⁴⁵⁾ More particularly, it may be said that their admission of the relevance of locality lies in the recognition of the fact that nuisance law had never been applied so as to entirely prevent the use of land for industrial manufacturing and trading purposes and that indeed there were localities in which these noxious and nuisance-producing activities were habitually carried on.⁽¹⁴⁶⁾

In the light of this fact it thus seemed legitimate to conclude that in these areas traditional standards of comfort

(145) Cf the rationale of the doctrine of locality put forward by the Lord President in Maguire v Charles McNeil Ltd 1922 SC 172 at 185:

'The law of nuisance is designed to protect the use and enjoyment of property free from all interference and annoyance. But this plan has to be accommodated to the rule - inevitable in the nature of things - which requires considerable sacrifice of individual comfort to be made as the price of the advantages which close neighbourhood to others, and to remunerative employment, brings with it. The rule operates more or less severely according to the particular character which is impressed on a locality by the operation, conscious or unconscious, of the economic habits of the community.... [The doctrine's] character was explained so long ago as 1756 in Kinloch v Robertson [above n 125] as a "temperament in equity" wrung from the rigour of the law of nuisance by the social necessity out of which close neighbourhood springs'.

(146) Their recognition of this reality can be gathered from their practice of mentioning localities notorious for their noxious industries ('Bethnal Green', 'Smithfield Market', 'Bermondsey') in juxtaposition to equally well known residential localities ('Grosvenor Square', 'Berkley Square', 'Belgrave Square') when giving epigrammatic expression to the locality doctrine.

had been abandoned⁽¹⁴⁷⁾ and new and different standards had been established⁽¹⁴⁸⁾ for the locality. This being so it would be only reasonable to judge a complaint that a nuisance existed by the local standard.⁽¹⁴⁹⁾

The great importance of the locality doctrine lay in the fact that it served to establish areas in which activities not conforming to traditional standards of comfort and convenience could be carried on with more or less impunity. This significant consideration was adverted to by Thesiger LJ in Sturges v Bridgman.⁽¹⁵⁰⁾ The adoption of a single universal standard of comfort could lead to a situation in which

'a man might go - say into the midst of the tanneries of Bermondsey, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavory character, and, by building a private residence upon a vacant piece of land put a stop to such trade or manufacture altogether.'⁽¹⁵¹⁾

(147) Cf Lord Kenyon CJ in R v Neville (1791) Peake 125:

'Where manufactories have been borne within a neighbourhood for many years, it will operate as a consent of the inhabitants to their being carried on, though the law might have considered them as nuisances, had they been objected to in time'.

(148) Cf the argument of Sir Rundell Palmer (later Lord Selborne LC) before the House of Lords in the St Helens case (1865) 11 HL Cas 642 at 647:

'When ... by the use of certain manufactures, a neighbourhood is, as it may be said, denaturalized, a person who comes to the neighbourhood cannot complain that what was done before he came there is continued. Under such circumstances the ordinary use of property is really that of its use in the special manner, and such use cannot give rise to a right of action What is done around him assumes the character of the ordinary and proper use of property' (emphasis supplied)

(149) Cf Lord Cranworth as quoted above at 338.

(150) (1879) 11 Ch D 852 at 865.

(151) Cf also London, Brighton & South Coast Rwy Co v Truman (1885) 11 App Cas 45. There an attempt was made to interdict the establishment of cattle-pens by the railway on the ground that they were located so close to habitations as to be a nuisance. The defendants pointed out that even if they 'removed to a place where there are now no houses, yet if houses were subsequently built in the neighbourhood, a nuisance would exist and another injunction might be applied for'. This consideration seems to have weighed with Lord Selborne who in holding the defendants entitled to establish the pens in the chosen locality,

(continued on the next page)

The locality principle however enabled the courts to refuse to suppress these activities at the instance of the plaintiff since

'What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner ... Judges and juries would be justified in finding ... that the trade or manufacture so carried on in that locality is not a private or actionable wrong.(152)

Scope

The extent to which the doctrine of locality could operate particularly as a defence to an alleged nuisance was circumscribed in two ways.

In the first place, it would seem that the term 'locality' did not connote an entire district but rather the 'immediate'⁽¹⁵³⁾ neighbourhood in which the plaintiff's land

(151) (continued)

pointed out that it was reasonable for the company to establish the pens in 'populous places' and not 'in fields remote from any human habitations', adding (at 56) that

'even if the company were to establish a cattle station at a distance from any human habitation it seems possible, from the case of Sturges v Bridgman, that the law of nuisance might still pursue them there (unless protected from it ...) in the event of an adjoining landowner afterwards thinking fit to build a house upon his own property'.

(152) Ibid. Cf the picturesque rationalisation of this principle in the American case of Peck v Newburgh Light, Heat & P Co (1909) 116 NYS 433:

'When the plaintiff selected his home within the sounds of the city he could not expect the silence of the country. He could not expect the circumambient air would be altogether free from the smoke and other pollutions from the houses, shops or factories. If like Lord Byron, he found 'the hum of cities horrible' nevertheless he had to recognise that he could not either quiet it or purify the air by halting men's business within the radius of his absolute comfort'.

(153) This qualification appears in the judgment of Lord Westbury LC in the St Helens case (1865) 11 HL Cas 642 at 650 (see above 298).

was situate. In other words the mere fact that there existed in a district a large number of nuisance activities which affected the plaintiff's property to a greater or lesser degree could not per se serve as a defence where the defendant established his activity in close proximity to the plaintiff's premises. (154)

Related to and arising out of this principle is the further limitation upon the locality doctrine that it does not operate to excuse nuisances which increase the amount of discomfort suffered by the plaintiff as a result of the nature of the locality. This principle was stated in the seminal decisions of R v Neville (1791)⁽¹⁵⁵⁾ and in R v Watts (1826)⁽¹⁵⁶⁾ and elaborately expounded in Rushmer v Polsue and Alfieri Ltd (1906).⁽¹⁵⁷⁾ Cozens - Hardy LJ there stated the principle in this way:

(154) This would appear to be the effect of the St Helens case. There although the defendants' enterprise was situate in an area notoriously of an industrial type it did not serve to exculpate them. They were held liable because within that locality they had caused substantial damage to the plaintiff. This at least seems to be the effect of the decisions in the Court of Queen's Bench (35 LJ QB 70). (In the House of Lords defendants failed because in terms of the Westbury doctrine (above 298-9) locality could not be taken into account where the nuisance caused material harm to property). Cf the judgment of Cockburn CJ which appears to suggest that a multiplicity of nuisances in an area cannot excuse a fresh one. Cf the remark of Lord Chelmsford LC in Crossley and Sons Ltd v Lightowler (1867) LR 2 Ch App 478 in repudiating an argument that plaintiffs could not complain of a nuisance since there were so many existing nuisances that even if the defendants were to cease their activities the plaintiffs would still suffer nuisance harm: 'The case of St Helens Smelting Co v Tipping is ... an answer to this defence'.

(155) (1791) Peake 125. There Lord Kenyon CJ after laying down the basic principle (see above 336) added the rider that 'if another man comes [into the neighbourhood] and by his manufacture, renders that which was a little unpleasant before, very disagreeable and uncomfortable, though that would not amount to a nuisance by itself, still he is answerable for it'.

(156) (1826) 2 C & P 486 (see above 337)

(157) [1906] 1 Ch 234 at 250.

'It was strenuously contended ... that a person living in a district specially devoted to a particular trade cannot complain of any nuisance ... caused by the carrying on of ... that trade without carelessness and in a reasonable manner. I cannot assent to this argument. A resident in such a neighbourhood must put up with a certain amount of noise. The standard of comfort differs according to the situation of the property and the class of people who inhabit it.... But whatever the standard of comfort in a particular district may be, I think the addition of a fresh noise caused by the defendant's works may be so substantial as to create a legal nuisance. It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible.... In short, if a substantial addition is found as a fact in any particular case, it is no answer to say that the neighbourhood is noisy....'

Coming to the Nuisance

We have seen that at one time there were trades of an argument, based upon the notion of prior occupation, that a landowner sued in nuisance might raise as a defence the plea that that plaintiff had 'come to' the nuisance. This defence tended to arise in circumstances in which a noxious trade or activity had been established and carried on in some remote place where, neighbours being absent, it caused no harm to others. The defence suggested itself when subsequently another party entered the locality and set up residence there, thereby being subjected to the nuisance emanating from the prior occupant's premises.

The defence, after being received in R v Cross⁽¹⁵⁸⁾ (1826), was categorically repudiated in Bliss v Hall⁽¹⁵⁹⁾ (1838). The doctrine of Bliss v Hall was reiterated by Byles J in Hole v Barlow⁽¹⁶⁰⁾ and Lord Romilly MR in Crump v Lambert⁽¹⁶¹⁾ (1867)

(158) (1826) 2 C & P 485 (see above 274).

(159) (1838) 4 Bing NC 183 (see above 275-6).

(160) In his charge to the jury (4 CB (NS) 334 at 336) where he observed that

'it used to be thought that if a man knew there was a nuisance and went and lived near it, he cannot recover, because it was said it is he that goes to the nuisance and not the nuisance to him. That used to be thought 100 years ago to be the law. That however is not the law now'.

(161) (1867) LR 3 Eq 409 at 413:

and authoritatively upheld by Lord Halsbury in London, Brighton & South Coast Ry Co v Truman⁽¹⁶²⁾ and Fleming v Hislop.⁽¹⁶³⁾ The rationale of the rule that coming to a nuisance is no defence, though not plainly spelt out by the English courts, is clearly based upon a repudiation of the doctrine of prior appropriation as a method for acquiring proprietary rights over land with its concomitant consequence

(161) (continued)

'... the owner of the adjoining or neighbouring tenement, whether he has or has not previously occupied it, - in other words, whether he comes to the nuisance or the nuisance comes to him - retains his right to have the air that passes over his land pure and unpolluted....'

(162) (1885) 11 AC 45 at 52: '... the old notion of people losing their rights of complaint because they come to a nuisance, has long since been exploded'.

(163) In the court below (Hislop and Others v Kelvinside Estate Co (1883) 10 Crt Sess 4th Series 426) the Lord Justice Clerk had observed that the defendants had alleged

'that the complainers came and sought out the nuisance instead of it being inflicted upon them. I am not in the least disposed to sustain that plea. Indeed, I think it is entirely unapplicable to the circumstances of this case, and as a general proposition cannot be predicated of an urban suburb like this'.

Adverting to this in the House of Lords (Fleming & Others v Hislop and Others (1886) 11 AC 686 at 696 Lord Halsbury observed:

'If the Lord Justice Clerk means to convey that there was anything in the law which diminished the right of a man to complain of a nuisance because the nuisance existed before he went to it, I venture to think that neither in the law of England nor in that of Scotland is there any foundation for any such contortion. It is clear that whether the man came to the nuisance or the nuisance came to the man, the rights are the same, and I think that the law of England has been settled, certainly for more than 200 years'

that the first occupant may determine the uses to which subsequent occupiers may put their lands. (164)

It is perhaps worth noting that in rejecting a defence of coming to the nuisance the courts were tacitly supporting the doctrine of the primacy of rights of habitation insofar as the most of the cases wherein the defence was rejected the nuisances 'come to' consisted in noxious and offensive

(164) The rationale was elaborately stated in contemporary decisions in American Courts upholding the rule that coming to a nuisance was no defence: See Taylor v People (1867) 6 Park Crim Rep (NY) 347:

'Such a doctrine would render the property of others subordinate to the purposes of him who might, before they had erected their dwellings, have devoted his own to an offensive and unwholesome business. There is no sound principle of law that will protect any man in thus depriving others of the substantial use and enjoyment of their property'.

See also Weirs Appeal (1873) 74 Pa 230; Campbell v Seaman (1876) 63 NY 568; North Western Fertilizing Co v Hyde Park (1878) 97 US 659. Perhaps the most elaborate statement of the rationale is to be found in US v Luce (1905) 141 F 385:

'A contrary doctrine [allowing such a defence] would be so unreasonable and oppressive as to work its own condemnation. If by way of illustration, one should purchase a lot of land 100 feet square in an uninhabited section and erect and operate upon it a bone-boiling establishment ... causing noxious ... odours or stenches to spread over the surrounding country within a radius of half a mile ... he would furnish the means of destroying the ordinary enjoyment of human existence throughout an area more than 2 188 times as large as the lot owned by him and devoted to the offensive business.... The establishment of the offensive business in such a case could ... prevent the then owners of the residue of the land within the sphere of the noisome odors from building and occupying dwellings thereon... [and] deprive them of the right to have and enjoy reasonably pure air in and about their homes. Such right they would possess by virtue of their ownership and occupancy of the land ... [and] would be seriously impaired or, perchance, wholly destroyed, by the erection and operation of the offensive business, and those succeeding to the title would be without remedy or redress of any kind for the continuance of the nuisance. But clearly such is not the law'.

trades. Further, it is worth noting also that in rejecting the defence the courts overlooked the fact that the plaintiff who had established his habitation next to an existing noxious industry and then successfully sued for the nuisance encountered, in a sense perpetrated a nuisance of his own by successfully inhibiting the right of the defendant to pursue a trade which until that time he had lawfully carried on.⁽¹⁶⁵⁾ The harshness of this latter consequence was to some extent ameliorated by the doctrine of locality which enabled the defendant to resist the action if he could establish that the effect of his trade upon the plaintiff was not unreasonable given the locality.⁽¹⁶⁶⁾

(b) Time

The relevance of the time at which the nuisance occurred was indicated by Pollock CB in Bamford v Turnley:⁽¹⁶⁷⁾

'... that may be a nuisance at midday which would not be so at midnight....'⁽¹⁶⁸⁾

The underlying premiss here is that an owner of land is entitled to constitute it as a place of quietude for his repose,

(165) For a discussion of this point see below 428-9 Cf Attorney-General v Corporation of Manchester [1893] 2 Ch D 87 which seems to show some sense of the possibly harsh effects of disallowing the defence of coming to a nuisance. There Chitty J in refusing to enjoin the establishment of a small-pox hospital noted the need to proceed with caution in cases such as these particularly 'because the doctrine of coming to a nuisance has long since been excluded'. This seems to imply that he would have considered the defence - if it had been available - to have been appropriate in this case.

(166) See above 342-3. It is plain though that the doctrine of locality is not at variance with the rejection to the defence of coming to a nuisance. These two principles are reconcilable on the basis that an activity may be a nuisance in a given locality if it exceeds the standards of toleration of that locality and in such an event it could not be open to the defendant to argue that since the locality was, say, industrial the plaintiff had no cause of action because he had come to the locality and set up a habitation there.

(167) (1862) 3 B & S 67 at 79.

(168) Cf North J in Byass v Bettam (1885) 2 TLR 88: '... Church bells might be rung in proper hours although a nuisance might be caused by ringing early in the morning'.

so that land-use activities which disturb that quietude and repose are prima facie nuisances. On the other hand the demand that the quietude of land should not be disturbed, constitutes a restraint upon the right of adjoining land owners to devote their land to noise-producing enterprises. A landowner's right to quiet cannot thus be allowed to unreasonably restrain such activities. Accordingly the question of the time when a noise nuisance is perpetrated can be seen to be central to any attempt to adjust these conflicting claims by the test of reasonableness.

Thus in Eyass v Bettam⁽¹⁶⁹⁾ (1855) it was held that the noise caused by machinery between the hours of 8 am and 8 pm was not a nuisance to a lodging house. So too in Moy v Stoop⁽¹⁷⁰⁾ (1909) it was held that the noise emanating from a children's nursery during the day-time did not amount to a nuisance. On the other hand in Rushmer v Poslue & Alfieri Ltd⁽¹⁷¹⁾ (1906) it was held that the noise of machinery in an industrial locality constituted a nuisance insofar as it occurred during the night-time.⁽¹⁷²⁾ And in De Keyzers Royal Hotel (Ltd) v Spicer Bros (Ltd)⁽¹⁷³⁾ (1914) it was held that pile-driving

'during the night seemed to go beyond the limit to which dwellers in the City of London had to submit'.

(169) Supra (n 168).

(170) (1909) 25 TLR 262.

(171) [1906] 1 Ch 234.

(172) Cf the dictum of Cozens-Hardy LJ (at 250): 'It does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam hammer is ... so worked as to render sleep at night almost impossible....'

(173) (1914) 30 TLR 251.

(c) The Gravity of the Harm

In order to give rise to a cause of action in nuisance the harm inflicted had to be of the sort which the judges designated as material.⁽¹⁷⁴⁾ In applying this elementary principle the judges developed a further rule to the effect that 'material' harm was not actionable if it was not sufficiently grave. This rule emerged as the judges began to include among the circumstances to be considered the factors of the duration of a nuisance; the sensitivity of the victim to the harm inflicted and the motive of the defendant in inflicting the harm.

Duration of harm

The idea that it was only those interferences with rights which were of some duration and not, as Brett J was to put it in Benjamin v Storr⁽¹⁷⁵⁾ (1874) 'fleeting or evanescent' was plainly derived from the principle that nuisance damage was not actionable under the doctrine of de minimis non curat lex.

The idea itself was well established in nuisance law having been applied to cases of obstruction of the highway by user to hold that it was only those uses which endured for an unreasonable length of time that amounted to public nuisances.⁽¹⁷⁶⁾

The relevance of the duration of a nuisance as a factor in determining the gravity of the harm suffered was indicated by Pollock CB in Bamford v Turnley⁽¹⁷⁷⁾ where he noted that one of the circumstances to be considered was whether a nuisance was 'temporary or permanent, occasional or continual' and observed that that

(174) See above 309-11.

(175) (1874) LR 9 CP 400.

(176) See above 175-6. See also R v Pappineau (1726) 2 Stra 637.

(177) (1861) 3 B & S 67 at 79.

'which is permanent and continual ... would be no nuisance if temporary and occasional only'.⁽¹⁷⁸⁾

Harrison v Southwark and Vauxhall Water Co⁽¹⁷⁹⁾ (1891) demonstrates that a material injury which is of short duration will not be actionable. The nuisance complained of was the noise of pumping engines employed in the course of temporary construction works. Vaughan Williams J, in refusing to enjoin the activities as a nuisance, made it plain that the defendant's activities, though the source of considerable damage, were excusable on the ground that they were of a temporary nature:

'It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours; but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so ... for the law, in judging what constitutes a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance.'⁽¹⁸⁰⁾

Of course the mere fact that an injury is of short duration is by no means an infallible excuse; the central issue is the nature and extent of the harm and not simply the question of time.⁽¹⁸¹⁾

(178) Bramwell B in the same case (at 84) seemed to question the pertinence of this enquiry, observing that it might be said that an interference with another's rights 'if of a temporary character might be justified; but I cannot see why its being of a temporary nature should warrant it ... I cannot think then that the nuisance being temporary makes any difference'.

(179) [1891] 2 Ch 409.

(180) At 413.

(181) See Fry J in Fritz v Hobson (1888) 14 Ch D 542 at 556:

'... nothing can be deemed to be fleeting or evanescent which results in substantial damage, and ... the question, therefore, is to be answered not by time, but by the effects upon the plaintiff'.

Cf Knight v Isle of Wight Electric Light and Power Co (1904) 73 LJ Ch 299.

Sensitivity to harm

In considering the harm caused to the plaintiff as determining the actionability of the nuisance complained of the courts were in effect looking to the nature of the land-use to which the defendant had devoted his property. The decision that the plaintiff had suffered a nuisance by reason of the damage caused to him, in effect meant that the defendant was to be prohibited from carrying on the particular activity. The strategic importance of the test of reasonableness as a basis for deciding whether an actionable nuisance had occurred is well-illustrated by the principle, applied in this connection, that a plaintiff could not succeed if the harm suffered by him was a consequence of his own abnormal sensitivity or the fact that his land was devoted to an abnormally sensitive use. The implication of this rule is thus that a landowner cannot, by reason of some high or abnormal sense of comfort or extraordinary enterprise, limit and restrain the many or usual land use activities of his neighbours by showing that he had suffered harm which was, in his terms, material. (182)

(i) Personal discomfort

As long ago as Aldred's case it had been laid down that the law did not take account of individual sensitivities. (183) This principle was however first expounded in express terms

(182) As will appear below the courts seem to have applied this consideration as much to cases of personal discomfort as to cases involving material injury to property. This would seem to create an exception to the general rule (above 327) that the 'circumstances' are not to be considered when dealing with material injuries to property. The exception is explicable on the ground that to concede actions to abnormally sensitive plaintiffs would be to impose unconsiderable restraints upon the uses to which a defendant landowner might devote his land.

(183) (1610) 9 Co Rep 57b where it was said 'Lex non favet votis delicatorem'. Cf Jones v Powell (1628) Hut 135 where Dodderidge J observed that 'if a man is so tender-nosed that he cannot endure sea coal, he ought to leave his house'. See too Comyns Digest Action on the Case for Nuisance (C): 'If a man set up a school so near my study, who am of the profession of the law, that the noise interrupts my studies, no action lies'. (Cf above 93 n 17).

in Walter v Selfe.⁽¹⁸⁴⁾ There the plaintiff complained of the personal discomfort suffered by him as a result of the noxious odours drifting onto his land from a brick 'clamp' upon the adjoining land of the defendant. In considering whether the plaintiff was entitled to an injunction Knight-Bruce VC considered whether the odours amounted to a 'material' interference with the plaintiff's comfort. In deciding this question he observed⁽¹⁸⁵⁾ that an 'important point ... for decision' was

'ought this inconvenience be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?'

