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JUDICIAL REGULATION OF DISCORDANT LAND USE INTERESTS

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THERE has in recent years been an increasing awareness of the need for land use regulation. Quite naturally attention has been focused mainly on the legislative and administrative devices for handling this problem. In England the main concern is with the administration of the Town and Country Planning Acts, and in the United States the various questions raised by Redevelopment Plans and Zoning occupy the center of the stage. Thus, the problem of judicial regulation of land use interests or, in the language of legal advantages conferred, the delimitation of an occupier's [1] privilege to use his land and his neighbor's [1] right not to be damaged in the use of his land, has to some extent been neglected.

The relationship between what the courts say and what they do may on occasion be somewhat tenuous, and the assumption that "the law" is "a closed automatic, syntactical system is . . . too obviously belied by the facts for many to give it conscious credence today." [2] Nevertheless, the courts do operate within the framework of a conventional syntax and a brief survey of that segment of it, in terms of which the courts have accorded legal protection to land use interests, is an essential prerequisite to an understanding of the present situation.

THE EARLY COMMON LAW

The writ of trespass became the common remedy for any direct and immediate interference with possession of land between 1250 and 1272.[3] It would be foolish to speculate exactly what interests it protected, because "in the days when the writ of trespass was taking a foremost place in the scheme of actions, the king's court had its hands full if it was to redress and punish the wrongs done by gentlemen who at the head of armed bands of retainers ravaged the manors of their neighbors." [4]

Although the writ came to lie where the interference consisted of such acts as driving a nail into the plaintiff's wall,[5] or shooting into the plaintiff's

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[1] For the sake of simplicity of presentation the terms "occupier" and "neighbor" are used in this paper to include all persons who can sue and be sued in relevant legal proceedings.

[2] Lasswell and McGougal, *Legal Education and Public Policy*, 52 YALE L. J. 203, 235 (1943).

[3] 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 524 n. 1.

[4] *Id.* at 10.

[5] Lawrence v. Obee, 1 Stark. 22, 171 Eng. Rep. 389 (K.B. 1815).

land,[6] its main purpose was clearly to keep people and their cattle off the plaintiff's land. Indeed, the ordinary form of trespass quare clausum fregit did not apply to the case of cattle straying unaccompanied by their owner on to the plaintiff's land.[7] But the need for a remedy in the royal courts in such cases appears to have been considerable, because in 1353 the writ of trespass was extended to meet this need.[8] Had that extension taken place only a few years later, it would have been done by means of an action on the case, but cattle escape continued to sound in trespass rather than in nuisance.

An early remedy of somewhat limited application was the Assize of Nuisance. It could be brought only by freeholders [9] against freeholders [10] and was designed to secure the abatement of disturbances of a permanent character.[11] Bracton speaks of the assize as being applicable to "servitudes",[12] but his conception of servitudes appears to be that of duties correlative to certain natural rights to the enjoyment of land.[13]

If the land on which the nuisance was created was alienated, the plaintiff could bring the writ *quod permittat prosternere,* which commanded the defendant to allow the plaintiff to abate the nuisance.[14]

Quite another kind of proceeding was the purpresture, an unlawful interference with the public's right of way along the highway, an encroachment against the king and enquirable of by the king's justices.[15] From this the public nuisance was born which came to include "lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law." [16] For some time the courts held steadfast that no private action lay where a person had been injured in the commission of a public nuisance, on the ground that the remedy of a criminal presentment barred such an action.[17] But eventually it was decided that where a man in the case of an obstruction of the highway had suffered "greater hurt or inconvenience than any other man had", he could "recover his damages that he had by reason of this special hurt." [18] Therefore, a plaintiff who has been injured in the use or enjoyment of his land may plead