In other words the fact that an activity may cause material harm to the plaintiff will not give rise to a cause of action if what the plaintiff complains of would not be a cause of complaint by a plain, sober and ordinary person.⁽¹⁸⁶⁾

(184) (1851) 4 De G & Sm 315.

(185) At 322.

(186) The point is well-illustrated by the contemporary American case of Rogers v Elliott (1888) 15 NE 708 where the sound of the bells of the defendant's church caused the plaintiff to go into convulsions. In refusing to hold the defendant liable in nuisance, the court found that the ringing of the bells did not materially affect the health or well being 'of ordinary people in the vicinity' and that, as the defendant's claim rested upon his 'peculiar condition', he could not 'demand as of legal right that the bell should not be used'. The court explained the principle involved as being that what had to be determined was 'the effect of noise upon people generally and not upon those, on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbances without suffering, nor upon those whose mental or physical condition makes them painfully sensitive to everything about them'. The court also usefully explained the rationale of the rule that ultra-sensitive individuals could not enjoy the protection of the law in these terms:

'If one's right to use his property were to depend upon the effect of the use upon a person of peculiar

(continued on the next page)

(ii) Damage to property

In Cooke v Forbes⁽¹⁸⁷⁾ (1867) it was intimated that the principle laid down in Walter v Selfe was relevant in connection with a nuisance causing material harm to property. In this case the plaintiff complained that the bleaching process employed by him was harmfully affected by gases emanating from the defendant's property. In the event he failed in his attempt to obtain an injunction on the ground that the injury complained of occurred only occasionally. However the defendant had argued the case on the ground that the plaintiff's process was 'unusual, not according to the custom of the trade' and that, a court would not interfere if the plaintiffs carried on their business in an 'extraordinary way'. They suggested that the plaintiff was standing on 'extreme rights' which, as the St Helens case had established, could not render a nuisance actionable. Page Wood VC conceded the point, observing that this was

(186) (continued)

temperament or disposition, or upon one suffering from an uncommon disease, the standard for measuring it would be so uncertain and fluctuating as to paralyze industrial enterprises. The owner of a factory containing noisy machinery, with dwelling houses all about it, might find his business lawful as to all but one of the tenants of the houses, and as to that one, who dwelt no nearer than the others, it might be a nuisance. The character of his business might change from legal to illegal or illegal to legal, with every change of tenants of an adjacent estate; or with an arrival or departure of a guest or boarder of a house near by; or even with the wakefulness of the tranquil repose of an invalid neighbour on a particular night. Legal rights to the use of property cannot be left to such uncertainty. When an act is of such a nature as to extend its influence to those in the vicinity, and its legal quality depends upon the effect of that influence, it is as important that the rightfulness of it should be tried by the experience of ordinary people, as it is, in determining a question as to negligence, that the test should be the common care of persons of ordinary prudence, without regard of the peculiarities of him whose conduct is on trial.'

(187) (1867) LR 5 Eq 166.

'an instance of a person carrying on a manufacture, which, if his neighbour had not happened to have another manufacture of great delicacy, probably would not have caused any injury to his neighbour.(188)

The sense of this dictum was approved and followed in Robinson v Kilvert⁽¹⁸⁹⁾ (1889). There the complaint was that heat emanating from the defendant's premises affected the paper used by the plaintiff in his trade rendering it less useful. The Lord Justices rejected plaintiff's contention that the heat constituted a nuisance, resting their decision essentially on the ground that plaintiff's trade was of a delicate and extra-ordinary nature.

Cotton LJ said⁽¹⁹⁰⁾ it would be wrong

'to say that the doing of something not in itself noxious is a nuisance because it does harm to some particular trade in the adjoining property, although it would not prejudicially affect any ordinary trade carried on there....'

Lopes LJ⁽¹⁹¹⁾ put the principle more directly:

'A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade'.⁽¹⁹²⁾

(188) At 173. It should be noted that the head-note to this case in the Law Reports is to the effect that it 'is no answer to a complaint by a manufacturer of a nuisance to his trade to say that the injury is felt only by the delicate nature of his trade'. Lindley LJ in Robinson v Kilvert (1889) 41 Ch D 88 at 96 however observed that the head-note 'goes too far, further than is warranted by the case'.

(189) (1889) 41 Ch D 88.

(190) At 94.

(191) At 97.

(192) Lindley LJ (at 96) adopted a similar view mainly by way of rejecting plaintiff's reliance upon the principle stated in the head-note to Cooke v Forbes (see previous note). He distinguished Cooke's case from the present by pointing out that the defendant there had discharged a noxious gas into the atmosphere thus injuring the plaintiff's bleaching process, saying that in such circumstances 'it may well be that he is liable for any damage done ... though such damage would not accrue if the neighbour's manufacture were not of a delicate description'. The present case was different in that there

Motive

The judges in considering whether nuisance harm was material on occasion treated the motive behind the harm inflicted as a circumstance which might determine whether a cause of action would lie in nuisance. The seminal case is Christie v Davey⁽¹⁹³⁾ (1893) where North J held that the noise complained of by the plaintiff, while not of such a degree as to be material, was actionable by reason of the fact that the defendant had caused it maliciously:

'I am satisfied that they [the noises] were made deliberately and maliciously for the purpose of annoying the Plaintiffs. If what had taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the Defendant was done only for the purpose of annoyance, and ... it was not a legitimate use of the Defendant's house to use it for the purpose of vexing or annoying his neighbours'.⁽¹⁹⁴⁾

Conversely, it would seem, the fact that a nuisance harm was a result of activity motivated by the public interest or welfare would render the harm, though material, not actionable.⁽¹⁹⁵⁾

(d) Social Utility

Perpetrators of nuisances persistently attempted to justify the nuisance harms they caused to their neighbours or the public at large by the contention that their activities

(192) (continued)

was no noxious gases discharged and involved no more than 'doing something not in itself noxious, and which makes the neighbouring property no worse for any of the ordinary purposes of trade'.

(193) [1893] 1 Ch 316.

(194) At 326. Cf the dictum of Lord Selborne in Gaunt v Fynney (1872) LR 8 Ch 8 at 12:

'... nuisance by noise (supposing malice to be out of the question) is ... a question of degree'.

(195) See Harrison v Southwark and Vauxhall Water Co [1891] 2 Ch 409 (discussed below 360).

contributed to the public advantage. The argument was raised particularly in the nineteenth century when innovations in the field of transportation systems and the improvement of towns caused states of affairs which technically amounted to nuisances.

Arguments to this effect of course amounted to the proposition that the private citizen as a landowner should be expected to endure interferences with his proprietary rights in order that the welfare of the general public should prosper. Such arguments when first advanced in the early decades of the nineteenth century were received with hostility as denying basic premises of eighteenth century individualism and the sanctity of private property. ⁽¹⁹⁶⁾

Thus as we have seen, the judges repudiated the doctrine enunciated in R v Russell ⁽¹⁹⁷⁾ (1827) that considerations of the public advantage might excuse nuisances in navigable rivers. ⁽¹⁹⁸⁾ So too they refused to admit that the public

(196) Classically expressed by Blackstone's (1 Comm 139):

'So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even a public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is nothing more essentially interested, than in the protection of every individual's private rights, as modelled by the municipal law'.

(197) See above 194.

(198) For reasons classically expressed by Denman CJ in R v Ward (1836) 4 Ad & E 384 at 404-5:

"In the infinite variety of active operations always going forward in this industrial community, no greater evil can be conceived than the encouragement of capitalists and adventurers to interfere with known public rights, from motives of personal interest, on the speculation that the changes made may be rendered lawful by being thought to supply the public with something better than what they actually enjoy. There is

(continued on the next page)

interest could justify nuisance harms to private property arising from works carried out under local improvement acts. (199)

In the field of private nuisance however the appeal to the public utility was advanced rather more successfully, albeit in a somewhat different guise. In Hole v Barlow Byles J had contended for a principle of limitation of the rights of private property owners on the grounds that this advanced trade and commerce generally. (200) This thesis, which closely coincides with that advanced in R v Russell, (201) although vigorously attacked by Baron Bramwell in Bamford v Turnley (202)

(198) (continued)

no practical inconvenience in abiding by the opposite principle, for daily experience proves that great and acknowledged public improvements soon lead to a corresponding change in the law, accompanied, however, with the just condition of being compelled to compensate any portion of the public who may suffer for their advantage."

(199) See Leader v Moxton (1773) 3 Wils KB 461 (a case tried by Blackstone himself) and Attorney-General v The Council of the Borough of Birmingham (1858) 4 K & J 528 where Page-Wood VC enjoined the operation of sewerage works serving the city of Birmingham on the ground of the nuisance caused to the estate of the relators, observing (at 540) that as far as the courts were concerned

'it is a matter of almost absolute indifference whether the decision will affect a population of 25 000, or a single individual The rights of the Plaintiff must be measured precisely as they have been left by the Legislature. I am not sitting here as a committee for public safety ... to prevent what, it is said, will be a great injury not to Birmingham only, but to the whole of England'.

For a gradual retreat from this position see however Lillywhite v Trimmer (1867) 36 LJ Ch 525 and Attorney-General v Corporation of Manchester [1893] 2 Ch 87.

(200) See above 251 (and cf *ibid* n 81), 280.

(201) Cf above 193-4.

(202) (1861) 3 B & S 67 at 84-5:

'But it is said that, temporary or permanent, it is lawful because it is for the public benefit. Now, in the first place, that law to my mind is a bad one which, for the public benefit, inflicts loss on an individual without compensation. But further, with great respect, I think this consideration misapplied in this and in many other cases. The public consists of all the individuals of it, and a thing is only for the public benefit when it is productive of good to those individuals on the balance of loss and gain to all. So that

(continued on the next page)

in terms of sturdy Blackstonian individualism,⁽²⁰³⁾ was nevertheless adopted in the form of a proposition that the rights of landowners could be subject to mutual and reciprocal limitations in order to advance the welfare of each.⁽²⁰⁴⁾ By putting the principle in these terms the judges of course glossed over the consideration of the public welfare although there can be no doubt that this was a consideration they had in mind when formulating the principle.⁽²⁰⁵⁾ The judges then

(202) (continued)

if all the loss and all the gain were borne and received by one individual, he on the whole would be a gainer. But whenever this is the case, - whenever a thing is for the public benefit, properly understood, - the loss to the individuals of the public who lose will bear compensation out of the gains of those who gain. It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for its site; and accordingly no one thinks it would be right to take an individual's land without compensation to make a railway. It is for the public benefit that trains should run, but not unless they pay their expences. If one of those expences is the burning down of a wood of such value that the railway owners would not run the train and burn down the wood if it were their own, neither is it for the public benefit they should if the wood is not their own. If, though the wood were their own, they still would find it compensated them to run trains at the cost of burning the wood, then they obviously ought to compensate the owner of such wood, not being themselves, if they burn it down in making their gains. So in like way in this case a money value indeed cannot easily be put on the plaintiff's loss, but it is equal to some number of pounds or pence, 101., 501. or what not: unless the defendant's profits are enough to compensate this, I deny that it is for the public benefit he should do what he has done; if they are, he ought to compensate.'

(203) Burn The Age of Equipoise 102 cites the passage quoted in the previous note as an illustration of Bramwell's 'unfailing grasp on the philosophy of individualism in its purest form', noting his 'simple faith in individual rights, freedom of contract and the efficacy of the test - does it pay? - with his refusal to regard society as more than the aggregate of the individual persons who compose it....'

(204) See above 304-5.

(205) See Willes J in Hole v Barlow (1858) 4 CB NS 334 cited above at 282.

gave expression to their underlying concern for the public interest by including in the set of 'circumstances' to be considered in determining whether an actionable nuisance had occurred, the consideration of the social utility of the defendant's activities.

The consideration of the social utility of the nuisance causing activities was initially expressed by implication from the fact that the courts were unwilling to suppress lawful and useful trades⁽²⁰⁶⁾ merely because they were productive of some measure of interference with a neighbour's comfort and convenience.⁽²⁰⁷⁾

The principle was given explicit recognition in Harrison v Southwark and Vauxhall Water Co⁽²⁰⁸⁾ (1891) where Vaughan Williams J in considering the nuisance caused by pumping works, pointed out that the use of land often involves a certain amount of harm to neighbours, and observed that it did not necessarily have to follow that an actionable nuisance existed. 'The business of life could not be carried on if it were so'.⁽²⁰⁹⁾ Thus, he went on to say, a nuisance caused as a result of the demolition of a house did not necessarily give rise to an action. This would be the case where the nuisance was 'created for the purpose of demolition' as opposed to 'sheer wantonness'. All of this followed, the learned judge concluded, because

'the law, in judging what constitutes a nuisance, does take into consideration ... the object ... of that which is said to constitute the nuisance'.

(206) Cf Byles J's reference to the manufacturing and social interests of the community in Hole v Barlow (supra) (cited above 251). See also Mellor J's remark in the St Helens case ((1866) 35 LJ QB 66 at 68) that 'where great works have been created and carried on, and are the means of developing the national wealth, you must not stand on extreme rights and allow a person to say, I will bring an action against you for this and that, and so on. Business could not go on if that were so'. See too the discussion of the circumstance of locality above at 341-3.

(207) Of course the mere fact that a trade was lawful or necessary was per se no excuse. In the light of Bamford v Turnley and the St Helens case, the question was whether the damage caused to others by the carrying on of such a trade was unreasonable.

(208) [1891] 2 Ch 409. Also on this case see above 351.

(209) At 413. Cf Mellor J as cited above 297.

II LIABILITY FOR NUISANCE

1. Nuisance in the era of Fault liability

The era in which the concept of private nuisance was revised and re-formulated in Bamford v Turnley and the cases descended therefrom was one which saw the rise in English law of the doctrine that there should be no liability for tortious harm without proof of fault.⁽²¹⁰⁾ This doctrine was manifested by the rise of the concept of negligence as a determinant of liability for tortious harm.⁽²¹¹⁾ In addition there grew up a distinct tort, denominated as the tort of Negligence,⁽²¹²⁾ which came to be the appropriate form of action for a wide range of harms and applied the criterion of negligence (or culpa) as the determinant of liability.⁽²¹³⁾

The judges, in re-formulating the nuisance concept in Bamford v Turnley and the cases which built on that decision refused, as we have seen, to adopt the concept of negligence as the standard for determining liability for the harm caused by an actionable nuisance.⁽²¹⁴⁾

(210) See Fleming Torts 8.

(211) Fleming (op cit 103) relates the rise of negligence to the advent of the Industrial Revolution. The courts, he writes, 'responded to the call for a new pattern of loss-adjustment by fastening onto the concept of negligence. The axiom 'no liability without fault' was quickly raised to a dogmatic postulate of justice, because it was best calculated to serve the interests of expanding industry' (op cit ibid).

(212) For the history of the tort of negligence see Winfield 'History of Negligence' (1926) 42 LQR 184; Fifoot History and Sources Chap 8.

(213) Fleming Torts 102-3.

(214) See above 332. The essential attitude of the judges was perhaps indicated by Lord Denman CJ in Bell v Twentyman (1841) 1 QB 766. There an action was brought for damage caused by water invading premises. It appeared that the flooding was due to a failure to scour the water-course, a duty resting upon the defendant. The defendant pleaded that he had been unaware of the state of the water-course and, upon being notified, had immediately repaired it. Lord Denman, in holding him liable, dismissed these pleas with the remark (at 774)

'The action is not founded on malice, or the breach of any moral duty, but is for compensation for damage

On the other hand the revised concept developed in Bamford v Turnley was not entirely unresponsive to the idea that economic enterprise should be released from the constraints of the medieval doctrine that a man acted at his peril in causing harm to others. Nuisance doctrine, as we have seen, had tended to deal harshly with commercial and industrial enterprises which corrupted the air, requiring them to either cease operations or to re-locate.⁽²¹⁵⁾ The dispensation established by Bamford v Turnley and the St Helens case while not allowing industry to avoid liability for nuisance harm by showing that it had acted without negligence,⁽²¹⁶⁾ nevertheless did enable it to avoid liability by showing that the nuisance complained of was not actionable given the circumstances of the harm, the locality, the duration of the harm and so on.

Highway nuisances

There was however one area of the law of nuisance where the concept of negligence gained some foot-hold. Traditionally obstructions in the public highway were denominated as instances of nuisance.⁽²¹⁷⁾ As we have seen, no action could lie at the instance of a member of the public harmed by such a nuisance except where special damage was incurred.⁽²¹⁸⁾ For these purposes the concept of special damages had come to include personal physical harm suffered in consequence of the obstruction in the highway.⁽²¹⁹⁾ In other words, an action in 'nuisance' might lie in respect of what could be described as an accident in the public highway. The question of liability for accidents was however a prime growth point for the concept of no liability without fault and for the tort of negligence.⁽²²⁰⁾ Thus it was

(214) (continued)

sustained by the neglect of a legal duty: and, if damage has been so sustained, the defendant is not the less bound to compensate for that because he has very promptly repaired his fault'.

(215) See above 125-6.

(216) See above 332.

(217) Above 24-6, 164ff.

(218) Above 144ff.

(219) Above 148.

(220) Cf Fleming Torts 8,103

that in the late eighteenth century we begin to encounter cases in which what would normally have been treated as actions in nuisance for special damages are treated and disposed of as actions for negligence. (221)

For a while it seemed as if this practice meant that the special action for damages for nuisances in the highway would be replaced by actions brought for negligence. (222) However in the 1840's the accident cases suddenly cease to be treated as actions brought in negligence and are brought as actions for nuisance. (223)

(221) See Bush v Steinman (1799) 1 Bos & P 404 (see below Sly v Edgley (1806) 6 Esp 6; Butterfield v Forrester (1809) 11 East 60; Flower v Adam (1810) 2 Taunt 314; Leslie v Pounds (1812) 4 Taunt 649; Coupland v Hardingham (1813) 3 Camp 398. See also Newark 'The Boundaries of Nuisance' (1949) 65 LQR at 485-4. Butterfield v Forrester for instance was a classic instance of special damages arising from a highway nuisance (cf Lord Atkin in Caswell v Powell Dufferin Associated Collieries Ltd [1940] AC 152 at 165) and argued by Serjeant Vaughan as such (see 11 East 60 at 61). Yet it was disposed of by the court on the grounds that the plaintiff had been contributarily negligent.

(222) Newark op cit 485.

(223) See Burgess v Gray (1845) 1 CB 578; Barnes v Ward (1850) 9 CB 392; Peachey v Rowland (1853) 13 CB 182; Cooper v Walker (1862) 2 B & S 770.

Newark op cit 485 suggests that the reason for this may have been 'that a new fashion was set by the fact that in the third edition of Chitty's Pleadings in 1831 the only precedent for a declaration in an action of the type we are considering was of the nuisance type'. An alternative reason suggested by the learned writer was that the profession perceived certain advantages flowing from declaring a nuisance rather than negligence. These were that to declare in negligence in cases where the action was brought against the owner of premises for a nuisance created by a contractor would mean that the plaintiff would fail as a result of the decision in Quarman v Burnett (1840) 6 M & W 499 which intimated that there could be no vicarious liability in negligence for the act of an independant contractor. On the other hand the exception to this rule in the case of torts in the nature of a nuisance suggested by Littledale J in Laughter v Pointer (1826) 5 B & C 547 and approved in Quarman v Burnett and, later, Reedie v L N W Railway (1849) 4 Exch 244 made it preferable to sue in nuisance rather than negligence (see further below 368).

The result of this development was as Newark points out (op cit 486) to introduce a principle of strict liability into the tort of negligence where it concerns injury to

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One effect of these developments was to institutionalize the heresy 'equally offensive to the legal historian and the jurisprudent',⁽²²⁴⁾ that the action for 'nuisance' is a remedy for recovering damages for personal injury.⁽²²⁵⁾ Another consequence was that a number of principles and doctrines developed in relation to the tort of negligence came to be carried over into the field of nuisance law where they infected the old law and stimulated the growth of some new principles.⁽²²⁶⁾ Thus there grew up the idea that contributory negligence was a defence in a nuisance action;⁽²²⁷⁾ the concept of a duty of

(223) (continued)

highway users from the condition of premises abutting onto the highway. Millner Negligence 187 remarks that though there may be good reasons for such an exception to the general principle of fault liability 'the use of an anomalous rule in nuisance to achieve this ... is an exceedingly haphazard way of providing for a recognised social need' Cf Friedman 'Incidence of Liability in Nuisance' (1943) 59 LQR 63 at 67-9.

(224) Newark op cit 488.

(225) See Newark op cit 488-9. Cf at 486.

(226) See also Newark op cit 486-490.

(227) See eg Fenna v Clare & Co (1894) 64 LJ QB 238. Butterfield v Forrester (1809) 11 East 60 is the source of this idea. The decision in fact establishes the defence of contributory negligence in actions for negligence but since the action was for special damages arising from a public nuisance (cf n 221 above) it seems to establish that contributory negligence is a defence in nuisance actions generally. In fact the defence of contributory negligence is hardly relevant in an action for nuisance where the gist of the action is a nuisance in the Bamford v Turnley sense (cf Winfield 'Nuisance as a Tort' (1930-2) 4 Camb LJ 189 at 200; Seavy 'Nuisance: Contributory Negligence and Other Mysteries (1951-2) 65 Harvard LR 984 at 988; Fleming Torts 368-9). The closest thing to a defence of contributory negligence in this area of nuisance would be the defence of 'coming to' a nuisance and, as we have seen (above 345) the Victorian judges steadfastly refused to recognise such a defence. Cf Seavy op cit 988 n 17. See however Lawrence v Obee (1841) 3 Camp 514 where a plaintiff failed in an action for nuisance by the stenches from a privy, the court finding that it was by her own act (the opening of a window) that the odours were able to invade her house. Whether this decision amounts to the application of a principle of contributory negligence is doubtful. It would seem more likely that the court saw case as one in which the nuisance was caused by the plaintiff rather than the defendant. In any event the decision would seem to be wrong: it is difficult to see why the plaintiff was not entitled to open a window in her wall and also to be free of the discomfort caused by noxious odours then entering the house.

care resting upon occupiers of land to prevent nuisance harm,⁽²²⁸⁾ and a doctrine of vicarious liability for nuisances.⁽²²⁹⁾

The effect of these developments was to throw the whole matter of the nature and incidence of liability for nuisance in the Bamford v Turnley sense into a state of confusion almost impossible to disentangle.

2. The Incidence of Liability

2.1. Introduction

The law of nuisance we have seen traditionally assigned liability for nuisance harm according to an elementary test of causation which was expressed in the form of the principle that the action for nuisance lay against 'him, who creates the nuisance'.⁽²³⁰⁾ This basic principle had been somewhat amplified in the seventeenth century⁽²³¹⁾ by the addition of a further principle that the action could also lie 'against him, who continues the nuisance erected by another'.⁽²³²⁾ This latter proposition tended to transcend the simple considerations of causation which underlay the first proposition and suggested that liability for nuisance might well lie based on a responsibility derived from the fact of control of the premises upon which a nuisance existed.

2.2. The Liability of the Creator of a Nuisance

The most elementary principle of liability for nuisance was that he who created that which caused the nuisance harm was the person liable to make compensation.⁽²³³⁾ This principle rested upon simple considerations of causation and, as such, determined liability without considerations of fault.⁽²³⁴⁾

(228) See below 386.

(229) See below 366.

(230) Comyns Digest 'Action upon the Case for Nuisance' (B).

(231) See above 95-7.

(232) Comyns op cit ibid.

(233) Cf above 49-51.

(234) Cf above 361. See also Rapier v London Tramways Co [1893] 2 Ch 599.

Indeed so strictly was the test of causation applied that the author of a nuisance was held liable even though he no longer occupied the premises from which the harm emanated. (235)

Vicarious liability

A development of some importance that occurred during the nineteenth century was the establishment of a doctrine that a man could vicariously incur the liability of the author of a nuisance. This doctrine made its appearance in the collateral area of liability for nuisances in the highway. The seminal case was that of Bush v Steinman (236) (1799). The case involved injuries sustained by the plaintiff when using a public highway when his chaise overturned after colliding with a heap of lime placed in the highway by a third person employed to carry out repairs to the defendant's premises which adjoined the highway. Counsel for the plaintiff argued the case on the basis that there had been a nuisance (237) for which the defendant as an employer could be held liable. The court agreed with this, holding the defendant to be liable. Eyre CJ in particular confessed to 'great difficulty in stating with accuracy the grounds' why this should be so. The defendant, he observed, 'appeared to be ... far removed from the immediate author of the nuisance'. However he cited authority which

(235) This appears from Lord Holt's dictum in Rosewell v Prior (1701) 12 Mod 635 at 634: 'if a wrongdoer conveys his wrong over to another, whereby he puts it out of his power to redress it, he ought to answer for it'. This proposition was later approved in Thompson v Gibson (1841) 7 M & W 456. There it was argued that the defendants could not be held responsible for a nuisance erected by them because they no longer controlled the land upon which it stood. Parke B dismissed this contention with the remark

'that is a consequence of their own original wrong; and they cannot be permitted to excuse themselves from paying damages for the injury it causes, by shewing their inability to remove it, without exposing themselves to another action'.

(236) (1799) 1 Bos & P 404.

(237) Clearly the idea here was that the action was one for special damages arising from a public nuisance. Significantly however there was no effort made to show that special damage had been incurred so as to bring the case within the rule that allowed private individuals to sue for a public nuisance. The truth is of course that the case was really an action for negligence. Cf above 363.

which suggested that the owner of premises might be liable to be indicted for a public nuisance for acts carried out by his servants or agents⁽²³⁸⁾ and reasoned that the same principle could apply where the nuisance was created by a contractor employed by the owner. This he thought was a principle 'highly convenient, and beneficial to the public' suggesting that it was neither necessary nor desirable that the plaintiff should be required to proceed against the actual author of the nuisance.⁽²³⁹⁾ Heath J founded liability on the relation of master and servant saying that English law recognised a vicarious liability arising out of that relationship. He cited Rosewell v Prior in support of his view saying that that case established that one who 'was benefitted by the nuisance complained of' could be held liable to third parties injured by the nuisance.⁽²⁴⁰⁾ Rooke J too rested liability on the nature of the relationship between the defendant occupier and the person who was the actual author of the nuisance:

'The person from whom the whole authority is originally derived, is the person who ought to be answerable, and great inconvenience would follow if it were otherwise The plaintiff may bring his action either against the person from whom the authority flows, and for whose benefit the work is carried on, or against the person by whom the injury was actually committed'.⁽²⁴¹⁾

(238) 'According to ... Blackstone's Commentaries if one of a family "layeth or casteth" any thing out of the house which constitutes a nuisance the owner is chargeable. Suppose then that the owner of a house, with a view to rebuild or repair employ his servants to erect a hord in the street (which being for the benefit of the public they may lawfully do) and they carry it out so far as to encroach unreasonably on the highway, it is clear that the owner would be guilty of a nuisance....'(at 407-8).

(239) 'Where a civil injury of the kind now complained of has been sustained the remedy ought to be obvious, and the person injured should have only to discover the owner of the house which has been the occasion of the mischief; not be compelled to enter into the concerns between that owner and other persons....' (at 408).

(240) At 409.

(241) At 410.

Bush v Steinman thus asserted the vicarious liability of a principal for not only the nuisances created by a servant but even those of an independant contractor. The proposition that a master could be held vicariously liable as the creator of a nuisance established by his servant was endorsed in 1824 in Laughter v Pointer⁽²⁴²⁾ and since then has never been in doubt.⁽²⁴³⁾ On the other hand the proposition that he might be vicariously liable for nuisances created by an independant contractor was not quite so simply settled.

Quite early in the nineteenth century the English judges in settling the law of vicarious liability in relation to masters and their 'servants' concluded that the principle should not apply where the 'servant' was an independant contractor. This view contradicted that expressed in Bush v Steinman and thus, in propounding it, the judges had to overrule Bush v Steinman. Significantly, however, in the course of repudiating the principles laid down in the case, the judges chose to specifically uphold it insofar as it related to the law of nuisance.

In Laughter v Pointer (1826)⁽²⁴⁴⁾ Littledale J in considering Bush v Steinman noted that it was a case in which 'the injury was done upon or near and in respect of the property of the defendant', a fact which suggested to him that there was a 'rule of law' that

(242) (1826) 5 B & C 547 (see below 369)

(243) See Garrett Nuisances 242. Express judicial authority for the proposition is mainly found in cases of public nuisance. In R v Medley (1834) 6 C & P 292 at 299 Lord Denman CJ instructed a jury that the directors of a company could be held liable for a nuisance by way of polluting a public river:

'... if persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants'.

See too R v Stephens (1866) LR 1 QB 702.

(244) (1826) 5 B & C 547 at 560.

'... in all cases where a man is in possession of fixed property he must take care that his property is so used and managed, and that, whether his own property be managed by his own immediate servants or by contractors or their servants. The injuries done upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises.

This dictum was approved in Quarman v Burnett⁽²⁴⁵⁾ (1840) Rich v Basterfield⁽²⁴⁶⁾ (1846) and Reedie v London & N W Rwy Co⁽²⁴⁷⁾ (1849). In the latter case Rolfe B rationalised it for the law of nuisance by suggesting it to be an application of the sic utere tuo ut alienum non laedas principle⁽²⁴⁸⁾ and expressing

'the principle on which parties possessed of fixed property are responsible for acts of nuisance occasioned by the mode in which the property is enjoyed'.

The effect of Reedie's case was to suggest that a landowner could be vicariously liable for 'nuisances' caused by the acts of an independent contractor. This doctrine certainly appeared in cases involving the removal of lateral support for land⁽²⁴⁹⁾ and cases involving public nuisances perpetrated in a highway.⁽²⁵⁰⁾ Whether it also applied in respect of private

(245) (1840) 6 M & W 499 at 510-511.

(246) (1847) 4 CB 783 at 802.

(247) (1849) 4 Exch 244 at 256.

(248) See below 287-8

(249) See Bower v Peate (1876) LR 1 QB 321; Dalton v Angus (1881) 6 AC 740; Lemaitre v Davis (1881) LR 19 Ch D 281; Jolliffe v Woodhouse (1894) 10 TLR 553. Technically the removal of lateral support may be classified as a 'nuisance' (cf above 113n96) it is hardly a nuisance in the sense of the decisions in Bamford v Turnley and the St Helens case. Thus Atiyah Vicarious Liability 352 observes of these cases that it 'is not entirely clear whether they are properly regarded as cases of nuisance, nor even if they are, is it clear whether they illustrate any general principle'. The underlying premiss of these cases, notably Bower v Peate, is that a landowner may be held vicariously liable by reason of the fact that he had instructed the contractor to undertake work which was inherently dangerous (cf Atiyah op cit 33-2). The concept of the 'extra-hazardous' activity hardly invokes the idea of a nuisance in the Bamford v Turnley sense.

(250) See Ellis v Sheffield Gas Consumers Co (1853) 2 E & B 767 (the ratio of the case being that the nuisance was a

nuisances properly so-called was however never clearly established during the nineteenth century. (251)

2.3. Landlord's liability

Introduction

The idea, promoted in Bush v Steinman and Laughter v Pointer, that a man might be held liable for a nuisance of which he was not the author was taken up with particular vigour in the nineteenth century in cases where the nuisance harm was perpetrated by one who was the tenant of premises held under a lease.

(250) (continued)

result of the contractor doing what the employer instructed him to do); Hole v Sittingbourne & Sheerness Rwy Co (1861) 6 H & N 488 (the nuisance being the obstruction of a navigable river by works carried out by the contractor. Again this was a case of the contractor doing what he was employed to do and thereby perpetrating the nuisance. Pollock CB (at 497) rested the employer's liability on the principle qui facit per alienum facit per se. Wilde B (at 500) treated it as a case in which it was as if the employers had created the nuisance themselves, adding that it was 'not distinguishable from the case where a landowner orders a person to erect a building upon his own land which causes a nuisance'.) The effect of these decisions was that there was no vicarious liability for the actions of an independent contractor 'except where the defendant had actually authorized the creation of a public nuisance' (Atiyah op cit 352). As to the subsequent confusion which crept into this branch of the law (cf Tarry v Ashton (1876) LR 1 QB 314) see Atiyah op cit 353-5 who submits that the true rule is that the vicarious liability for the acts of independent contractors can exist in respect of public nuisances.

(251) Cf Atiyah op cit 355 who writes that apart from the support cases 'which are probably sui generis and not perhaps strictly cases of nuisance at all - it is a matter of some doubt whether the tort of private nuisance always involves liability for independent contractors'. The principle that such liability might exist was first stated clearly in Mantania v National Provincial Bank Ltd [1936] 2 All ER 633 at 645-6 where Slesser LJ held,

'We are here concerned with the annoyance such as may found an action for nuisance, but the principles in my opinion are the same as regards the liability of a person who employs an independent contractor, that is to say, that if the act done is one which in its very nature involves a special danger of nuisance being complained of, then it is one which falls within the exception for which the employer will be responsible if there is a failure to take the necessary precautions that the nuisance shall not arise'.

(continued on the next page)

In Rosewell v Prior⁽²⁵²⁾ (1701) a landlord had been held liable for nuisance harm emanating from premises let by him on the ground that he had actually created the nuisance and could not avoid liability simply by reason of the fact that he no longer occupied the premises. Later in the century, in Cheetham v Hampson⁽²⁵³⁾ (1791) it was held that a landlord could not be held liable for nuisances created by his tenant. Then a few years later, in Payne v Rodgers⁽²⁵⁴⁾ (1794), an action brought for personal injuries suffered as a result of a defective cellar flap in the highway, the landlord of the premises was held liable since he had undertaken to repair the defect which had caused the harm.

R v Pedley (1834)

The nature of a landlord's liability next came up for consideration in the nineteenth century, in the case of R v Pedley⁽²⁵⁵⁾ (1834), a prosecution for a public nuisance.

The defendant was prosecuted for the public nuisance caused by certain privies in houses of which he was the owner but which were let by him to various tenants on an annual lease.

The houses had been built by the defendant's predecessor in title from whom the defendant had purchased the properties. The nuisance arose as a result of the privies not being cleansed. Previously the tenants had cleansed these, but recently had failed to do so. The defendant had been requested to abate the nuisance so caused, but had not done so. The indictment was then preferred.

(251) (continued):

Cf Darling J in O'Dell v Cleveland House Ltd (1910) 102 LT 602 who observed that 'it is not the law that a man can say, 'I admit I am bound to love my neighbour as myself, but I am not going to do it because I have hired another man to do it for me, an independent contractor'.

(252) (1701) 12 Mod 635. See also above 98-100.

(253) (1791) 4 TR 318. Lord Kenyon CJ said (at 319) it would be 'deplorable' if landlords were to become 'liable to be harrassed with actions for the culpable neglect of their tenants'. Rosewell v Prior was distinguished as a case in which the landlord's liability was based on his own 'misfeasance'.

(254) (1794) 2 H Bl 350.

(255) (1834) 1 A & E 822; 3 LJMC 119. These reports of the case do not always agree as to what was said by the judges.

For the defendant the point was taken that the nuisance was not created by him but rather by his tenants. Rosewell v Prior was distinguished on the ground that there it was held that the landlord's liability flowed from the fact that he had created the nuisance before letting the premises with it thereon.

The court of the King's Bench however found the defendant to be liable, though for reasons which are not entirely clear and which seem to have gone beyond principles already laid down.

Lord Denman CJ purported to apply the rule in Rosewell v Prior.⁽²⁵⁶⁾ For the rest it is difficult to establish exactly why Lord Denman considered the defendant liable. His main theme seems to have been that the defendant profited by his ownership of the premises and thus ought to be liable for the nuisances thereon.⁽²⁵⁷⁾ He seems to have thought that there was a duty upon the landlord to cleanse the buildings and that he was thus liable for the omission to ensure that they were cleaned.⁽²⁵⁸⁾

- (256) In the Adolphus and Ellis' report Lord Denman is quoted (at 826) as holding the defendant liable on the principle of the 'earlier case which shews that the receipt of rent is an upholding and continuing of the nuisance' The Law Journal report quotes him as saying simply 'The receipt of rent by him is an upholding of that nuisance' (at 121).
- (257) 'He has for his own profit, become the owner of property the natural consequences resulting from the use whereof is a public nuisance' (3 LJMC at 121). 'Had the use of the buildings by which the nuisance is produced been a matter of independent contract, no one could have doubted that the person receiving a profit from the use would have been answerable for the nuisance' (1 A & E at 827).
- (258) It had been argued that the defendant could not be held liable because the tenants were contractually bound to cleanse. Lord Denman held that there was no contract to this effect and added that even if there were it merely established 'that the landlord considered himself bound to provide for the cleansing' and he would thus be liable for his failure to enforce the contract (1 A & E at 826).

The judgment of Littledale J is usually cited as expressing the ratio of R v Pedly. The judgment appears to be an exegesis of Rosewell v Prior⁽²⁵⁹⁾ though in fact it consists in little more than the enunciation of a series of propositions for which no authority is cited. Its gist appears to be that a landlord must not let premises with a nuisance upon them.⁽²⁶⁰⁾ However it is not plain how Littledale J arrived at this principle. His judgment begins with the statement that one who acquires land with a nuisance upon it is liable therefor even though he lacks the power to abate it.⁽²⁶¹⁾ This principle he adds does not apply where the nuisance is created after the letting of the premises⁽²⁶²⁾ unless the landlord has had the opportunity to abate and has failed to do so.⁽²⁶³⁾ On the facts he held that the defendant was liable since the tenancies in the instant case were determined annually and thus the defendant had had the opportunity to abate the nuisance and had failed to do so.⁽²⁶⁴⁾

(259) Adolphus and Ellis do not report Littledale J as citing Rosewell v Prior. However the Law Journal's version of the case reflects him as beginning his judgment with the words 'The law seems to be laid down in Roxwell [sic] v Prior' (at 121).

(260) 1 Ad & El at 827. Littledale J is reported as saying in the course of his decision: 'He is not to let the land with the nuisance upon it'. In Rich v Basterfield (1846) 4 CB 783 at 804 Cresswell J in analysing R v Pedly observed that 'Littledale J seems to have rested his judgment upon the principle; that the landlord was not to let the land with the nuisance upon it'

(261) 'If a nuisance be created, and a man purchase the premises with the nuisance upon them, though there be a demise of it for a term at the time of the purchase, so that the purchaser has no opportunity of removing the nuisance, yet by purchasing the reversion he makes himself liable for the nuisance' (1 Ad & El at 827).

(262) '... if, after the reversion is purchased, the nuisance be created by the occupier, the reversioner incurs no liability....' (1 Ad & El at 827). 'Where he buys a property without a nuisance, and the tenant erects a nuisance upon it, if there be a term of years, the landlord is not liable' (3 LJMC at 121).

(263) This is implicit from the decision on the facts. See the next note.

(264) 'If there be a tenancy from year to year, as he can remove his tenant, and thus put an end to the nuisance he will be liable if he makes a new lease' (3 LJ MC at 121). 'Here the periods are short, so that there has been a

Tainton J disposed of the matter on the ground that the defendant was under a duty to maintain the premises in such a way as to prevent the nuisance occurring and was thus liable for his failure to discharge this duty.⁽²⁶⁵⁾ There was no authority for this proposition and it was later expressly dissented from.⁽²⁶⁶⁾ Williams J too seems to have held that the defendant's liability arose from the fact that he ought to have abated the nuisance and had failed to do so.⁽²⁶⁷⁾

The Nature of the Landlord's Liability

Insofar as anything about the decision in R v Pedly is clear, it would seem that the case represents an attempt to apply to landlords the same broad principle of vicarious liability for nuisances which had been established by Bush v Steinman.⁽²⁶⁸⁾ It is not without significance that it was Littledale J who gave the leading judgments in Laughter v Pointer⁽²⁶⁹⁾ (1826) and R v Pedly. In the former case this judge had formulated the proposition that an occupier 'ought to be chargeable [for nuisances] ... occasioned by any acts of persons brought upon the premises'.⁽²⁷⁰⁾ Although he does not refer to this principle in R v Pedly it would seem that he had this same principle in mind when finding the landlord (as one who was responsible for the presence of the tenants upon the premises) liable for the acts of the tenants. The judgment

(264) (continued)
reletting; and that has taken place after the user of the buildings has created the nuisance. This is, therefore, a case in which the reversioner is liable' (1 Ad & El at 817).

(265) 'It is the duty of the landlord to exact from his tenants, that they will cleanse from time to time as may be requisite, or reserve to himself a right to enter to do so' (1 LJ MC at 121).

(266) See Rich v Basterfield (1847) 4 CB 783 at 804.

(267) '... he appears by his own expressions to have admitted that it lay in his own power to remove the nuisance' (1 Ad & El at 828).

(268) See above 366

(269) Above 368

(270) See above 369

of Tainton J too seems to proceed on a tacit idea that the landlord, like the occupier, can be liable by reason of the control he exercised over the premises upon which the nuisance existed,⁽²⁷¹⁾ while the judgment of Denman CJ by its emphasis upon the 'profit' derived by the landlord hints at liability based upon the rationale employed in holding occupiers vicariously liable for nuisances of servants and contractors.

But whatever the intention of the judges in R v Pedly, the case was not subsequently treated as imposing a blanket liability upon landlords for nuisances caused by their tenants. Indeed Lord Denman himself, in the next case of Russell v Stenton⁽²⁷²⁾ (1842) stated categorically that a landlord was not, as such, liable for nuisances brought about by the non-feasance of his tenants. The action in this case arose from the omission to cleanse drains upon premises occupied by tenants. The plaintiffs however sued the defendant as 'owner and proprietor' of the premises, citing Rosewell v Prior and Payne v Rodgers. Lord Denman held that the plaintiff's plea disclosed no cause of action, since it

'charges no act on the part of the defendant, either of making or continuing the nuisance. It merely states him to be the owner and proprietor of the drains, and seeks to cast upon him, as such, a legal obligation to make good the damage ensuing to his neighbour There is no authority in support of such a claim, but several against it; Brent v Haddon, Cheetham v Hampson.⁽²⁷³⁾

(271) Cf below 377

(272) (1842) 3 QB 449.

(273) R v Pedly was cited in argument - 'Rosewell v Prior shews that the defendant, even if he had demised ... might have been subject to liability, as here alleged, for not cleansing and repairing' - but Lord Denman (at 459) considered it no further than to describe its ratio in the following terms:

'R v Pedly was an indictment against the owner of houses and privies, which had been built for the very purpose of being so used as to create a nuisance unless the owner took effectual means to prevent it. These means not having been adopted, the owner, who received rents for both, was held liable for the public nuisance which arose....'

The effect of R v Pedly upon the concept of the landlord's liability was more fully considered in the Court of Common Pleas in 1847 in the case of Rich v Basterfield⁽²⁷⁴⁾ This case is significant for the manner in which Cresswell J, who delivered the judgment of the court, sought to set the decision in Pedly in the general context of the principles relating to the incidence of liability for nuisances.