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[6] Pickering v. Rudd, 1 Stark. 56, 171 Eng. Rep. 400 (K.B. 1815).
[7] WILLIAMS, LIABILITY FOR ANIMALS 131 (1939).
[8] 27 Lib. Ass. pl. 56, fol. 141 (1353 or 1354).
[9] Y.B. 33 Hen. 6, f. 26 (1455).
[10] Fitzherbert's Natura Brevium 452.
[11] BRACTON, f. 232-5.
[12] BRACTON, 231b-5.
[13] BRACTON, 220b-221.
[14] Fitzherbert's Natura Brevium 124; Winfield, *Nuisance as a Tort,* 4 CAMB. L. J. 189, 191 (1931).
[15] GLANVIL, Book IX, ch. 11.
[16] Newark, *Boundaries of Nuisance,* 65 L. Q. REV. 480, 482 (1949).
[17] Y.B. Pasch. 2 Edw. 4, pl. 21 (1462); Y.B. Trin. 33 Hen. 6, pl. 10 (1455).
[18] Fitzherbert, J., Y.B. Mich. 27 Hen. 8, pl. 10 (1536).

this as "special damage" in public nuisance rather than proceed by way of private nuisance.[19]

Even before the industrial revolution these remedies were inadequate safeguards of land use interests, and in the 15th century the action on the case for nuisance sought to fill the gap.

The Assize of Nuisance [20] was superseded by the action on the case, but as so often in the common law, faint echoes of the past are heard from time to time.[21]

Trespass, cattle trespass and public nuisance continued as co-existing remedies, and public nuisance is relevant here only as a possible alternative to private nuisance in certain situations.[22]

The distinction between trespass and nuisance is of vital importance where strict pleading is required, and even where the forms of action have been buried, different standards of liability may keep the distinction alive.[23] At first the courts applied the test which had been used to distinguish the Assize of Nuisance from trespass: if the harm originated on the plaintiff's land, trespass, if on the defendant's land, nuisance was the correct remedy.[24] But this was merged in the wider question of whether the damage was direct or consequential, the test used to distinguish trespass from case. This was like jumping from the frying pan into the fire. Referring to the famous illustration of the distinction between logs thrown at a person and logs laid in the highway,[25] Professor Winfield comments that "The unfortunate litigants were certainly not the only people who stumbled about among the logs." [26] However difficult, the importance of drawing this line, apart from strict pleading requirements, lies in the possible distinction in standards of liability. For one thing, damage has to be proved in nuisance, but not in trespass. In this connection I cannot support Holmes' view that "a principle cannot be stated which would retain the strict liability in trespass while abandoning it in case." [27] There is no reason why policy should not require stricter standards of liability in one type of "set of consequences" than in another. Although I agree that liability for

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[19] See Ricket v. Met. Ry., 5 B. & S. 156, 122 Eng. Rep. 787 (Q.B. 1865).

[20] The writ quod permittat had previously become obsolescent because of its cumbrous procedure.

[21] E.g., the allusion in later cases to the "permanence" requirement; see not 49 *infra*.

[22] For the theory that liability in public and private nuisance is the same, see Wringe v. Cohen, [1940] 1 K.B. 229, and note, 56 L. Q. REV. 143 (1940).

[23] See *infra*.

[24] Y.B. Trin. 13 Hen. 7, f. 26, pl. 4 (1498).

[25] Reynolds v. Clerk, 8 Mod. 272, 88 Eng. Rep. 193 (K.B. 1725).

[26] 4 CAMB. L. J. 202 (1931), citing Courtney v. Collett, 1 Ld. Raym. 272, 91 Eng. Rep. 1079 (K.B. 1698).

[27] HOLMES, THE COMMON LAW 91 (2d ed. 1923).

trespass was never absolute,[28] Holmes' arguments that liability in trespass as elsewhere in the law of tort is based on fault, assuming the defendant to be an average, reasonable or prudent man, are not always convincing.[29]

After the development of the action on the case, there was no need for a broad construction or further extension of trespass, and its use has been mainly restricted in practice to cases where the defendant entered the plaintiff's land, or otherwise interfered with it in an obviously "direct" manner. Where relative strictness of liability proved an attraction to the courts, there was ample scope for its operation, as we shall see, in nuisance.[30]

Cattle trespass, while continuing to exist independently has, in its role of logical precursor to the action on the case, made an impact on the later law.