The facts of the case were very similar to those in R v Pedly. The defendant had previously erected upon his land a shop in which he installed a stove and chimney. He then let the premises to tenants who, by lighting fires in the stove, caused a smoke nuisance. The plaintiff then sued the defendant whose case rested mainly on R v Pedly which, it was argued, 'decided, that, if a landlord erects a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and lets the land with the building so erected, he is liable....'⁽²⁷⁵⁾ The plaintiff on the other hand argued, in effect, that he as landlord could not be held vicariously liable for the acts of his tenants.⁽²⁷⁶⁾

Cresswell J approached the matter by establishing first whether the defendant could be liable on the principle of Rosewell v Prior in that he, by erecting the chimney, could be regarded as the author of the nuisance. On the facts he found that since the chimney was not per se a nuisance, the rule in Rosewell v Prior could not apply. The question thus resolved itself to an enquiry whether the subsequent use of the chimney by the tenant could make the defendant, his landlord, liable.

There were cases, Cresswell J observed,⁽²⁷⁷⁾ 'in which owners of fixed property have been held liable for the consequences of acts done upon it by persons not strictly their

(274) (1847) 4 CB 783.

(275) This was how Cresswell J (at 800) summarised the defence contentions.

(276) Cresswell J summarised the argument thus: '... it was contended, that, inasmuch as the fires ... were made not by the defendant or his servants, but his tenants, he was not responsible' (ibid).

(277) At 801.

servants or agents'. These cases rested on the rationale laid down by Littledale J in Laughter v Pointer,⁽²⁷⁸⁾ showed that an owner was under a duty to 'take care that his property is so used or managed that other persons are not injured'. This principle Cresswell J said,⁽²⁷⁹⁾ explained all the cases except Pedly.

The judgment of Littledale J in that case 'seems to have rested ... on the principle that the landlord was not to let the land with the nuisance upon it'. To this proposition Cresswell J expressed⁽²⁸⁰⁾ the court's entire assent. It was also 'probably [what] Lord Denman meant ... when he said the receipt of rent was upholding and continuing the nuisance'.

Tainton J, however, had held the landlord liable on the ground of his failure to exact from his tenants an undertaking to cleanse.⁽²⁸¹⁾ To this proposition Cresswell J stated the court's dissent.⁽²⁸²⁾

Cresswell J thus came to the conclusion⁽²⁸³⁾ that if R v Pedly

'is to be taken as the decision that a landlord is responsible for the act of his tenant in creating a nuisance, by the manner in which he uses the premises demised, - we think it goes beyond the principle to be found in any previously decided cases; and we cannot assent to it.'⁽²⁸⁴⁾

(278) See above 368-9

(279) At 802.

(280) At 804.

(281) See above

(282) At 804.

(283) At 805.

(284) This dictum represents the court's rejection of the judgment of Tainton J in R v Pedly. Anent that Cresswell J said earlier in his judgment (at 804)

'it appears to us, that, if a landlord lets premises, not in themselves a nuisance but which may or may not be used by the tenant so as to become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are so used or not: the landlord cannot be made responsible for the acts of the tenant: and a fortiori he would not be liable, if he had taken an obligation from the tenant not to use them so as to create a nuisance, even without reserving a right to enter and abate a nuisance, if created'.

The result of Rich v Basterfield was thus to establish that a landlord's liability for nuisances upon demised premises was in no way vicarious in its nature, nor was it premised upon the same principle as determined the liability of the occupier of land.⁽²⁸⁵⁾ The conclusion seems to be based on the fact that the landlord being not in control of the premises cannot be held liable for nuisances created upon them by other persons,⁽²⁸⁶⁾ a proposition which is broadly consistent with principle, laid down at this time, upon which an occupier was visited with liability.⁽²⁸⁷⁾

(285) Earlier in his judgment Cresswell J (at 800) had intimated that the ratio of Bush v Steinman could not apply to the case of a landlord since 'such liability attached only upon persons in possession; ... the defendant in this case not being in possession at the time when the nuisance complained of was created, could not be made liable. And such now is the opinion of the court'.

(286) That this was the principle involved was made clear in the later case of Gandy v Jubber (1864) 5 B & S 78 by Crompton J who pointed out (at 87)

'it certainly seems hard that if a man lets his premises, and so divests himself of all power of control over them, he should be made liable for the default of the tenant. The owner ought not to be liable for subsequent nuisances which did not originate with himself, and which he cannot prevent - for these so long as the tenant is in possession the owner is irresponsible'.

Mellor J (at 91) explained the principle in the light of the decisions which had held a landlord to be liable for nuisances upon the demised premises

'It is unquestionably the duty of the owner of premises to let them free from nuisance; and if he does so, and the tenant enters into possession and subsequently creates one, he and not the landlord is liable, so long at least as the landlord is unable to regain possession of the premises, and thereby to abate the nuisance'.

(287) Cf below 388

The Incidence of Landlord's Liability

In Rich v Basterfield⁽²⁸⁸⁾ Cresswell J in the course of his analysis of the effect of the decision in R v Pedly took the opportunity to expound the grounds upon which such liability did arise:

"If, then, The King v Pedly, is to be considered as a case in which the defendant was held liable because [1] he had demised the buildings when the nuisance existed; or [2] because he had relet them after the user of the buildings had created a nuisance; or, [3] because he had undertaken the cleansing, and had not performed it; - we think the judgment right...."

This dictum must be read more as a summation by Cresswell J of the existing law as to a landlord's liability than as a statement of the precise effect of the judgments allowed in R v Pedly. The first and third grounds of liability in fact express the rationes of Rosewell v Prior⁽²⁸⁹⁾ and Payne v Rodgers⁽²⁹⁰⁾ respectively while the second ground is probably as correct a statement of the ratio of R v Pedly as can be achieved.

[1] liability for letting premises with nuisance upon them.

In Rosewell v Prior⁽²⁹¹⁾ (1701) the landlord who let premises with an existing nuisance upon them was held liable basically because he had been the author of a continuing nuisance. In Cheetham v Hampson⁽²⁹²⁾ (1791) Buller J explained the decision in slightly different terms

'... there the owner let the premises with the nuisance complained of, which had been before erected upon them. That therefore was a misfeazance of which he himself had been guilty; and, say the Court, his demise affirmed the continuance of the nuisance, and therefore might be said to be a continuation of it by himself....'

(288) (1847) 4 CB 783 at 805.

(289) See above 371

(290) See above 371

(291) (1701) 12 Mod 635. See above 98-100

(292) (1794) 2 H Bl 350. See above 371

Buller J by eliding over the fact that the defendant in Rosewell v Prior was the actual author of the nuisance thus tended to present the ratio of the case in the form of a proposition that the letting amounted to a continuance for which a landlord (whether author or not) became liable.

In Bush v Steinman⁽²⁹³⁾ (1799), the next case in which Rosewell v Prior was considered, Heath J⁽²⁹⁴⁾ described the ratio of the case as being that the landlord 'affirmed the continuance by his demise, and received rent as a consideration for it', suggesting that the landlord was properly liable to be sued because he was profiting by the nuisance.⁽²⁹⁵⁾ In R v Pedly⁽²⁹⁶⁾ (1834) Denman CJ treated Rosewell v Prior as deciding that 'receipt of rent is an upholding and continuing of the nuisance'. Cresswell J in Rich v Basterfield⁽²⁹⁷⁾ (1847) also considered Rosewell v Prior as determining that a landlord should not let premises with any existing nuisance upon them for 'if he had, by letting and receiving rent for them in that condition he would have been liable for continuing and upholding the nuisance....' In Todd v Flight⁽²⁹⁸⁾ (1860) Erle CJ although mentioning that the defendant in Rosewell v Prior had created the nuisance, nevertheless explained his liability as being 'because [the nuisance] existed at the time of the demise'. And in Gandy v Jubber⁽²⁹⁹⁾ (1869) Crompton J stated that Rosewell v Prior held that 'if a man lets or relets his lands with a nuisance upon it, he is responsible for such nuisance, notwithstanding the tenancy'. He added that no doubt the defendant had had notice of the existence of the nuisance at the time of letting but that 'notice was not there the foundation of liability'.

(293) (1799) 1 Bos & P 404.

(294) At 409.

(295) Indeed he cited Rosewell v Prior as supporting by analogy the principle which he was laying down, that an occupier of land could be vicariously liable for nuisances created by independent contractors. Rosewell v Prior, he said, 'is analogous to the present; the ground of decision having been that the Defendant was benefitted by the nuisance complained of'.

(296) (1834) 1 Ad & El 822 at 826.

(297) (1847) 4 CB 783 at 801.

(298) (1860) 9 CB (NS) 377 at 389.

(299) (1864) 5 B & S 78 at 87.

[2] Liability upon re-letting

It was never abundantly clear what was the actual effect of the decision in R v Pedly. Clearly it did not amount to a simple application of the rule in Rosewell v Prior. The facts of the cases were not on all fours since in Rosewell the nuisance clearly existed at the time the landlord let the premises while in Pedly the nuisance arose after the letting when the tenants failed to cleanse the privies. Insofar as the result of Pedly was that the landlord was held liable, the case seemed to suggest that liability could rest upon a landlord for nuisances created by his tenants. Dicta in the judgments, especially that of Little J, suggested that the liability was not vicarious but rather a result of the fact that the landlord had let the premises with the nuisance upon them.⁽³⁰⁰⁾ In the circumstances that the tenancies in that case were renewed annually, the result of the decision seemed to be that although a landlord could not be liable for a nuisance created by a tenant during the term of the tenancy, he could be held liable if at the end of the term he did not abate such a nuisance but re-let the premises with it still extant.

This at least seemed to be the construction placed upon R v Pedly by some of the later cases. In Rich v Basterfield⁽³⁰¹⁾ (1842) Cresswell J said⁽³⁰²⁾ that Little J had

'rested his judgment on the principle, that the landlord was not to let the land with the nuisance upon it He assume[d] that there was an existing nuisance at the time of the letting, which had not afterwards been removed. To his judgment, proceeding on that ground, we entirely assent'.

Erle CJ in Todd v Flight⁽³⁰³⁾ (1860) seemed to regard R v Pedly as establishing such a principle of liability. The landlord's liability arose there, he said,⁽³⁰⁴⁾ because he had let the premises 'when [the privy] had become a nuisance'. The ratio of the case was however most fully analysed in Gandy v Jubber⁽³⁰⁵⁾ (1864).

(300) See above 373-4.

(301) Supra (n 297).

(302) At 804.

(303) (1860) 9 CB (NS) 377.

(304) At 390.

(305) (1864) 5 B & S 78.

The question in this case was whether a landlord whose premises were let on an annual tenancy could be held liable for a nuisance upon the premises of which he was not the author (and indeed of whose existence he had no notice).

The court of the Queen's Bench decided that he could be held liable.

Crompton J⁽³⁰⁶⁾ held that it was clear on authority and principle that a landlord who let or relet premises with a nuisance upon them could be held liable.⁽³⁰⁷⁾ Since, in this case, the landlord had not been a party to the original demise, he could only be liable if he could be said, in the circumstances, to have relet the premises. In considering this point Crompton J adverted to the decision in R v Pedly. 'I take it', he said

'to be clear ... that where a tenant having a long lease of premises so uses them as to create a nuisance, the landlord, having no power or right of interference, incurs no responsibility; but if having regained possession of the property the landlord relets it with the nuisance thereupon remaining, in such case he is liable; and for this Rex v Pedly is an authority'.

Mellor J without referring to Pedly nevertheless approved of the proposition enunciated by Crompton J, pointing out⁽³⁰⁸⁾ that where a tenancy is from year to year the landlord can by giving notice regain possession of the premises in order to

(306) At 87.

(307) This he deduced from Rosewell v Prior which he said 'held ... that, if a man lets or relets his land with a nuisance upon it, he is responsible'. As a matter of principle he added, the owner

'being liable for nuisances and obstructions in existence at the date of demise, it seems clear that he would be equally responsible for reletting the premises with the nuisance upon them, and in this I see no hardship, notwithstanding the absence of notice to him'

(308) At 92.

abate the nuisance. If he fails to do so and the premises are thus relet the landlord thus can be taken to have confirmed the nuisance. He had 'in his hands a power which he might and should have exercised [and] must be held responsible for the consequences of not having done so!'

Gandy v Jubber thus appears to confirm the proposition enunciated by Cresswell J in Rich v Basterfield that R v Pedly was a case in which a landlord was considered liable 'because he had relet [premises] after the user of the [premises] had created a nuisance'.

Indeed Gandy v Jubber appears to extend the scope of this form of landlord liability in that the judges of the Queen's Bench there held that liability arose even where a lease was tacitly relocated. Crompton J held⁽³⁰⁹⁾ that the defendant was liable in the instant case because

'his permitting the tenant to remain in occupation year after year without taking steps for the termination of the tenancy is, I think, equivalent to a new letting at the termination of each year'.

Blackburn J too held liability to arise on this basis, citing the judgment of Littledale J in R v Pedly. There, he said,⁽³¹⁰⁾ the case of a tenancy from year to year had been dealt with

'from a conviction that, if such a tenancy were suffered to continue, it was practically the same thing as the renewal of a tenancy for a short period'

The decision of the court on this point was taken on appeal to the Exchequer Chamber⁽³¹¹⁾ where after argument the plaintiff accepted a stet processus and no judgment was delivered. The judgment of the court was however prepared⁽³¹²⁾ and it makes it plain that the Exchequer Chamber proposed to overrule the decision of the Queen's Bench. The court said⁽³¹³⁾ it differed from the Queen's Bench on the point whether liability arose where a lease was tacitly relocated.

(309) At 89.

(310) At 91.

(311) Gandy v Jubber (1865) 5 B & S 485.

(312) And subsequently published in 9 B & S 15-18.

(313) 9 B & S 16.

[3] Undertaking to repair

Payne v Rodgers⁽³¹⁴⁾ (1794) held a landlord liable for a nuisance upon the leased premises even though it arose after the letting. The ground of liability was given as the fact that the landlord had entered into a covenant with the tenant to effect repairs to the premises. The only explanation given as to why such a contract should render the landlord liable to third parties was that of avoiding circuitry of action.⁽³¹⁵⁾

The principle was followed in Leslie v Pounds⁽³¹⁶⁾ (1812) (although without citation of Payne v Rodgers) and the case apparently approved in Russell v Stenton⁽³¹⁷⁾ and Todd v Flight⁽³¹⁸⁾. Indeed the rule in Payne v Rodgers has never been dissented from⁽³¹⁹⁾ and was much followed in the twentieth century in a line of cases which extended the landlord's liability for damage caused to members of the public by nuisances upon his premises.

3. The liability arising from the control of premises

Continuing a Nuisance

We have seen that in the seventeenth century the elementary principle that the author of a nuisance was liable therefor was amplified by a principle that liability for a nuisance could be visited upon one who was not the actual

(314) (1794) 2 H Bl 350.

(315) Bohlen 'Fifty Years of Torts' (1936-7) 50 Harvard LR 725 at 747 n 41 suggests that a better reason for the decision 'seems to be that the owner of land is required as such to keep the structures thereon in such condition as not to be dangerous.... Putting the tenant in exclusive possession of the land makes it unlawful for the landlord to enter to make such repairs as he learns to be necessary. The covenant to repair carries with it an implied right of entry for that purpose and thus the duty otherwise suspended remains in force'. Cf Beven Negligence 498 n (h) who offers a similar explanation of the decision: 'This liability of the landlord is perhaps to be explained on the ground that, as an incident of his obligation to repair, he retains a certain amount of control over the premises'.

(316) (1812) 4 Taunt 649.

(317) (1842) 3 QB 449 at 458.

(318) (1860) 9 CB (NS) 377 at 389.

(319) Bohlen op cit 747 describes it as establishing 'universally accepted law'

author of the nuisance but who could be said to have continued the original wrong.⁽³²⁰⁾ This principle, although originally presented as an instance of the creation of a 'fresh' nuisance,⁽³²¹⁾ plainly rested upon the consideration that the occupier of premises upon which the nuisance existed ought to have prevented it causing harm to others. The inarticulate premiss of this idea was that the occupier, by virtue of his power of control of the premises, was in a position to abate the nuisance.

The principle that a person could be held liable for continuing a nuisance seemed to be predicated on the fact of his control of the premises from which the nuisance harm emanated⁽³²²⁾ and his 'fault' in not abating the nuisance.⁽³²³⁾

The Victorian judges though paying some lip service to the traditional formula that a man was liable for 'continuing' a nuisance⁽³²⁴⁾ made no real attempt to define what the term

(320) Above 95-7

(321) Ibid.

(322) Cf R v Watts (1702) 1 Salk 357. There a tenant was indicted for maintaining a ruinous house. The court held him liable

'... for it is not only charged, but found, that the defendant was occupier, and in that respect he is answerable to the public; for the house was a nuisance as it stood, and the continuing of the house in that condition is continuing the nuisance'.

'Precisely the same reason applies to the case of a private nuisance by a ruinous house' (per Parke B in Chauntler v Robinson (1849) 4 Exch 163 at 170.

(323) Rosewell v Prior (1701) 12 Mod 635 hints at this. There Holt CJ (at 640) held that a lessee might be sued for a nuisance, of which he was not the author, upon the premises occupied by him 'for it was the lessee's fault to contract for an interest in land on which there is a nuisance'.

(324) See Thompson v Gibson (1841) 7 M & W 456. Cf Russell v Shelton (1842) 3 QB 449 (cited above 375). See too Saxby v Manchester and Sheffield Rwy Co (1869) LR 4 CP 198 where Montague Smith J, in the course of argument, observed (at 201) that 'Persons coming into possession of land after the creation of a nuisance upon it have been held responsible for its continuance'.

actually meant.⁽³²⁵⁾ This can be attributed to the fact that they were in fact engaged in elaborating the underlying principle in other terms and contexts.

Occupier's liability

The idea that the occupier of land was under some sort of obligation to ensure that conditions existing upon his land did not cause harm to others was first explicitly expressed in the nineteenth century in the context of nuisance actions for damages incurred in the public highway. A seminal decision was that in Coupland v Hardingham⁽³²⁶⁾ (1813). The plaintiff suffered injuries as a result of falling into an unguarded space on the defendant's premises, which adjoined the public highway. The accident had occurred because the space was not fenced, and the defendant took the point that it had been in this condition for many years and certainly long before he came into possession of the premises. This argument, which in effect said that the defendant had not created the 'nuisance', was rejected by Lord Ellenborough CJ with the observation that the defendant was

'bound to guard against the danger to which the public had been exposed; and that he was liable for the consequences of having neglected to do so, in the same manner as if he himself had originated the nuisance.... [I]t is a duty which the law casts upon the occupier of the house to render it secure'.

(325) See Saxby's case (supra) where the court seems to have considered the nature of the defendant's liability for continuing a nuisance. The facts of the case are complicated and the effect of the judgments (which cite no authorities) is difficult to gather. Lord Wright in Sedleigh-Denfield v O'Callaghan [1940] AC 880 at 908 found it 'most difficult to understand' and thought it should never have been reported. In Barker v Herbert [1911] 2 KB 633 Vaughan Williams LJ said that the effect of the judgments in the case was 'that to impose a liability upon the possessor of land ... there must be either the creation of a nuisance by him or a continuation by him of a nuisance'. In Sedleigh-Denfield's case (supra) Viscount Maugham thought it 'suggests that if the occupier "adopts" or "continues" the nuisance, he will be liable if damage is caused' (at 891). Lord Romer thought it favoured the idea of 'the liability of an occupier of land for continuing a nuisance created by another' (at 913)

(326) (1813) 3 Camp 398.

In Proctor v Harris⁽³²⁷⁾ (1830) a case also involving injuries sustained as a result of a cellar flap in the pavement⁽³²⁸⁾ being left open Tindal CJ reiterated the duty of care to be displayed by the occupier of premises:

'He is not bound to resort to every mode of security that could be surmised, but he was bound to use such a degree of care as would prevent a reasonable person, acting with an ordinary degree of care, from receiving any injury'.

The idea of an occupier's duty of care next appears in dicta in Laughter v Pointer.⁽³²⁹⁾ There Littledale J in expounding the nature of a master's vicarious liability for the acts of his servants, suggested that where the harm suffered was 'in the nature of nuisances' then the occupier of premises might well be vicariously liable since

'... the rule of law may be that in all cases where a man is in possession of fixed property he must take care that his property is not so used and managed that other persons are not injured'.

Abbott CJ expressed⁽³³⁰⁾ a similar view:

'I have the control and management of all that belongs to my land or my house; and it is my fault if I do not so exercise my authority as to prevent injury to another'.

The extent to which these principles could be related to the nuisances of the conventional sort was suggested by Rolfe B in Reedie's case⁽³³¹⁾ (1847) when, in considering the judgments in Laughter v Pointer he observed

(327) (1830) 4 C & P 337.

(328) Tindal CJ treated the flap as a nuisance, putting it to the jury that the question for decision was 'whether ... this flap was in the nature of a nuisance'.

(329) (1826) 5 B & C 547 at 560.

(330) At 576. Cf Littledale J's remark (at 562): 'Houses and land come under the fixed use and enjoyment of a man for his regular occupation and enjoyment in life; the law compels him to take care that no persons come about his premises who occasion injury to others'.

(331) (1849) 4 Exch 244 at 256.