The English Law

The scope of nuisance is so vast and the issues raised in the decisions of the courts are so plentiful that a comprehensive account is not attempted here.

Attempts at comprehensive definition like, for example, "Nuisance is the unlawful interference with a person's use or enjoyment of land or of some right over or in connection with it",[31] even if adopted judicially,[32] are of small comfort. What kind of interference is unlawful? Although the courts use kinds of damage, such as vibration, noxious fumes, pollution, etc.[33] as grounds of primary classification, there is little difficulty as to the specific nature of damage that will ground an action. Every kind of interference is a potential nuisance, but how much interference is needed in what circumstances to afford relief to the plaintiff?

Since in trespass to land the transgression consisted mainly in the crossing of a boundary line, the more or less uniform standard of liability may be regarded as natural. In the field of nuisance however, where the sanctified privilege of user is opposed to the neighbor's sanctified right not to be damaged, it is not surprising that the law has been characterized by vacillating standards.

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[28] See Winfield, *The Myth of Absolute Liability,* 42 L. Q. REV. 37 (1926).

[29] E.g., while admitting that the words "contra pacem" were inserted in the writ to grant jurisdiction in the king's court, Holmes suggests that "vi et armis" was not needed for this purpose and that these words might have had literal significance. HOLMES, THE COMMON LAW 101 (2d ed. 1923). However, though, as has been mentioned, the writ of trespass was used in early law mainly to deal with marauders, the words "vi et armis" were in practice often omitted; see, for example, De Banco Roll No. 2A, Pasch. 1 Edw. 1, mm. 1, 2, 3d, 5, 6, 10, 14, 15, 17, 18, 19 (1272).

[30] And later the rule in Rylands v. Fletcher, L. R. 1 Ex. 265 (1866).

[31] Winfield, 4 CAMB. L. J. 190 (1931).

[32] Howard v. Walker, [1947] K.B. 860.

[33] See SALMOND, THE LAW OF TORTS 220 (10th ed. 1945).

There was plenty of material the courts could use in their arguments by analogy to arrive at a standard of strict liability. Cattle trespass furnishes an apt illustration. In *Tenant v. Goldwin*[34] where filth flowed from the defendant's privy onto the plaintiff's land, Holt, C. J., said: "Everyone must so use his own, as not to do damage to another. And as everyman is bound so to look to his cattle as to keep them out of his neighbour's ground, that so he may receive no damage; so he must keep in the filth in his house of office, that it may not flow in upon and damnify his neighbour." [35] This illustrates a typical common law process: the need for a remedy for cattle escape is met by the extension of trespass and the standard of strict liability is carried over in the process. Then comes the action on the case and the argument goes something like this: the escape of filth is in many respects similar to the escape of cattle; liability for cattle escape is strict, therefore, liability for the escape of filth is strict. On such solid ground Holt, C. J., could afford to bolster his argument with the English version of the maxim "sic utere ut alienum non laedas"; less fortunate judges with less convincing material at their command have had to rely on the persuasiveness of Latin prose, coupled at times with an appeal to Divine authority.[36]

At the opposite extreme there are the cases where no action will lie by virtue of a common or natural right of the defendant.[37] These "rights" are either privileges of the defendant to use his land in a certain way, with correlative no-rights in the plaintiff to interfere with these land uses, irrespective of damage caused to him, or rights proper, such as the right to have a fence kept in repair where the plaintiff has no action when he is damaged by the escape of cattle or deleterious matter as a result of his breach of the duty to fence.[38]

So, for example, a landowner may dig on his land and thereby deprive his neighbor of water from underground springs flowing in undefined channels [39] and it makes no difference if he does so maliciously,[40] the damage being

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[34] 2 Ld. Raym. 1089, 92 Eng. Rep. 222 (Q.B. 1704).

[35] *Id.* at 1092.