'If, for instance, a person occupying a house or a field should permit another to carry on there a noxious trade, so as to be a nuisance to his neighbours, it may be that he would be responsible, though the acts complained of were neither his acts nor the acts of his servants. He would have violated the rule of law, "Sic utere tuo ut alienum non laedas"'. (332)

These dicta hinted that the liability for nuisances upon premises followed from the fact that the occupier was in control of the premises. That control was a crucial element in determining liability for nuisances was made plain in the line of cases dealing with the liability of a landlord for nuisances upon the leased premises. (333) Those cases emphasised that, as a general rule, liability for nuisance could not be visited upon an owner not in possession of the premises but rather fell upon the occupier actually in possession. (334)

These authorities thus all suggested a principle that the occupier of premises could be held liable for nuisances of which he was not the author if he was in possession of those premises. Thus when the point came up crisply for decision the Victorian judges did not hesitate to hold an occupier who had neither created, nor authorized the creation of a nuisance to nevertheless be liable for nuisance harm suffered by a neighbour. This principle was clearly laid down in equity in

(332) For an application of this principle see White v Jameson (1874) LR 18 Eq 303 where Jessell MR held that the occupier of lands who authorized another to establish a brick-kiln which proved to be a nuisance to the defendant was 'liable to be sued in equity as well as at law'.

(333) See above 375-77

(334) See Cheetham v Hampson (1791) 4 TR 318 ('[an action for nuisance] cannot be supported against the owner of the inheritances when it is in the possession of another'); Russell v Shenton (1842) 3 QB 449 (cited above 375) Rich v Basterfield (1847) 4 CB 783 at 800 ('[some cases have occurred in which] the owners of fixed property were held liable for injuries arising from acts done upon that property by persons not strictly their servants or agents ... [S]uch liability attached only upon persons in possession'); Chauntler v Robinson (1849) 4 Exch 163 at 170 ('It does not follow that the owner of the estate, as distinguished from the occupier, may not be made liable, but not simply because he is owner').

1876 in the case of Broder v Saillard.⁽³³⁵⁾ The nuisance in question was noxious matter which penetrated the plaintiff's premises. It was a result of a defective pipe of which the defendant, who had only recently come into occupation of the premises, was entirely unaware. Jessell MR conceding that the defendant had 'done nothing at all except occupy the house ... in the usual way',⁽³³⁶⁾ nevertheless held that that was 'quite irrelevant on a question of law',⁽³³⁷⁾ and gave judgment against him.⁽³³⁸⁾

The apotheosis of this line of development occurred in Humphries v Cousins.⁽³³⁹⁾ The action was for damages for injuries suffered as a result of the escape of noxious matter from a defective drain on the defendant's premises. The defendant did not know of the drain or the defect but notwithstanding this he was held to be liable. Denman J explained the sources of this liability in these terms:

'The prima facie right of every occupier of a piece of land is, to enjoy that land free from all invasion of filth or other matter Moreover, this right ... is an incident of possession and does not depend on the acts or omissions of other people; it is independent of what they may know or not know of the state of their own property, and independent of the care or want of care which they may take of it.... [H]as the defendant infringed those rights and is he the person liable for the infringement?⁽³⁴⁰⁾ [I]t was the defendant's duty to keep the sewage ... from passing from his own premises to the plaintiff's premises.... This duty is incidental to the defendant's possession of land and is the necessary consequence of the right of the plaintiff. That duty, like its correlative right, is independent of negligence on the part of the defendant, and independent of his knowledge or ignorance of the existence of the drain'.⁽³⁴¹⁾

(335) (1876) LR 2 Ch 692.

(336) At 697.

(337) At 698.

(338) The action was for an injunction and it should be borne in mind that the award of such a remedy is less sensitive to considerations of fault than where the action is for damages (cf Winfield and Jolowicz Tort 320; Kenworthy 'The Relationship between Nuisance Criteria in Equity and Damages' (1949) 54 Dickinson LR 109. This fact would partially explain the strictness of the approach of the Master of the Rolls.

(339) (1877) LR 2 CP 239.

(340) At 243-4.

(341) At 245.

III THE NUISANCE REMEDIES

1. Action for Damages

The action for damages as a means of remedying nuisances was, as we have seen,⁽³⁴¹⁾ defective in the sense that it made no direct provision for the abatement of the conditions causing the harm complained of. In practice this meant that a wrongdoer might well perpetuate that which had been judged to be an actionable nuisance. This deficiency in the action was to some extent overcome by the practice of allowing the victim of a continuing nuisance successive actions for the same source of nuisance harm⁽³⁴²⁾ until the wrongdoer was compelled by economic pressure to put an end to the source of the harm. The practice was for a jury to award nominal damages in respect of the initial action and then, if the harm continued, to 'give such damages as may compel him to abate it...'⁽³⁴³⁾

One consequence of this approach was that it became clear that in actions for damages the courts would not allow a plaintiff to obtain damages for prospective harm from the nuisance.⁽³⁴⁴⁾

(341) Above 102.

(342) See Battishill v Reed (1856) 18 CB 696 where this principle for the first time was clearly laid down. It is interesting to note that the main source of authority cited in court was Blackstone (see above 101 n 45) and a passage from Sedwick's Damages which drew heavily upon American case law in stating the rule (see 18 CB 696 at 707-8). The judges in this case stated the rule as follows: 'Every day the defendant continues the nuisance, he renders himself liable to another action' (per Jervis CJ AT 714); 'There is no doubt, upon the authorities, that an action might be maintained for continuing the erection after judgment recovered in the first action' (per Cresswell J at 716); '... fresh actions may be brought as long as the nuisance is continued' (per Williams J at 716).

(343) See Jervis CJ in Battishill v Reed (supra) at 714:

'I think the jury did right to give, as they generally do, nominal damages only in the first action; and, if the defendant persists in continuing the nuisance then they may give such damages as may compel him to abate it....'

(344) Since such damages were the subject of any future action for the continuance of the nuisance. Thus as Williams J pointed out in Battishill v Reed (supra) at 717:

2. Self-help

'There is no doubt' Lord Denman CJ said in 1846⁽³⁴⁵⁾ 'that a person who is injured by a private nuisance may abate it.' This willingness to allow abatement of nuisances as 'an exception to the general law of England, that a man has no right to take the law into his own hands'⁽³⁴⁶⁾ was not only historically justified⁽³⁴⁷⁾ but necessary in view of the deficiency of the common law action for damages in ensuring the abatement of nuisances.⁽³⁴⁸⁾ At the same time however the judges, no doubt influenced by the consideration that the victim of a nuisance could obtain abatement through the award of an injunction,⁽³⁴⁹⁾ began to take a more rigid view of the propriety of recourse to self-help.

(344) (continued)

'It would clearly have been a misdirection to have told the jury, that, in estimating the damages, they might take into consideration the diminution in value of the plaintiff's premises, if he might afterwards have brought a fresh action from day to day for the continuance of the nuisance.... It is impossible, that, after the plaintiff has once recovered the full value, the defendant is to be liable to a succession of actions for the continuance of the nuisance'.

Cf Willes J (at 718): 'To hold that the plaintiff could recover a full compensation for the injury done to his reversion in the first action, when he may have repeated actions for the continuance of the nuisance, would be manifestly inconsistent and absurd'. The court of Chancery however had the power, under the Chancery Procedure Amendment Act 1858 (see below n 364) to make an award of prospective damages in lieu of awarding an injunction (see eg Jenks v Clifden [1897] 1 Ch 694.

(345) Perry v Fitzhove (1846) 8 QB 757 at 775.

(346) Per Wilde B in Jones v Jones (1862) 1 H & C 1 at 5-6.

(347) Cf above 55, 103.

(348) Cf above 101.

(349) Cf above 231.

This attitude is clearly seen as early as 1797 in Kirby v Sadgrove⁽³⁵⁰⁾ where Eyre CJ expressed the view that

'[A]batement ought only to be allowed in clear cases of nuisance where the injury is apparent on the first view of the matter. The abater makes himself his own judge, and proceeds at his own hazard to destroy the thing which he considers an infringement of his right; whereas in an aciton, the invasion of his property meets with a fair discussion, and obtains for him a proper recompence, without the previous destruction of the thing in dispute. We ought not to strain a point to let in this species of remedy....'

In Earl of Lonsdale v Nelson⁽³⁵¹⁾ (1823) Best J observed that, subject to one exceptional type of case,⁽³⁵²⁾ the victims of nuisances 'should not take the law into their own hands, but follow the advice of Lord Hale and appeal to a Court of Justice'.⁽³⁵³⁾ The general limitation nature of the right to resort to self-help was stated in these words in Roberts v Rose⁽³⁵⁴⁾ (1865) by Blackburn J:

'We are all agreed that where a person attempts to justify an interference with the property of another in order to abate a nuisance, he may justify himself as against the wrongdoer so far as his interference is positively necessary. We are also agreed that, in abating the nuisance, if there are two ways of doing it, he must choose the least mischievous of the two. We also think that if, by one of these alternative methods some wrong would be done to an innocent third party or the public, then that method cannot be justified at all, although an interference with the wrongdoer himself might be justified. Therefore where the alternative method involves such an interference it must not be adopted; as it may become necessary to abate the nuisance in a manner more onerous to the wrong doer'.

(350) (1797) 3 Anst 892 at 896.

(351) (1823) 2 B & C 302 at 312.

(352) For which see below n 358.

(353) Best J reference is to Hale De Portibus c 7 where the author refers to the power to abate obstructions to navigation in ports, adding that 'because this many times occasions tumults and disorders, the best way to reform public nuisances is by the ordinary Courts of Justice'.

(354) (1865) LR 1 Exch 82 at 89.

In the seventeenth century it had been established that self-help could not be resorted to without prior notice to the offending party.⁽³⁵⁵⁾ In Lonsdale v Nelson⁽³⁵⁶⁾ Best J glossed⁽³⁵⁷⁾ this rule, stating that nuisances caused by acts of omission could not be abated by self-help without previous notice.⁽³⁵⁸⁾

The seventeenth century sources of the rule that a nuisance could be abated by self-help without notice seemed to suggest that the principle did not apply as against one who was not the actual author of the nuisance.⁽³⁵⁹⁾ The rule was considered and approved by Parke B in Jones v Williams⁽³⁶⁰⁾ (1843):

'It is clear that if the plaintiff himself was the original wrong-doer ... [the nuisance] might be removed by the party injured, without any notice to the plaintiff ... but if the nuisance was levied by another, and the defendant succeeded to the locus in quo afterwards, the authorities are in favour of the necessity of a notice being given ... before the party aggrieved can take the law into his own hands.... We think that a notice or request is necessary ... in the case of a nuisance continued by an alienee....'

(355) See above 105.

(356) (1823) 2 B & C 302 at 311.

(357) The suggestion that there was a distinction for these purposes between nuisances by omission and commission was advanced by James Parke, (counsel for the plaintiff, and later Parke B and Lord Wensleydale) in an ingenious argument based on the nature and purpose of the Assize of Nuisance (see 2 B & C 302 at 305-6). As Parke B he approved of the proposition in Jones v Williams (1843) 11 M & W 176 at 181.

(358) To this rule he made one exception. Where the branches of trees overhung a public road or private property these could be cut back without previous notice. This exception he explained as being based on the danger threatened by over-hanging branches: 'The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice (at 312)'. Best J's dictum concerning the notice required in the case of overhanging boughs was expressly approved by the House of Lords in Lemmon v Webb [1895] AC 1. For an analysis of Best J's dictum see also the judgment of Kay LJ in Lemmon v Webb [1894] 3 Ch D 1 at 22, 24.

(359) Above 105.

(360) (1843) 11 M & W 176 at 182.

3. Injunction

The injunction, effectively introduced as a remedy for nuisance at the beginning of the nineteenth century,⁽³⁶¹⁾ rapidly proved to be the most efficient and flexible mode of redressing nuisances. In the course of the century the remedy was made more readily available by the removal of the rule that the existence of the nuisance had to be established by an action at law before an injunction could issue,⁽³⁶²⁾ and the establishment of the principle that a court of common law in certain circumstances might award an injunction.⁽³⁶³⁾

The great merit of the remedy, in addition to its flexibility, lay in the fact that it provided the means for obtaining judicial abatement of a nuisance, a form of redress which, we have seen, was not available after the demise of the Assize of Nuisance. The equity judges were well aware of the advantage of the injunction as a nuisance remedy as is revealed by their attitude towards the principle that damages might be awarded in lieu of an injunction. This power was conferred in 1858⁽³⁶⁴⁾

(361) Above 231.

(362) Under the influence of the Common Law Procedure Act 1854 (17 & 18 Vict c 125) (which gave the courts of common law a certain power to award injunctions) and the Chancery Amendment Act 1858 (21 & 22 Vict c 27) (which gave the court of Chancery a certain power to award damages in addition to or in lieu of an injunction (see further below n 364)). Bacon VC in Roskell v Whitworth (1871) 19 WR 804 observed that in any event it was

'the clear and paramount duty of the court, not less in obedience to the statutory enactments [noted above] than to the dictates of good sense and justice (which is the perfection of good sense) to decide at once any question for the decision of which it has satisfactory materials, without sending the parties litigant to some foreign extramural tribunal, there to undergo the dilatory, expensive, uncertain hazards of an enquiry which this court possesses the full means of deciding....'

(363) By s 79 of the Common Law Procedure Act 1854 (17 & 18 Vict c 125) which provided that where 'the party injured is entitled to maintain and has brought an action, he may claim a writ of injunction against the repetition or continuance of such ... injury'.

(364) By Lord Cairns' Chancery Procedure Amendment Act 1858 (21 & 22 Vict c 27 s 2) which provided that in 'all cases in which the Court of Chancery has jurisdiction to

but seldom exercised,⁽³⁶⁵⁾ the Chancery judges pointing out that to award damages was to enable a wrong-doer to buy the right to inflict a nuisance upon another person.⁽³⁶⁶⁾

IV THE NUISANCE CONCEPT AND THE COMFORT OF HUMAN EXISTENCE

1. Introduction

We have seen how the nuisance concept, originating in the idea of protecting an occupier's possessory interests in real property, corporeal and incorporeal,⁽³⁶⁷⁾ had come to recognise and protect more refined interests of the physical well-being of the occupier.⁽³⁶⁸⁾ These interests, identified as the amenities of domestic habitation,⁽³⁶⁹⁾ in essence expressed

(364) (continued)

entertain an application for an injunction ... against the commission or continuance of any wrongful act ... it shall be lawful for the same court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such injunction....'

(365) Between 1858 and 1894 the power was exercised on fourteen occasions only. See Shelfer v City of London Electric Lighting Co [1895] 1 Ch 287 at 303, 319.

(366) Lindley LJ in Shelfer v City of London Electric Lighting Co (supra) at 315 said that

'... the Court of Chancery has repudiated the notion that the Legislature intended to turn that court into a tribunal for legalizing wrongful acts; or in other words, the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrong-doer is able and willing to pay for the injury he may inflict'.

A L Smith LJ in the same case (at 322) made the same point:

'Many judges have stated, and I emphatically agree with them, that a person by committing a wrongful act ... is not thereby entitled to ask the court to sanction his doing so by purchasing his neighbour's rights by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be'.

(367) Above 39.

(368) Above 114.

(369) Ibid.

certain claims of personality⁽³⁷⁰⁾ relating to the integrity, comfort and convenience of the person of those in occupation of real property.

Although, technically speaking, interferences of this sort were merely one of a galaxy of offences which went under the title 'nuisance',⁽³⁷¹⁾ after the decisions in Bamford v Turnley and the St Helens case there was a clear tendency to understand the substantive meaning of the term 'nuisance' as being that which interfered with the ordinary comfort of human existence.⁽³⁷²⁾

(370) Cf above 126 n 154.

(371) The exact meaning of the term 'nuisance' was never satisfactorily settled in the nineteenth century (nor, indeed, in the twentieth). It continued to be used in a technical sense to denote such disparate activities as failure to repair a highway (cf above 166); obstructions to highways and navigable rivers (Chap 4 above); indecent exposure of the person (above 173 n 64); open cellar-flaps and other dangerous conditions in a highway (above 362); encroachments into the air-space above land (cf above 102 n 50 and see Fay v Prentice (1845) 1 CB 828; Earl of Lonsdale v Nelson (1823) 2 B & C 302; Lemmon v Webb [1895] AC 1); obstructions of natural light (cf above 120); the establishing of rival markets, fairs (see above 145) and ferrys (cf n 443 below).

(372) A tendency perhaps promoted by the legislature's choice of the term to denote the sanitary offences dealt with under the public health legislation being enacted at this time (cf above 208). The opinion of Lord Westbury in the St Helens case that the test of reciprocal reasonableness developed for nuisance law in Bamford v Turnley should be restricted to actions where 'sensible personal comfort' was affected would also suggest the tendency. It is however perhaps best illustrated by the cases in which the judges were called on to give a meaning to the word 'nuisance' when it occurred in covenants regarding the occupation of land. In Tod-Heatly v Benham (1888) LR 40 Ch 80 Bowen LJ observed (at 97-8) that

'[i]f guided by the Common Law we know what nuisance is..... I will assume ... that "nuisance" in this covenant means only a nuisance at Common Law: that is in the language of Vice Chancellor Knight-Bruce in Walter v Selfe [(1851) 4 De G & Sm 315 at 322] "an inconvenience materially interfering with the ordinary comfort physically of human existence...." Any material interference with the ordinary comfort of existence: that would be a nuisance'.

See also Martin B in Fletcher v Rylands (1865) 3 B & C 774 at 792 (cited below 424 n 27).

Sir Frederick Pollock in his treatise The Law of Torts, first published in 1887, noted that the 'conception of private nuisance' included 'direct interferences with

(continued on the next page)

As Fleming⁽³⁷³⁾ has pointed out this conception of the character of nuisance establishes it as a bridge 'between torts of the conventional pattern concerned primarily with personal injury and property damage, and torts such as defamation and malicious prosecution which reach out to vindicate more sophisticated interests of personality, like reputation'. The concept of nuisance as a remedy for interferences with the ordinary comfort of human existence constitutes the law's way of protecting interests which

'standing alone, are still outside the pale of legal protection as being altogether too refined and precious'.⁽³⁷⁴⁾

2. The Comfort of Human Existence

The Victorian judges although committed to the principle that the comfort of human existence ought to be protected, tended to take a somewhat narrow view of what exactly fell within the concept. Essentially their attitude was that human existence was tendered uncomfortable by offensive odours and noise.⁽³⁷⁵⁾ Other phenomena which could have the effect of

(372) (continued)

the rights of the possessor' hardly distinguishable from trespasses (an idea based on 'the old authorities, and the course of procedure on which [the action was] founded'); obstructions (viz interferences with ancient lights) and 'annoyances' ('the continuous doing of something which interferes with another's health or comfort in the occupation of his property'). This latter species of nuisance, Pollock observed, is 'that which is most commonly spoken of by the technical name....'

(373) Introduction to the Law of Torts 186.

(374) Fleming op cit ibid. So for instance 'smell and noise may well be actionable although neither would qualify as 'personal injury' in a negligence action....' (ibid).

(375) An interesting light is thrown on this attitude by the modern studies of 'proxemics' (theories of man's cultural use of space). Man, these studies show, responds to violations of the space which he occupies, either as a territory or an egocentric preserve in which the organism exists ('personal space') (see generally Hall The Hidden Dimension; Goffman Relations in Public). Violations of these spaces are effected by various modalities, especially odour, sounds and vision (Goffman op cit 68-74). These modalities acquire the character of an 'offence' against individual claims to space (Goffman op cit 74-84)

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disturbing the repose or tranquility of mind of the occupier of land tended to be regarded as 'too refined and precious' to enjoy even the protection of the law of nuisance.

2.1. Olfactory nuisances

The seminal instance of a nuisance affecting the comfort of existence was that of causing stench, odours, stinks or smells to invade a neighbour's house or lands.

The idea that that which was offensive to the olfactory sense could constitute an actionable nuisance was a well established principle in medieval times when stench, odours, stinks or smells had been regarded as 'corrupting' the air and were suppressed usually by way of primitive sanitary legislation.⁽³⁷⁶⁾ In Aldred's case⁽³⁷⁷⁾ (1611) the court of King's Bench allowed an action for nuisance on the ground of the stench emanating from a pig-sty. For the most part however these early precedents did not more than lay down that stench could be actionable as nuisances. In particular they provided no guidance on the circumstances or factors which rendered stench an actionable nuisance.⁽³⁷⁸⁾

This point seems to have been first considered in public nuisance cases. In R v White and Ward⁽³⁷⁹⁾ (1757) the defendants were charged with a public nuisance in that they had

(375) (continued)

because they are the means by which men can perceive space. That is to say man's perception of spaces, either territorial or personal, is effected through the olfactory, auditory and visual senses (Hall op cit chap 4) and, for this reason odours, noise and sights can be offensive to human beings as indicia of invasions by others of their spaces which are the source of physical and mental repose and tranquility. The interesting point is that olfaction and hearing are the two earliest and most basic means of communication, while sight was the last, though most specialized sense, developed in man (Hall op cit 40). As we will see below the law of nuisance, as a device for protecting the comfort of human existence has more readily recognised olfactory and auditory offences as 'nuisances' and has been reluctant to admit visually offensive conditions as constituting an actionable nuisance.

(376) See above 73.

(377) (1611) 9 Co Rep 57.

(378) Jones v Powell (1628) Hut 135; Palm 536 is a significant exception. See the discussion of this case above at 135.

(379) (1757) 1 Burr 333.

created 'noisome and offensive stinks and smells'. The defence took the point that the indictment was bad because it did not indicate why the stenches were harmful to the public.⁽³⁸⁰⁾ The Crown on the other hand argued⁽³⁸¹⁾ that

'an offensive stench is of itself a nuisance; even though it should not be strictly hurtful. An indictment merely for a stench would have been good; even without any epithets. It depends upon rendering the property of other persons incommodious and uncomfortable to them'.

The court seems to have accepted this contention, Lord Mansfield⁽³⁸²⁾ disposing of this part of the case with the observation that

'it is not necessary that the smell should be unwholesome; it is enough, if it renders the enjoyment of life uncomfortable'.

In R v Davey⁽³⁸³⁾ (1805) where the complaint concerned a 'sulphurous smell' Heath J directed the jury that it must appear

'that the grievance was either destructive to the general health of the inhabitants, or rendered their dwellings uncomfortable or untenable',

He pointed out that the witnesses who had been subjected to the odour were 'in health' and there was no evidence that the noxious vapours which would endanger the health of people. The jury duly acquitted.

This direction appeared then to make the actionability of the stench parasitic to danger to health. However in the next case of R v Neil⁽³⁸⁴⁾ (1826) Abbott CJ followed the ratio of White and Ward and held that it was not necessary to show injury to health, adding that

(380) Citing precedents and authorities which suggested that the stench had to be 'contagious' or 'infectious' or 'unwholesome' or 'insalubrious' (at 335).

(381) At 336.

(382) At 337.

(383) (1805) 5 Esp 217.

(384) (1826) 2 C & P 485.

'if there be smells offensive to the senses that is enough, as the neighbourhood has a right to fresh and pure air'.

Bliss v Hall⁽³⁸⁵⁾ (1838) was the first nineteenth century case to allow an action for private nuisance arising from stench. Echoing Rankett's⁽³⁸⁶⁾ case, it involved the odours arising from candlemaking. Tindal CJ⁽³⁸⁷⁾ rested the plaintiff's right to an action upon the broad principle that

'[w]hen a person becomes occupier of a house, he is entitled, by common law, to all reasonable rights, easements, and appurtenances, amongst which good wholesome air is of course included'.

The leading nineteenth century case on the nature of odours as a nuisance was Walter v Selfe⁽³⁸⁸⁾ (1851). There Knight Bruce VC explained⁽³⁸⁹⁾ the actionability of stench as deriving from a claim to one of the basic media of human existence, namely the claim of persons

'to an untainted and unpolluted stream of air for the necessary supply and reasonable use of himself and his family ... for the ordinary purposes of breath and life'.

This claim, he intimated, rested not so much upon the interest of physical health or damage to property⁽³⁹⁰⁾ but rather upon the interest in physical comfort as a normal incident of the occupation of land.⁽³⁹¹⁾

(385) (1838) LJ MC 122.

(386) See above 125.

(387) At 123.

(388) (1851) 4 De G & Sm 315.

(389) At 321.

(390) Knight Bruce VC (at 323) did not consider it necessary to decide whether stench had to be shown to be 'noxious to human health, to animal health, in any sense, or to vegetable health'. However he did add that it was not 'incumbent upon the Plaintiff to establish that vegetable life or vegetable health, either universally or in particular instances, is noxiously affected by the contact of vapours and floating substances....'

(391) The Vice-Chancellor made it plain that the essential question was whether the stench 'will be an inconvenience to the occupier' of the premises, and, indeed, concluded that the stench complained of would 'abridge and diminish seriously and materially the ordinary comfort of existence'

By 1867 Lord Romilly MR considered

'it to be established by numerous decisions ... that offensive vapours alone, though not injurious to health may ... constitute a nuisance to the adjoining or neighbouring property....'(392)

2.2. Noise

The great increase in the incidence of machines and mechanical manufacturing devices associated with the Industrial Revolution threw up the question whether noise and vibration constituted a nuisance.

Prior to the nineteenth century the question had been little considered but such authority as there was suggested that noise was indeed regarded as a species of nuisance. (393)

(391) (continued)
of the defendant (at 323).

It is interesting to note that Knight-Bruce VC recognised (at 323) the stenches to be a cause of actual physical discomfort:

'Ingredients may, I believe, be mixed with air of such a nature as to affect the palate disagreeably and offensively, though not unwholesomely. A man's body may be in a state of chronic discomfort, still retaining its health, and perhaps even suffer more annoyance from nauseous or fetid air for being in a hale condition'.

(392) Crump v Lambert (1867) LR 3 Eq 409 at 412. Cf the statement of principle in the contemporary American case of Cleveland v Citizens Gas Light Co (1869) 20 NJ Eq 201:

'Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated, make life uncomfortable.... [W]hatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable, is a nuisance'.

(393) In R v Smith (1726) 2 Stra 704 the accused was convicted of a public nuisance 'for making great noises in the night with a speaking trumpet ... which the court held to be a nuisance....' In R v Lloyd (1802) 4 Esp 200 the noise of a tin-mans trade was held not to be a public nuisance though the court intimated that in the circumstances it might well have amounted to a private nuisance (see above 225). Martin v Nutkin (1724) 2 P Wms 266 is an interesting case which suggests that a peal of bells was considered to be a nuisance. The case is interesting in that the plaintiff instead of proceeding in nuisance 'purchased' the defendant's undertaking not to toll the bells at certain times. When the defendant breached this agreement the court issued an injunction to restrain the ringing.

The question first came up for consideration in the nineteenth century in Elliotson v Feetham⁽³⁹⁴⁾ (1835). There the plaintiff complained of 'divers loud, heavy, jarring, varying, agitating, hammering and battering sounds and noises' caused by the defendant's machinery. The defendant did not deny that there was a nuisance but pleaded prior occupation. This defence failing, judgment was entered for the plaintiff. The matter was more fully considered in Soltau v De Held (1851)⁽³⁹⁵⁾. There the plaintiff complained of the nuisance caused by the ringing of bells. His complaint was upheld both at common law⁽³⁹⁶⁾ and in equity.⁽³⁹⁷⁾

In Scott v Firth⁽³⁹⁸⁾ (1864) the plaintiff succeeded in an action for nuisance arising from the 'vibrations' and 'noise' emanating from a rolling mill on adjoining premises. Indeed it seems that by this stage there was no question that noise could be considered to be the basis of an action for nuisance, a proposition spelt out by Romilly MR in 1867 in Crump v Lambert:⁽³⁹⁹⁾

'I consider it to be established by numerous decisions that ... noise alone ... may ... constitute a nuisance to the owner of adjoining or neighbouring property'.

From this time forward there are numerous instances of successful

(394) (1835) 2 Bing (NC) 134.

(395) (1851) 2 Sim (NS) 133.

(396) The proceedings at common law were not reported. However it appears from the reports of the case in equity that the plaintiff instituted an action for damages 'for the nuisance committed to him by means ... of ... the bells' and a verdict was found for him and damages awarded.

(397) Kindersley VC granted an injunction upon the facts of the case. However he observed (at 143) that the ringing of the bells could not be regarded as a nuisance per se:

'... a chime of bells may be, and no doubt is, an extreme nuisance, and perhaps an intolerable nuisance, to a person who lives within a very few feet ... but to a person who lives at a distance from them, though he is within the sphere of their operations ... so far from its being a nuisance, or inconvenience, it may be a positive pleasure. For I cannot concur with the proposition that in all circumstances and under all conditions, the sound of bells must be a nuisance'.

(398) (1864) 4 F & F 349.

(399) (1867) LR 3 Eq 409 at 412.

actions in nuisance for noise. Remedies were granted for noises arising from industrial operations,⁽⁴⁰⁰⁾ from trades and occupations⁽⁴⁰¹⁾ from construction works and building operations,⁽⁴⁰²⁾ entertainments,⁽⁴⁰³⁾ animals⁽⁴⁰⁴⁾ and various other sources.⁽⁴⁰⁵⁾

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- (400) Gort (Viscountess) v Clark (1868) 18 LT 343 (saw, steam engine); Roskell v Whitworth (1871) 19 WR 804; Goose v Bedford (1873) 21 WR 449 (steam Hammer); Gaunt v Fynney (1872) Ch App 8; Beaumont v Emery [1875] WN 106 (steam engine); Sturges v Bridgman (1879) 11 Ch D 852 (mortar and pestle).
- (401) Crump v Lambert (1867) LR 3 Eq 409; Baxter v Bower (1875) 44 LJ Ch 625 (foundry); Gullick v Tremlett (1872) 20 WR 358 (forge); Heather v Pardon (1877) 37 LT 393; Byass v Bettam (1886) 2 TLR 88; Smith v Jaffray (1886) 2 TLR 480; Polsue & Alfieri v Rushmer [1907] AC 121 (printing trade); Tinkler v Aylesbury Dairy Co (1888) 5 TLR 52, Fanshawe v London & Provincial Dairy Co (1888) 4 TLR 694 (dairies).
- (402) Harrison v Southwark and Vauxhall Water Co [1891] 2 Ch 409, Webb v Barker [1881] WN 185; Howland v Dover Harbour Board (1898) 14 TLR 355; Shelfer v City of Lond. Electric Lighting Co [1895] 1 Ch 287.
- (403) Inchbald v Robinson (1869) 4 Ch App 388 (circus); Barham v Hodges [1876] WN 234 (skittle alley); Walker v Brewster (1867) LR 5 Eq 25 (fair); Bostock v North Staffs Rwy Co (1852)(regatta); Bellamy v Wells (1890) 60 LJ Ch 156 (boxing contests).
- (404) Ball v Ray (1873) 3 Ch App 467, Rapier v London Tramways Co [1893] 2 Ch 588, Broder v Saillard (1876) 2 Ch D 692 (houses in stables); London, Brighton & South Coast Rail Co v Truman (1885) 11 AC 45 (cattle).
- (405) Jenkins v Jackson (1888) 40 Ch D 71 (dancing lessons); Christie v Davey [1893] 1 Ch 316 (music lessons); Moy v Stoop (1909) 25 TLR 262 (nursery).

It is interesting to note that the Victorian judges in holding noise to be a species of nuisance did not insist upon the complaint being parasitically attached to some other more obvious proprietary harm. In Soltau v De Held⁽⁴⁰⁶⁾ the defendant sought to rebut the plaintiff's claim that there was an actionable nuisance by arguing that the plaintiff while citing noise as the harm involved in fact was complaining of the depreciation in value of his land consequent upon the presence of the peal of bells. And, the argument went, since mere economic loss was no ground for an action in nuisance,⁽⁴⁰⁷⁾ the plaintiff could not succeed in his claim. Significantly Kindersley VC, while agreeing that there could be no action for mere depreciation, allowed the injunction, thus suggesting that the noise alone, by reason of its physiological effect upon auditors, amounted to a nuisance.

2.3. Other interferences with the Comfort of Existence

It is fairly clear that the courts in admitting odours or noise as species of nuisance were protecting interests of personality or, in other words, harms which impinged upon the person of a landowner rather than upon his corporeal property.⁽⁴⁰⁸⁾

(406) (1851) 2 Sim (NS) 133.

(407) See below

(408) That the Victorian judges were alert to this distinction is revealed by decisions concerning compensation for 'injurious affectation' of land under the Lands Clauses Consolidation Act 1845. The Act spoke about injurious affectation of land and when landowners came to claim compensation for the effects of noise and smoke (emanating usually from railways) the judges refused to award it on the basis that the injury involved was to the person of the landowner rather than to his land. Hammer-smith Railway Co v Brand (1867) LR 4 HL 171 seems to be the source of this rule. It was applied in City of Glasgow Union Railway Co v Hunter (1870) LR 2 Sc & Div 78 though not without some reluctance on the part of Lord Westbury who there said (at 86)

'Another vice or error was introduced [into the law on the point] ... when it was decided that the particular loss sustained by the inhabitants of a house ... which did not touch the house, but most materially affected the comfort of the inhabitants thereof and their enjoyment of the property, was not an injury to property'.

However having so recognised that the nuisance concept might protect interests of personality, they evinced considerable reluctance at extending this protection to the full range of these interests. In particular they refused to allow actions for nuisance brought on the ground that the defendant's activities induced fear in the mind of the plaintiff, or invaded his sense of privacy, or offended his aesthetic sensibilities.

(i) Fear

In 1752 Lord Chancellor Hardwicke was asked to enjoin the construction of a small-pox hospital.⁽⁴⁰⁹⁾ The ground upon which the injunction was sought was, it seems, in part the 'terror' that the existence of such an institution 'occasioned in the neighbourhood'.⁽⁴¹⁰⁾ Lord Hardwicke refused the injunction, apparently on the ground that the establishment of such institutions was 'of great advantage to mankind'⁽⁴¹¹⁾ and, further, on the ground that the institution was no nuisance because

'the fears of mankind, though they be reasonable ones, will not create a nuisance'.⁽⁴¹²⁾

However so potent was the dread of small-pox that when, in the late nineteenth century, provision was made for the establishment of parochial small-pox asylums, local inhabitants quickly resorted to the law of nuisance in order to prevent their erection. Although there can be little doubt that

(409) The case is reported as Baines v Baker (1752) Amb 158; and as Anon (1752) 3 Atk 750. Both reports, Kindersley VC remarked in Soltau v De Held (1851) 2 Sim (NS) 133 at 148 'are jejune' and 'very unsatisfactory'.

(410) See Ambler's report (supra). '[a]s far as one can collect from the reports of the case ... the intended erection of the small-pox hospital spread dismay and terror through the neighbourhood' Kindersley VC in Soltau v De Held (supra) at 148).

(411) See Ambler's report.

(412) These words appear only in Atkins' report of the case.

these attempts were motivated by fear of the spread of the disease they were usually presented in the form that the hospital in fact constituted a real threat to public health, an argument that relied heavily upon the theory of the 'aerial dissemination' of the disease.

In 1878 a jury found a small-pox hospital to be a nuisance.⁽⁴¹³⁾ The managers sought to challenge this decision on the basis that they had statutory authority to maintain the hospital.⁽⁴¹⁴⁾ When this contention was finally rejected by the House of Lords,⁽⁴¹⁵⁾ the hospital was closed down.

However this case did not have the effect of subverting the principle laid down by Lord Hardwicke. Its correctness was confirmed⁽⁴¹⁶⁾ and the courts, sceptical of the aerial theory of the dissemination of small-pox,⁽⁴¹⁷⁾ made it plain

(413) Hill and others v. Managers of the Metropolitan Asylum District (1878) 48 LJ QB 562.

(414) See also the decision of the Court of Appeal in this case, reported in (1879) 49 LJ QB 228.

(415) Metropolitan Asylum District Managers v Hill (1881) 16 AC 193.

(416) In the Hill case (supra) Lord Blackburn observed that Lord Hardwicke had stated 'what is undoubtedly law, that loss arising from the fears of mankind though reasonable, would not create a nuisance at law' (1881) 6 AC 193 at 206. Cf Bendelow v Guardians of Wortley Union (1887) 57 LJ Ch 762 where counsel for the Union argued that the injunction could only issue where there was proof of imminent danger to health: '... these principles have been applied to hospitals from the time of Lord Hardwicke' It is interesting to note that in this case, which is one of the few in which the hospital was enjoined, the court relied upon evidence of a medical practitioner who had been instructed to report on the circumstances and dangers involved with the instant hospital, his report expressly leaving out of account 'any mental anxiety caused to the plaintiffs by the proximity of the hospital'.

(417) See Fleet v Metropolitan Asylums Board (1886) 2 TLR 361; Attorney-General v Rathmines (below n 418); Attorney-General v Nottingham Corp [1904] 1 Ch 673.

that they would only act against such institutions where the complaint rested upon something more substantial than the traditional dread⁽⁴¹⁸⁾ of the disease,⁽⁴¹⁹⁾ an attitude that broadly confirmed that mere mental distress or anxiety arising from another's use of his land would not give rise to an action in nuisance.⁽⁴²⁰⁾

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- (418) Cf FitzGibbon LJ in Attorney-General v Rathmines & Pembroke Joint Hospital Board [1904] 1 I-R 161: 'It seems probable that the dread of small-pox is to a great extent the result of tradition. That scourge of the eighteenth century retains its terrors for those who do not realise that it has been deprived of most of its dangers. Vaccination is not only a preventive, but it also modifies the disease'. Cf the discussion of the legal history of vaccination by Lord Blackburn in the Hill case (1881) 6 AC 193 at 206.
- (419) Attorney-General v Manchester Corp [1893] 2 Ch 87; Attorney-General v Guilford (1895) 12 TLR 54 ('The question is, is there here a real apprehension of a real danger, not a sentimental or fanciful one?'); Rathmines case (supra) where FitzGibbon LJ said that 'A sentiment of danger and dislike, however natural or justified ... proof that it will abridge a man's pleasure or make him anxious' would justify an injunction.
- (420) This principle was followed in America in 1887 when, in Westcott v Middleton (1887) 43 NJ Eq 478, 11 Atl 490, it was held that an injunction could not issue against an undertaker's establishment on the ground of the anxiety it induced in the plaintiff by reminding him of death. However in Densmore v Evergreen Camp (1910) 112 Pac 255; 31 LRA (NS) 608 it was held that an undertaker's establishment by its 'mute reminders of mortality, the hearse, the chapel, the ... bodies, autopsies' - 'cannot help but having a depressing effect upon the mind of the average person', and the court issued the injunction. In Saier v Joy (1917) 198 Mich 295; 164 NW 507, the court held that reminders of morality and the consequent depression of mind 'deprive the home of that comfort and repose to which its owner is entitled' and enjoined an undertaker's establishment. The result of these and other decisions has been to establish a general doctrine of the American law of nuisance that places such as cemeteries, funeral homes, insane asylums and the like may qualify as nuisances by reason of their psychological effect upon neighbouring landowners. Cf Noel, 'Unaesthetic Sights as Nuisances' (1939) 25 Cornell LQ 1; Note 'Aesthetic Nuisances: An Emerging Cause of Action' (1970) 45 New York U LR 1075; Silverstone 'Visual Pollution' (1974) 12 Alberta LR 542.

(ii) Privacy

The notion that an invasion of the privacy of a man's home might constitute a nuisance was, as noted above, not unknown in the medieval law.⁽⁴²¹⁾ In Cherrington v Abney⁽⁴²²⁾ (1709) the existence of a right to privacy was indirectly asserted in holding that 'ancient lights' could not be substituted in a re-built house in a position other than that which they had occupied in the old structure lest they be made higher so as to overlook a neighbouring house 'for privacy is valuable'.

However in Chandler v Thompson⁽⁴²³⁾ (1811) Le Banc J said that although 'an action for opening a window to disturb the plaintiff's privacy was to be read of in the books' he had never known such an action. He added that when he was in the court of Common Pleas Lord Chief Justice Eyre used to say 'that such an action did not lie'. This hardening of opinion against the recognition of an action in nuisance for an invasion of privacy is reflected by the decision in Re Penny⁽⁴²⁴⁾ (1857) that a landowner could not obtain compensation under the Land Clauses Consolidation Act 1846 for injurious affectation of land by reason of it being overlooked. Then in 1861 Kindersley VC in Turner v Spooner⁽⁴²⁵⁾ provided the quietus for the old view:

'... no doubt the owner of a house would prefer that a neighbour should not have the right of looking into his window or yard, but neither this court nor a court of Law, will interfere on the mere ground of invasion of privacy; and a party has a right even to open new windows, although he is thereby enabled to overlook his neighbour's premises, and so interfering, perhaps, with his comfort'.

(421) See above 119.

(422) (1709)

(423) (1811) 3 Camp 80.

(424) (1857) 7 El & Bl 660.

(425) (1861) 1 Drew & Sm 467.

The question was touched on by the common law judges in Tapling v Jones (1862) who made it clear that while they recognised that an invasion of privacy might well amount to an interference with the comfort and convenience of a house, no action in nuisance could lie.⁽⁴²⁶⁾ So fixed did this principle become that the courts refused redress even where a defendant set up mirrors so as to be able to spy upon the interior of the plaintiff's home.⁽⁴²⁷⁾

The only instance where the courts seem to have been prepared to concede some claim to privacy lies in the case of Lyons and Sons v Wilkins (1899) where 'watching and besetting' a house was held to constitute a common law nuisance.⁽⁴²⁸⁾

(426) In the Exchequer Chamber (Jones v Tapling (1862) 31 LJ CP 342) Blackburn J stated the proposition quite explicitly:

'It is quite true that the opening of a new window looking into the grounds of another may not only annoy the neighbour, but may often affect the value of his property. I suppose that the marketable value of a villa, with a garden enclosed by trees and secluded from public view, would be seriously affected if a fresh story were raised in a neighbouring house, so as to overtop the trees and expose the garden to the view of neighbours; but the law of England considers this no injury. No action lies against him who puts up the new window, there is no equity to restrain him ... he has done an act perfectly legal, though it may be annoying to his neighbour'.

In the House of Lords (Tapling v Jones (1865) 11 HL Cas 290 at 305) Lord Westbury LC affirmed the principle, observing that "'invasion of privacy by opening windows" ... is not treated as a wrong for which any remedy is given'. Lord Chelmsford too conceded that the opening of a window might 'materially interfere with the comfort and enjoyment of his neighbour, but of this species of injury the law takes no cognizance. It leaves every-one to his own self-defence against an annoyance of this description....'

(427) Balham Dentist case (1904) see Kenny Cases on Tort (4 ed (1929) 405-6 who records this unreported case.

(428) [1899] 1 Ch 255. The case involved an interpretation of the Conspiracy and Protection of Property Act 1875 (38 & 39 Vict c 86) which made it unlawful for members of a trade union to 'wrongfully' 'watch and beset' (ie picket) premises. (s 7) In considering whether in the instant case picketing had been carried out wrongfully, members of the Court of Appeal held the activities contravened the statute since they constituted a common law nuisance and were thus unlawful:

(continued on the next page)

(iii) Prospect

The seventeenth century judges had categorically stated that interference with the prospect from a building constituted no nuisance.⁽⁴²⁹⁾

This principle was followed in the eighteenth century by the courts of equity. In the Fishmongers Company case⁽⁴³⁰⁾ (1752) Lord Hardwicke LC refused to enjoin the construction of a wall saying that although the plaintiff's property might depreciate in value by the wall 'rendering the prospect less pleasant ... that is no reason to hinder a man from building on his land'. In the same year he stated the principle more directly in Attorney-General v Doughty⁽⁴³¹⁾ (1752) in refusing to enjoin buildings which would have intercepted the prospect from Gray's Inn gardens. 'I know' he said

'no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns; and I must grant injunctions to all the new buildings in this town'.

This dictum was approved (obiter) by Lord Blackburn in Dalton v Angus⁽⁴³²⁾ (1881). There he remarked that the distinction between the right to light and the right to prospect as being that between necessity and delight was 'more quaint than satisfactory'. The reason why there could be no right to prospect, he said, was that such a right 'would impose a burden on a very large and indefinite area' and thus should not be allowed to be created 'except by actual agreement'.⁽⁴³³⁾

(428) (continued)

'Such conduct seriously interferes with the ordinary comfort of human existence and ordinary enjoyment of the house beset, and such conduct would support an action on the case for nuisance at common law' (per Lindley MR at 267);

'To watch or beset a man's house for the length of time and in the manner and with the view proved would undoubtedly constitute a nuisance....' (per Chitty LJ at 271-2);

'At the common law watching and besetting ... might or might not be so conducted as to amount to a nuisance' (per Vaughan Williams LJ at 273).

(429) Above 118-9.

(430) (1752) Dick 164.

(431) (1752) 2 Ves 453.

(432) (1881) 6 AC 740 at 824.

(433) It became the practice to covenant for a right of prospect

(continued on the next page)

Indeed not only did the Victorian judges refuse to admit a right of prospect from a house, they refused also to recognise the right of prospect of a house or premises. In Smith v Owen⁽⁴³⁴⁾ (1866) the plaintiff complained that a structure erected by the defendant obstructed the public's view of his shop-window. However Wood VC refused an injunction, plainly regarding this case as no different to that where a landowner's view from his premises was obstructed.⁽⁴³⁵⁾

The dicta of Lords Hardwicke and Blackburn suggest that judicial reluctance to extend the protection of the law of nuisance to a landowner's interest in the prospect from his premises lies in a concern for the consequences that would follow from the recognition of an easement of prospect. The decision in Campbell v Paddington Corporation⁽⁴³⁶⁾ (1911) indicates that where there is no question of the landowner claiming a right in the nature of an easement, the judges were prepared to recognise prospect as an incident of landholding. In that case the plaintiff sued for special damages resulting from a public nuisance. The nuisance was an obstruction of the highway and the special damage alleged was the obstruction of the

(433) (continued)

from a house. Where a right so acquired was interfered with no action lay in tort but had to be brought on the covenant: Western v MacDermott (1866) 2 Ch App 72; Manners v Johnson (1875) 1 Ch D 673.

(434) (1866) 35 LJ Ch 317.

(435) '... there was nothing to prevent a neighbour building on his own ground in such a way as to obstruct the distant view of ... a sign'. See also Butt v Imperial Gas Co (1866) LR 2 Ch App 158 where it was complained that a gasmeter newly erected obscured the public view of the plaintiff's place of business. Lord Chelmsford LC was certain that this constituted no nuisance

'... if the building of a wall which merely intercepts the prospect of another ... is not a legal injury, it ... [is] very difficult to see how a building, which merely obstructed premises from the view of passers-by, could be the subject of an action' (at 161).

See however Cobb v Saxby [1914] 3 KB 822 where it was held that an unlawful obstruction of the highway which obscured the public view of the plaintiff's premises, entitled the plaintiff to a remedy.

(436) [1911] 1 KB 869.

view from the plaintiff's premises. The court of King's Bench held for the plaintiff on the ground that although there could be no easement of prospect, an interference with the view from premises caused by an unlawful act entitled the owner to damages resulting therefrom.⁽⁴³⁷⁾

It is plain that nineteenth century attitudes to what qualified as a nuisance were nothing if not inconsistent. Proceeding from a basic premiss that a landowner was entitled to demand an interest in the comfort and convenience of his home the courts admitted actions in nuisance for the discomfort and inconvenience caused by noise and odour while refusing actions where the discomfort or inconvenience took the form of mental distress or an interference with aesthetic sensibilities.

The roots of this inconsistency probably lie in nuisance's primordial connection with the disseisin and the consequent idea that a nuisance was a form of physical invasion of the victim's land. Noise and odour while undoubtedly affecting personal rather than proprietary interests, nevertheless had the appearance of being invasions of the lands of the victim. Anxiety and aesthetic distress on the other hand seemed not to involve any invasion of matter from without but to be indigenous in their origins and thus hardly in the traditional nuisance mould.⁽⁴³⁸⁾

(437) 'I agree that the law does not recognise a view or prospect from a house as a right in the nature of an easement which can belong to anybody as of right.... But that is not this case. This is a case of a person ... unlawfully erecting a structure in the public street which seriously interferes with the enjoyment by the plaintiff of her house. That is enough to give the plaintiff a right of action on the case for disturbing her in the enjoyment, use, and occupation of her house....' (per Avory J at 875-6). See too Lush J at 878-9.

(438) Cf Ellickson 'Alternatives to Zoning : Covenants, Nuisance Rules, and Fines as Land Use Controls' (1973) 40 U Chi LR 681 at 734-5:

'When an unneighbourly land use decreases surrounding property values, the traditional objections to recovery in the absence of physical invasion are not persuasive. Damage from aesthetic blight may be difficult to measure, but so may damage from noise, smoke, vibration or other spillovers readily accepted as nuisances. Nor does there seem to be any physiological or psychological reason to distinguish visual harm from other types of sensory discomfort. Idiosyncratic tastes of complaining

3. Economic Harm

Often the complaint that a landowner had suffered a nuisance to the comfort of his existence was motivated by the economic harm (in the sense of the depreciation in value of the land) brought about by the presence of the condition or state of affairs alleged to be a nuisance. (439)

However since Bracton's time it had been the established principle of common law that mere economic loss arising from the manner in which another used his land was damnum sine injuria. (440)

The closest that the common law had come to recognising that economic loss might give a cause of action for nuisance was the doctrine that one who suffered loss of income from his franchise to hold a market or fair⁽⁴⁴¹⁾ or maintain a ferry⁽⁴⁴²⁾

(438) (continued)

landowners are not more likely to arise in aesthetic cases than in olfactory cases and can be eliminated by ... recognising a defence of hypersensitivity [cf above 352]'. .

(439) Cf Fleming Introduction to the Law of Torts 186-7:

'Most often of course economic values are primarily involved, as when unnecessarily noisy building operations drive away the patrons of a hotel next door, or when the advent of a factory or small-pox hospital in a predominantly residential neighbourhood threatens to impair property values....'

(440) Bracton illustrated the concept of damnum sine injuria by the example of a mill-owner who lost custom by reason of his neighbour attracting away clientele by establishing a mill upon his own land. See above 43 n 44.

(441) See above 45.

(442) The emergence of new methods of transportation in the early nineteenth century seems to have stimulated a rash of cases for disturbance of the franchise of maintaining a ferry (see Huzzey v Field (1835) 2 Cr M & R 432; Pim v Curell (1840) 6 M & W 234; North and South Shields Ferry Co v Barker (1848) 2 Exch 136; Chamberlaine v Chester & Birkenhead Rwy Co (1848) 1 Exch 870; Newton v Cubitt (1862) 12 CB (NS) 32; R v Cambrian Rwy Co (1871) LR 6 QB 422; Hopkins v Great Northern Rwy Co (1877) LR 2 QBD 224).

was entitled to obtain redress by an action for 'nuisance'.⁽⁴⁴³⁾ The judges however explained this type of action for nuisance as being based not upon the loss of profits but rather on the fact that the establishment of a rival market, fair or ferry violated the incorporeal property right which was the franchise.⁽⁴⁴⁴⁾

(443) The nature of an action for nuisance for disturbance of a ferry was extensively examined by the House of Lords in Hammerton v Dysart [1916] AC 57. There Viscount Haldane observed that there were two theories as to the nature of this right of action:

'According to one theory there is no right of action excepting for protection against the infliction of nuisance consisting in actual loss of tolls caused by obstruction of traffic. On this view the cause of action is nuisance strictly so-called and nothing more, and accordingly a substantial interference and consequent pecuniary injury must be proved. The cause of action on this footing resembles that for obstruction of ancient lights (at 68-9)... [The other theory is] that at the foundation there must be a substantive title of a proprietary character, and that the principle applies which was explained in the judgment of Holt CJ in Ashby v White [(1703) 2 Ld Raym 938 at 955], that "a damage is not merely pecuniary, but an injury imparts a damage, when a man is thereby hindered of his right"' (at 70).

(444) See especially Hammerton v Dysart (supra). The earlier sources suggested that the action lay because the ferryman was obliged by law to maintain the ferry and was thus entitled to the profits of his enterprise: Prior of St Nedeport's case (1442) YB 22 Hen 6 f 14 pl 23 (see Fifoot History and Sources 96); Blackstone 3 Comm 219 (cited with approval in Letton v Goodden (1866) LR 3 Eq 123 at 132-3). On this ground, it was said, the case of the ferry differed from that of the mill-owner mentioned by Bracton. Cf Lord Parker of Waddington in Hammerton v Dysart (supra) at 84-5:

'As an instance of damage which gives rise to no cause of action, that is, of *damnum sine injuria*, Bracton mentions the case of a mill, the profits of which might be seriously damaged by the competition of a rival mill without giving rise to any action for nuisance. The mill owner has no right to immunity from damage to his profits by reason of competition on the part of others. In the case of an action for disturbance of a ferry the damage alleged has invariably been that the profits of the ferry had been diminished or impaired.... So much is clear, but why does the ownership of a ferry confer a right to immunity from damage by competition, whereas the ownership of a mill does not? The answer is ... [that the] right of the ferryman involves an obligation to keep up the services

(continued on the next page)

The courts of equity also refused to recognise that economic harm might constitute a nuisance entitling an applicant to an injunction. In Fishmongers Co v East India Co⁽⁴⁴⁵⁾ (1752) Lord Hardwicke in refusing an injunction against a building which obstructed ancient lights, remarked

'It is true the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground'.

In Attorney-General v Nichol⁽⁴⁴⁶⁾ (1809) Lord Eldon approved 'the observation of Lord Hardwicke, that a diminution of the value of the premises is not a ground'. Kindersley VC in Soltau v De Held⁽⁴⁴⁷⁾ (1851) spelt out the rule quite clearly:

'... it is said that part of what is alleged by the plaintiff as the mischief arising to him is the diminution in value of his house; and it is said, and with perfect truth, by the defendant's counsel, that diminution in value does not constitute nuisance....'

So too in Jones v Tapling⁽⁴⁴⁸⁾ (1862) Blackburn J, recognising that the plaintiff's property might be depreciated in value as a result of being overlooked by defendant's house, observed that no action could lie on this ground. In Harrison v Good⁽⁴⁴⁹⁾ Bacon VC in formulating the nature of a nuisance observed that there is no

'... authority for the proposition that, because a depreciation in value would take place, the owners of adjoining property suffering depreciation have therefore a right to call that a "nuisance" The law upon that subject I take to be clear and plain'.

(444) (continued)

of the ferry for the benefit of the public, but the right of the mill owner involves no such obligation. The ferryman has undertaken a public burden in consideration of the Crown's grant of the right to take tolls, and he would have a legitimate grievance if the public, while enjoying the benefit of the obligation, were allowed to destroy the consideration for which it was undertaken. This ground of distinction between the franchise ferry tolls and the mill has always been recognised....'

(445) (1752) 1 Dick 164.

(446) (1809) 16 Ves 338 at 342.

(447) (1851) 2 Sim (NS) 133.

(448) (1862) 31 LJ CP 342 (see n 426 above).

(449) (1871) LR 11 Eq 338 at 353.

A reason why the Victorian judges refused to consider mere economic loss as an actionable nuisance may be their insistence upon the nuisance action being based upon 'material' harm to property and their conception of such harm being that which was tangible or visible.⁽⁴⁵⁰⁾

(450) Cf above 328 n 94.

P O S T S C R I P T

NUISANCE IN THE TWENTIETH CENTURY : AN OVERVIEW

The history of the nuisance concept in the twentieth century is largely a story of decline and neglect. As an instrument of social administration nuisance has lost the central and strategic position it had come to occupy in the nineteenth century. As a consequence it has not enjoyed much in the way of substantial judicial elaboration nor has it been the subject of any major scholarly and critical analysis. Yet for all this it would be premature to dismiss the concept to a museum of legal antiquities for there are signs that this eight hundred year old institution of English law may yet have a useful and significant role to play in the future.

Decline

The historical explanation for the decline in importance of nuisance law in the twentieth century is to be found within the concept itself.

A chief function of the common law of nuisance over the many centuries of its existence was to regulate the manner in which men used, exploited and enjoyed their real property.⁽¹⁾ But even while it was achieving an apothosis in Bamford v Turnley and the St Helens case⁽²⁾ the seeds of its demise were germinating. In the nineteenth century the British parliament intent upon reforming the sanitary conditions of English urban life, introduced a comprehensive system of land-use controls in the form of statutory devices for compelling the owners of private property to maintain and administer their land in a way which either eliminated or prevented insanitary conditions which treated the public welfare.⁽³⁾ The violations of the sanctity of the right of private property inherent in these schemes were disguised and made more palatable by the legislature's adoption of the word 'nuisance' to describe the insanitary conditions which it sought to repress.⁽⁴⁾

(1) Haar Land Use Planning 95; Williams The Structure of Urban Zoning 11-12. See also above 195 ff

(2) Above Chap 6.

(3) Above 195 ff.

(4) Above 208-9. Cf Mc Auslan Land, Law and Planning 37-46.

The success of the public health legislation spawned a movement for more extensive regulation of the ways in which men used their land. It was reasoned that the permanent protection of public health and welfare lay in an urban environment in which the many factors which went to make up a healthy, prosperous, progressive and satisfying style of human existence could be ensured by the scientific planning and organisation of patterns of land use with the urban core.⁽⁵⁾ This movement realised its ambition when, in 1909, the British parliament enacted the Housing Town Planning Etc [sic] Act⁽⁶⁾ which empowered local authorities to undertake town planning schemes in respect of land being developed for building purposes 'with the general object of securing proper sanitary conditions, amenity, and convenience in connexion with laying out and use of the land, and of any neighbouring land'.⁽⁷⁾

By the middle of the century town planning or (in America) zoning had pervaded all aspects of the city life and become the premier method of controlling and regulating the ways in which men might use and enjoy their land.

Ironically enough this alternative system, which substituted bureaucratic administration for private litigation under nuisance law as the system of land use control, rose to eminence on the shoulders of the common law concept of nuisance.⁽⁸⁾

(5) Cf Hall Urban and Regional Planning 42; Mumford The City in History 584ff 9 Ed 7 c 44. For the history of town planning in England as developed out of his seminal enactment see Heap The Land and the Development; 'New Developments in British Land Planning Law' (1955) 20 Law and Contemporary Problems 493; Griffith 'The Law of Property (Land)' in Ginsberg (ed) Law and Opinion in England in the Twentieth Century 127ff.

(6) 9 Edw 7 c 44.

(7) S 54(1).

(8) Cf Heap (op cit n15): 'On the old common law maxim, sic utere tuo ut alienum non laedas (the basis of the doctrine of good neighbourliness), statutory planning ... has now built a great edifice' (at 493). The main line of connection lay, of course, in the field of public nuisance where the nineteenth century public health legislation had demonstrated that the term, and indeed the concept of, nuisance could usefully be employed in

Mr Justice Sutherland of the American Supreme Court in Village of Euclid v Ambler Realty Co⁽⁹⁾ (1926), in approving zoning, made obeisance to the common law of nuisance:

'In solving doubts, the maxim sic utere tuo ut alienum non laedas, which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clue. And the law of nuisances, likewise, may be consulted, not for the purposes of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality'.

But for all this lip-service to the common law of nuisance, zoning and planning were to subvert the old institution, exposing its limitations,⁽¹⁰⁾ and causing it to fall into disrepute and desuetude.⁽¹¹⁾

(9) (1926) 272 US 365 at 387.

(10) Cf Williams The Structure of Urban Zoning 12:

'As a technique for modern land use control, nuisance law suits have all sorts of disadvantages. The legal questions which have not been definitely settled are rather remarkable: whether (and how) the list of common-law nuisances can be expanded, and whether there are different degrees of protection for tenant-occupied and owner-occupied residential areas. Moreover, criteria for consistent policy are notably absent: and there is practically no way for judges to coordinate their decisions with long-term land-use planning, even if they wanted to - which they don't. However, the most serious limitations come from the last point mentioned above - that the remedy is retroactive only, and so its use often involves destruction of existing investments without compensation. In brief, the remedy is erratic, and often too drastic to be usable'.

(11) See Ellickson 'Alternatives to Zoning : Covenants, Nuisance Rules and Fires as Land Use Controls' (1973) 40 U Chi LR 681 at 722:

'... administrative flaws of nuisance law combined with its doctrinal weaknesses to fuel the belief that public regulation systems such as zoning would be superior. As zoning began to flourish, nuisance law became less important'.

A further reason for the decline of nuisance was its confused and sprawling condition.⁽¹²⁾ Scholars in particular despaired of reducing its amorphous mass to some sort of rational order and structure,⁽¹³⁾ an attitude which, in the 1930's, led to a proposal that the use of the term nuisance should be avoided altogether⁽¹⁴⁾ and that, as it were, a fresh start should be made in constructing a set of rules to regulate the various harms huddled under the rubric 'nuisance

(12) Cf Fleming Torts 338-9; Prosser Torts 571. See also the analysis in Restatement of Torts 216 ff and the commentary thereon in Paton 'Liability for Nuisance' (1942) 37 Illinois LR 1.

(13) Cf the opening words to Prosser's chapter on nuisance in his Law of Torts:

'There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance"' (at 571).

See also Fleming's Law of Torts (at 338):

'Few words in the legal vocabulary are bedevilled with so much obscurity and confusion as 'nuisance'. Once tolerably precise and well-understood, the concept has eventually become so amorphous as well-nigh to deny rational exposition'.

Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480, also introduced his discussion with the complaint that while in most of the law of tort one at least knows where one is, while

'in nuisance it is very different : the subject as commonly taught comprises a mass of material which proves so intractable to definition and analysis that it immediately betrays its mongrel origins'.

(14) By the American Law Institute which in its Restatement of Torts Chapter 40 suggested that in dealing with 'the protection which the law gives to interests in the private use and enjoyment of land' it was 'desirable to avoid the use of a term ['nuisance'] attended with so much confusion and uncertainty of meaning' (op cit 215). It is interesting to note that the Institute proposes to use the term 'nuisance' in its Restatement (Second) of Torts (see Restatement (Second) of Torts (Tentative Draft) Chap 40).

A symptom of the declining importance of nuisance in the twentieth century is the paucity of academic studies of the concept. The monographs devoted to the topic are elderly, and of little merit⁽¹⁵⁾ and the more recent scholarly accounts of nuisance law are confined to chapters in general texts on the law of torts and a scattering of articles in learned journals.⁽¹⁶⁾

Perhaps even more depressing is the fact that twentieth century judges have 'hesitated to commit themselves to meaningful propositions of a rationalizing character in administering this area of the law.'⁽¹⁷⁾ To a large extent they have simply continued the tradition of earlier centuries in allowing causes of action to be framed in 'nuisance' when there exists no particular reason, except history, for bringing an action under this rubric.⁽¹⁸⁾

(15) The first monograph on the subject appeared in England only in 1890 (to a rather naïve expression of surprise in the *Law Quarterly Review* (see (1908) 24 *LQR* 348). In that year E W Garrett a metropolitan police magistrate, published his single-volumed treatise The Law of Nuisances a work which, a review in the *Law Quarterly Review* (1908) 45 *LQR* 348) pointed out, was lacking 'as a scientific and literary study of a branch of the law' being 'a mere simple enumeration of cases in the manner of the old text-books, without any very manifest co-ordinating principle'. Garrett's book ran two editions, the last appearing in 1908.

An earlier treatise on nuisance had appeared in America in 1875 when Horace Gay Wood published A Practical Treatise on the Law of Nuisances in their Various Forms, including Remedies therefor in Law and Equity (xxvi & 937pp (Albany)). A second edition appeared in 1883 (1071pp) and a third in 1893 (2 vols (San Francisco)). There is no evidence that this work was employed by English lawyers and it certainly was not cited in any of the English cases. Prosser (*Torts* 571 n 5) dismisses both Garrett and Woods' books as being 'of dubious value'.

(16) Of particular merit are Newark 'The Boundaries of Nuisance' (1949) 65 *LQR* 480; Fleming *Torts* Chap 15; Street *Torts* Chap 11; McLaren 'Nuisance in Canada' in Linden (ed) Studies in Canadian Tort Law Chap 13.

(17) McLaren op cit (n 16 above) 321.

(18) Cf McLaren op cit ibid:

'So often have the judges, in the most indiscriminating manner, mouthed the magic word "nuisance" as the apparent solvent of a novel or difficult case, and so tenaciously have they clung to the word when it is obvious that its only association with the factual situation is an historic and semantic one, that the term has taken

Thus for instance there has been no significant attempt in the twentieth century to explore and analyse the relationship in the traditional dichotomy of 'public' and 'private' nuisance,⁽¹⁹⁾ or the mystery of the true nature⁽²⁰⁾ of the

(18) (continued)

on a chameleon-like quality which defies simple definition. This element of self-inflicted complexity seems to have persuaded the judiciary that explanation is best avoided'.

(19) For thoughtful and helpful discussion of the relationship see Street Torts 240-1; McLaren *op cit* (n 16) at 324-332.

(20) The tendency to regard a public nuisance as a species of private nuisance which affects a multiplicity of individuals (see above 222-6) was enhanced by dicta in Attorney-General v PYA Quarries Ltd [1957] 2 QB 169. There Denning LJ (as he then was) in considering (at 190) 'the difference between a public nuisance and a private nuisance' observed:

'The classic statement of the difference is that a public nuisance affects Her Majesty's subjects generally, whereas a private nuisance only affects particular individuals. But this does not help much. The question, "When do a number of individuals become Her Majesty's subjects generally?" is as difficult to answer as the question "When does a group of people become a crowd?" Everyone has his own views. Even the answer "Two's company, three's a crowd" will not command the assent of those present unless they first agree on "which two." So here I decline to answer the question how many people are necessary to make up Her Majesty's subjects generally. I prefer to look to the reason of the thing and to say that a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large.

See also the judgment of Romer LJ at 180-4 where the authorities are reviewed. From these the learned lord justice deduced that 'any nuisance is "public" which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects' (at 184).

concept of public nuisance.⁽²¹⁾ Nor has the exact nature of the internal relationship of the various components of the concept of private nuisance been the subject of much strict juridical analysis.⁽²²⁾ Nor has much progress been made in determining the proper scope of the remedy by way of the action for private nuisance.⁽²³⁾

(21) The most important contemporary discussion of the matter has occurred in the American Law Institute in the course of the drafting of sections for the Restatement (Second) of Torts. The reporter for Tentative Draft No 16 offered the definition of a public nuisance as

'a criminal interference with a right to common to all members of the public'.

Members of the ALI Council questioned the proposition that a public nuisance was always a crime. A revised version of the draft met with the approval of the ALI and is likely to become the official restatement of the law on this topic. Tentative Draft No 17 defined a public nuisance as

'an unreasonable interference with a right common to the general public'.

Commentators (Bryson and Macbeth 'Public Nuisance, the Restatement (Second) of Torts, and Environmental Law' (1972) 2 Ecology LQ 241) on these tentative drafts have supported the view that a public nuisance should not be considered to be always a crime. They have pointed out (at 246-7) that there has been a gradual movement to separate the concept of public nuisance from its criminal origins, both by way of the emergence of the injunction for public nuisances (cf above 218) and the tendency to reduce the traditional instances of indictable nuisances to statutory form. They conclude (at 247) that

'it can be argued that public nuisance is an action which never developed many typically criminal characteristics and is now growing away from its broad criminal sources toward, on the one hand, increasingly specific definition as a criminal offence and, on the other hand, toward a broad cause of action in tort which has fewer criminal aspects'.

(22) But see Street Torts 215 ff whose account of the concept is closely analytical.

(23) There is still debate on the question whether the action for nuisance lies for interferences with easements. Salmond contended that the interference with an easement was not a nuisance (Salmond Torts (7 ed) Chap 8), a view which Winfield (op cit (n 25) 190 n 12) condemned as 'unhistorical' and which was not followed in the next edition of Salmond's book. Cf Winfield and Jolowicz Torts 319. So too there is still obscurity about the concept that an action for material damage to property (cf above 327-8) is actionable as a nuisance (see Street Torts 216-7) and Millner (Torts 182) has suggested that actions for this type of harm could 'found upon negligence rather than nuisance'.

This is not to say that twentieth century nuisance law has not had occasion to gloss or perfect principles laid down in the nineteenth century and before. Significant attempts have been made to delimit the true boundaries of nuisance,⁽²⁴⁾ to mark out the differences between nuisance and the torts of trespass,⁽²⁵⁾ negligence⁽²⁶⁾ as well as the relationship between nuisance and the rule in Rylands v Fletcher.⁽²⁷⁾

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- (24) Notably by Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480.
- (25) Kine v Jolly [1905] 1 Ch 480 at 487; Southport Corp v Esso Petroleum Co Ltd [1954] 2 QB 182; [1956] AC 218. Winfield 'Nuisance as a Tort' (1930-2) 4 Camb LJ 189 at 201; Newark 'Trespass or Nuisance or Negligence' (1954) 17 Mod LR 579; Hudson 'Trespass or Nuisance' (1960) 19 Mod LR 188-190.
- (26) Winfield op cit (n 25) 197-201; Newark 'The Boundaries of Nuisance' (1949) 65 LQR 480; Newark op cit (n 25 above); Buxton 'The Negligent Nuisance' (1966) U Malaya LR 1; 'Nuisance and Negligence Again' (1966) 29 Mod LR 676; Millner Negligence 130 ff; Winfield and Jolowicz Torts 320 ff; Williams and Hepple Foundations 104; Clerk and Lindsell Torts para 1411.
- (27) In the same year as the House of Lords gave judgment in the case of St Helens Smelting Co v Tipping (1865) 11 HL Cas 642, the court of Exchequer entertained the case of Fletcher v Rylands (1865) 3 H & C 774. The action arose from water escaping from a reservoir upon the defendant's land and flooding the plaintiff's adjoining mine-works. The case was argued as if it involved nuisance principles but Martin B (at 792) held that the case was not one of nuisance 'in the ordinary and generally understood meaning of that word, that is to say, something hurtful or injurious to the senses'. Nor could it be said to involve a trespass and thus, he held, the defendant could not be liable. Pollock CB agreed with Martin B, Bramwell B dissenting. The court of Exchequer Chamber (in Fletcher v Rylands (1866) LR 1 Ex 265) reversed this finding (a decision affirmed by the House of Lords in Rylands v Fletcher (1868) LR 3 HL 330) in terms which apparently confirmed that the matter was not one of nuisance (or trespass) but came under a head of liability which was sui generis. Since then it has been traditional to regard the rule in Rylands v Fletcher and the sort of factual situations coming within its scope as distinct and distinguishable from nuisance. The exact points of distinction are however unclear and their demarcation has been a matter of some dispute. For formulations of the distinction between the rule in Rylands v Fletcher and nuisance, see especially Winfield op cit (n 25) 192-7; Street Torts 255-7. Cf Newark 'Boundaries of Nuisance' (1949) 65 LQR 480 at 487-8 who argues that Rylands v Fletcher was in truth 'a simple case of nuisance'.

The central idea that nuisance law involved a balancing of conflicting interests⁽²⁸⁾ has been classically restated by Lord Wright in Sedleigh-Denfield v O'Callaghan⁽²⁹⁾ (1940), while the judges have demonstrated a pleasing willingness to extend the protection of the physical comfort of human existence into areas not previously within the ambit of the nuisance concept.⁽³⁰⁾ In particular there has been something of a departure from the nineteenth century tendency to restrict the concept of harm to the comfort of human existence to auditory or olfactory types of interference.⁽³¹⁾ Thus in Thompson-Schwab v Costaski⁽³²⁾ Lord Evershed MR, in holding a house of prostitution to be a private nuisance, said of the activities of the defendants:

(28) Cf above 304-5.

(29) [1940] AC 880 at 903.

'A balance has to be maintained between the rights of the occupier to do what he likes with his own and the right of the neighbour not to be interfered with. It is impossible to give any precise or universal formula, but it may broadly be said that a useful test is perhaps what is reasonable according to the ordinary usages of mankind living in society, or, more correctly in a particular society'.

(30) 'The forms which nuisance may take are protean' Lord Wright pointed out in Sedleigh-Denfield's case (supra) *ibid.*

(31) Cf above 397.

(32) [1956] 1 All ER 652 at 654. Interferences with physical comfort by affecting the temperature of premises has also been held to constitute an actionable nuisance (see Dublin (South) City Market Co v McCabes Ltd [1953] IR 283 at 311). On the other hand the courts have tended to cling to the old notion that an interference with that which is 'a matter of delight' (cf above 118) cannot constitute a nuisance. Thus the old rule (see above 410) that interference with the prospect from a house still stands (cf Mayo v Seaton UDC (1903) 68 JP 7) though not without some expression of disapproval ('English law has long recognized the duty of occupiers of land not to offend their neighbour's sense of smell or hearing, but has left them lamentably free to offend their neighbour's sense of sight,' per Scott LJ in McVittie v Bolton Corporation [1945] 1 KB 281 at 283)). So too in Bridlington Relay Ltd v Yorkshire Electricity Board [1965] Ch 436 it was held to be no nuisance to interfere with television broadcasts since these were a 'recreational facility' and Buckley J could find no authority in which interference with a 'purely' recreational facility had been held to constitute a legal nuisance. For the case for considering 'unaesthetic' sights as nuisances see the literature cited above 410 n 420.

'... it does not follow at all that their activities should ... be regarded as free from the risk or possibility that they cause a nuisance, in the proper sense of that term, to a neighbour merely because they do not impinge on the senses - for example the nose or the ear - as would the emanation of smells or fumes or noise. The test which I adopt ... is ... whether what is being done interferes with the plaintiff in the comfortable and convenient enjoyment of his land, regard being had, to borrow Lord Wright's language, to the usages in this matter of civilised society....'

For all this the law of nuisance remains in considerable confusion. Its historic and essential concern - the relationship between neighbouring landowners - is obfuscated by a judicial tendency to use the word nuisance as descriptive of types of harm not related to neighbour relations. This obscurity is confounded by the fact that behind this semantic veil the judges 'do make substantive decisions between groups of cases, applying different criteria of liability in reaching their decisions':⁽³³⁾

'In most instances the invocation of the word "nuisance" conceals a deliberate thought process which is especially geared to the type of problem exercising the court. In some situations the process of reasoning and the criteria applied are those of another head of tortious liability producing an ostensible degree of functional overlap between nuisance and the other tort'.⁽³⁴⁾

All of this makes it plain that nuisance law needs rethinking 'on both the high analytical and sober practical levels'.⁽³⁵⁾ Happily it seems that the time when this enterprise will be undertaken may not be far off.

Renaissance

Of recent years there has been something of a renaissance in the study of nuisance law. The principal cause of this has been a rising concern for the integrity of the natural environment. The realisation that technological advances in this century seriously threaten the capacity of the natural media

(33) McLaren op cit (n 16) at 321-2.

(34) McLaren op cit 322.

(35) Note 'An Economic Analysis of Land Use Conflicts' (1969) 21 Stanford LR 293 at 315.

of existence to continue to sustain vegetable and animal life has led scholars to examine a variety of devices and strategies for abating the threat of environmental pollution.⁽³⁶⁾ Nuisance law, traditionally concerned with the natural amenities of light, air and water and moulded in the nineteenth century in the crucible of the Industrial Revolution, offered historical precedents for legal devices by which land-uses might be controlled in the interests of preventing wholesale pollution of rivers, lakes, the soil and the atmosphere.⁽³⁷⁾

At the same time economists began to study the economic implications of attempts to regulate industrial enterprise in the interests of environmental protection.⁽³⁸⁾ The thrust of these studies was towards devising the most 'efficient'⁽³⁹⁾ methods of regulating the use of 'property rights'⁽⁴⁰⁾ in the natural media of existence. Perhaps inevitably, economic theorising came to focus on nuisance law as one of the existing social mechanisms for regulating human exploitation of natural resources.

(36) See eg Dales Pollution Property and Prices.

(37) See eg Comment: 'The Rule of Private Nuisance Law in the Control of Air Pollution' (1968) 10 Ariz LR 107; Note: 'Air Pollution as a Private Nuisance' (1967) 24 Wash & Lee LR 314; Note: 'A Trend towards Coalescence of Trespass and Nuisance: Remedy for Invasion of Particulates' 1961 Wash U LQ 62; Jeurgensmeyer 'Common Law Remedies and Protection of the Environment' (1971) 6 UBC LR 215; McLaren 'The Common Law Nuisance Action and the Environmental Battle' (1972) 10 Osgoode Hall LJ 505.

(38) See eg Dales op cit (n³⁶ above); Kneese Economics and the Environment Pearce Environmental Economics; Kohn Air Pollution Control; Walters Noise and Prices.

(39) In the economic sense of achieving optimal allocation of resources. See Posner Economic Analysis of Law 4, 11, 17-18.

(40) Economists use the term 'property right' in the sense of the 'right to benefit or harm oneself or others' and thus see property relationships as involving transactions in which the parties bargain to modify the harms or enhance the benefits flowing from their rights of property. See Demsetz 'Toward a Theory of Property Rights' (1967) 57 Am Econ Rev 347. Cf Posner op cit Chap 2.

In 1960 R H Coase published his immensely influential study of 'The Problem of Social Cost'.⁽⁴¹⁾ Devoted to demonstrating a fallacy in classic economic theory the article focused on the question of the efficient allocation of resources. In the course of his article Coase sought to illustrate his theory by an analysis of some nineteenth-century nuisance cases notably Sturges v Bridgman;⁽⁴²⁾ Cook v Forbes⁽⁴³⁾ and Bryant v Lefever.⁽⁴⁴⁾

In the course of his discussion of these cases Coase made a number of provocative and instructive points. The cases illustrated, he demonstrated, that the problem of the costs of exploiting resources was inevitably reciprocal in nature⁽⁴⁵⁾ and thus had to be resolved by determining which of

(41) Coase 'The Problem of Social Cost' (1960) 3 Jo Law & Economics 1-44.

(42) (1879) 11 Ch D 852. See on this case above 342-3.

(43) (1867) LR 5 Eq 166. See on this case above 354.

(44) (1879) LR 4 CPD 172.

(45) Coase (op cit 11-13) demonstrated this by analysing the case of Bryant v Lefever (supra). There the plaintiff, until 1879, was able to light fires in the fire places of his dwelling and the smoke was drawn off by the chimney. In that year the defendant, his neighbour, increased the height of a wall on his land so that it affected the air currents and caused the chimneys to cease to draw off the smoke, which debouched into plaintiff's dwelling. The Court of Appeal held that there was no nuisance since, it said, the harm complained of by the plaintiff was caused by him as a result of his choosing to light fires. Coase however observes (at 13) that it was not the plaintiff but rather both parties who caused the nuisance:

'Who caused the nuisance? The answer seems fairly clear. The smoke nuisance was caused both by the man who built the wall and by the man who lit the fires. Given the fires, there would have been no smoke nuisance without the wall; given the wall there would have been no smoke nuisance without the fires. Eliminate the wall or the fires and the smoke nuisance would disappear [I]t is clear that both were responsible and both should be forced to include the loss of amenity due to the smoke as a cost....'

Sturges v Bridgman established the same point (Coase op cit 8-10). Up until a certain date the defendant, a confectioner had carried on his business, without the noise of it being a nuisance to anyone. Then his neighbour, a doctor, extended his consulting room to a part of his premises where the noise from the confectioner's kitchens was annoying. He sought and was granted an

the various possible methods of dealing with the problem was the most efficient in an economic sense. As Coase put it,⁽⁴⁶⁾ in the situations revealed by cases such as Bryant v Lefever and Sturges v Bridgman

'[t]he real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm'.

The courts, in the nuisance cases, Coase conceded,⁽⁴⁷⁾ often

(45) (continued)
injunction. These facts, Coase points out, (at 13) demonstrate that both parties were responsible for the harm:

'The doctor's work would not have been disturbed if the confectioner had not worked his machinery; but the machinery would have disturbed no one if the doctor had not set up his consulting room in that particular place'.

(46) Op cit 2.

(47) '... it is clear ... that the courts have often recognised the economic implications of their decisions and are aware (as many economists are not) of the reciprocal nature of the problem. Furthermore, from time to time, they take these economic implications into account, along with other factors, in arriving at their decisions.... [at 19] The doctrine that the harmful effect must be substantial before the court will act, is no doubt, in part a reflection of the fact that there will almost always be some gain to offset the harm.... In ... Sturges v Bridgman, it seems clear that the judges were thinking of the economic consequences of alternative decisions [at 20].... The courts do not always refer very clearly to the economic problem posed by the cases brought before them but it seems probable that in the interpretation of words and phrases like "reasonable" or "common or ordinary use" there is some recognition, perhaps largely unconscious and certainly not very explicit, of the economic aspects of the questions at issue [at 22]'. Coase summarised his analysis of the nuisance cases with the observation that the 'problem which we face in dealing with actions which have harmful effects is not simply one of restraining those responsible for them.... [T]he courts are conscious of this and ... they often make, although not always in a very explicit fashion, a comparison between what would be gained and what lost by preventing actions which have harmful effects' (at 27-8). Cf the doctrine of the balancing of interests developed by the courts of equity (above at 240).

attempted to achieve exactly this albeit crudely and with an imperfect understanding of what they were about.

Coase then turned to elaborate his own theorem as to the proper mode of avoiding the most serious harm. In this connection he developed an argument that it mattered not to whom a property right was initially allocated since the market forces in the economy would lead the parties involved to strike a bargain which would result in the most economically efficient result.⁽⁴⁸⁾

Legal scholars, relying upon economic concepts of efficiency in the allocation and distribution of wealth, have used Coase's theorem to analyse the conflicts of interests involved in the use and exploitation of adjoining land units.⁽⁴⁹⁾

(48) Coase (op cit 9 ff) illustrated his point by reference to Sturges v Bridgman (supra). The issue here, he noted, in a sense was whether the doctor was to have a noiseless environment at the cost of suppressing the confectioner's trade or vice versa. The court by enjoining the confectioner's activities 'entitled' the doctor to a noiseless environment. Coase's point was that the confectioner might well however purchase from the doctor that entitlement (ie acquire the right to disregard the injunction) and so continue his trade (for an actual example of such bargaining see the case of Martin v Nutkin (1724) 2 P Wms 266 discussed above 401 n 393). Whether or not the parties would come to such an agreement depended upon their respective evaluations of the costs and benefits involved (ie the doctor would not waive the injunction if the confectioner did not offer to pay more than it would cost the doctor to practice in noisy conditions; the confectioner would not offer an amount which would make it unprofitable for him to carry on his trade). If in these circumstances the parties concluded an agreement the allocation of rights would be of optimal economic efficiency since both parties benefitted and neither lost. It should be pointed out that this is a gross over-simplification of Coase's basic theorem which is considerably more sophisticated particularly as regards the process by which a bargain would be reached and the hurdles ('transaction costs') which might prevent an agreement. See Coase op cit 15 ff. Cf Posner Economic Analysis of Law 16-21. For closer analysis of Coase's theorem in this regard see Demsetz 'When does the Rule of Liability Matter' (1972) 1 Jo Legal Studies 13; Calabresi 'Transaction Costs, Resource Allocation and Liability Rules' (1968) 11 Jo Law and Economics 67.

(49) A stimulating example of the application of this technique is provided by Ellickson 'Alternatives to Zoning : Covenants, Nuisance Rules and Fines as Land Use Controls'

In this way they have revealed not only the weaknesses of doctrines of traditional nuisance law⁽⁵⁰⁾ but have been able to construct theoretical frameworks which would enable basic principles of nuisance law to be applied in a way which would

- (49) (continued)
 (1972) 40 U Chi LR 681. See also Note 'An Economic Analysis of Land Use Conflicts' (1968) 21 Stanford LR 293; Posner Economic Analysis of Law 24-32. See too Ogus and Richardson 'Economics and the Environment: A Study of Private Nuisance' [1977] Camb LJ 284.
- (50) Cf Ellickson op cit at 720 who attributes much of the decline of nuisance law in the twentieth century to its failure to deploy the remedies of injunction and damages in such a way as to achieve the Coasian object of 'avoid[ing] the more serious harm'. By way of illustration of his point he mentions nuisance law's traditional refusal to allow that interferences with prospect and other matters of delight might be actionable. Insofar as to allow an action would involve enjoining some activity this would seem right since the social cost of enjoining, say, the erection of a block of flats, would far exceed the cost to the householder of being deprived of the prospect. But it does not necessarily follow that it would be improper to award damages for the loss of prospect. By not considering both options the traditional nuisance law is seen to afford landowners a more limited type of protection than is perhaps justified, a factor which thus discourages resort to nuisance law. For a recent example of the sort of discriminating use of nuisance remedies advocated by Ellickson see Spur Industries Inc v Webb Development Co (1972) 494 P 2d 700. In this case the plaintiff by 'coming to' the defendant's stock-yards caused them to become an enjoynable nuisance. The court while prepared to issue the injunction ordered the plaintiff to pay damages to the defendant as compensation for the economic loss incurred in having to close-down the stock-yards in terms of the injunction. (see also Note: 'Nuisance' (1973) 26 Vanderbilt LR 193). See also n 51 below.

lead to results which were more 'efficient' and thus more acceptable to litigants. (51)

Nuisance law, now some eight hundred years old is alive but not well. The prescriptions for restoring it to full health are however at hand. All that is required is that they be administered.

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- (51) For proposals for enhancing the efficiency of nuisance law see Ellickson *op cit* (n 49 above) at 722ff. See also Michelman 'Pollution as a Tort' (1971) 80 Yale LJ 647; Calabresi and Melamed 'Property Rules, Liability and Inalienability - One View of the Cathedral' (1972) Harvard LR 1089. These latter articles, after analysing in Coasian terms the considerations of efficiency in relation to the solution of pollution/nuisance-type situations, demonstrate that there are at least four possible methods by which the law might respond to a nuisance in order to achieve the most satisfactory result: (i) to abate the nuisance by the award of an injunction (ii) to award damages but not an injunction (ie allow the nuisance to continue but at a price) (iii) neither enjoin the nuisance nor award damages (iv) to enjoin the nuisance but award damages to the defendant (cf the Spur Industries case (n 50 above)). Ellickson (*op cit* 738-9) points out that while traditional nuisance law customarily relies upon options (i) and (ii), in terms of efficiency, it would be preferable to employ options (ii) and (iv).