[36] See Smith, *Reasonable Use as a Defense,* 17 COLUM. L. REV. 383 (1917). Strict liability cases abound, but some more noteworthy ones are: Humphries v. Cousins, 2 C.P. 239 (1877); Broder v. Saillard, [1876] 2 Ch. 692; Rapier v. London Tramways Co., [1893] 2 Ch. 599. See also Friedmann, *Incidence of Liability in Nuisance,* 59 L. Q. REV. 63 (1943).

[37] The confusion of the courts of a common right, which is founded on prescription or grant, with a natural right, which is not (see 7 HOLDSWORTH, HISTORY OF ENGLISH LAW 328-331 (1926), is not relevant here.

[38] See WILLIAMS, LIABILITY FOR ANIMALS 203 *et seq.* (1939).

[39] Acton v. Blundell, 12 M. & W. 324, 152 Eng. Rep. 1223 (Ex. 1843); Chasemore v. Richards, 7 H.L.C. 349, 11 Eng. Rep. 140 (H.L. 1859).

[40] Mayor of Bradford v. Pickles, [1895] A.C. 587; Allen v. Flood, [1898] A.C. 1.

"damnum absque injuria".[41] However, not many activities seem to enjoy this freedom from judicial interference.[42]

Although these extremes show the scope of variation, they serve but as peripheral standards in the practice of the courts. For the great mass of "ordinary acts" the courts have claimed to apply the rule of "give and take, live and let live." [43]

Maxims like "de minimis non curat lex" and "lex non favet delicatorum" have been presented with a flourish to counter-balance "sic utere. . . ."

The law will take cognizance of substantial damage only; or as Knight-Bruce, V. C., put it in *Walter v. Selfe,*[44] "Ought this inconvenience to 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?"

Minor considerations, tests and distinctions, all were engulfed in one big test, that of "reasonableness": "Every man is bound to use his own property in such a manner as not to injure the property of his neighbor, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so. But the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view: and therefore, in an action for nuisance to property by noxious vapours arising on the land of another, the injury to be actionable must be such as visibly to dimish the value of the property and the comfort and enjoyment of it. . . . In determining that question, the time, locality, and all the circumstances should be taken into consideration." [45]

Thus "coming to a nuisance" [46] is no longer a defense in itself; it is the nature of the whole locality which determines what is a nuisance, irrespective of whether the plaintiff came there before or after the alleged nuisance.[47]

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[41] A policy allowing certain activities a greater extent of privilege seems unexceptionable, but it seems strange, when applied in such a way, that a man may deprive his neighbor of water, while being liable for pollution.

[42] See Christie v. Davey, [1893] 1 Ch. 316, and Hollywood Silver Fox Farm v. Emmett, [1936] 2 K.B. 468.

[43] Bramwell, B., in Bamford v. Turnley, 31 L.J.Q.B. 286, 175 Eng. Rep. 1037 (Q.B. 1862).

[44] De G. & Sm. 1851, 64 Eng. Rep. 849 (Ch. 1851).

[45] Mellor, J., in St. Helen's Smelting Co. v. Tipping, 4 B. & S. 608, 11 Eng. Rep. 1483 (H.L. 1863); but it may not be enough for a judge to leave to the jury the single question: "Was the defendant's conduct reasonable?"; Hole v. Barlow, 4 C.B. (N.S.) 334, 140 Eng. Rep. 1113 (C.P. 1858) (apparently overruled by Bamford v. Turnley, note 43 *supra,* on other grounds). Apparently he has to incorporate the various minor "guides" provided by previous decisions.

[46] 2 BLACKSTONE, COMMENTARIES 402-403.

[47] Sturges v. Bridgman, 11 Ch. D. 852 (1879).

Similarly, the usefulness of a business is not a defense in itself; it may be required to be carried on elsewhere.[48]

Permanence of interference was required before the Assize of Nuisance would lie; and in spite of certain cases apparently still requiring it,[49] the general view seems to be that the temporary nature of interference is one element in the assessment of "reasonableness".[50]

And, perhaps most important, negligence on the defendant's part is clearly a factor in the assessment of "reasonableness", although it is not determinative; [51] but as the Lord Porter said in *Longhurst v. Metropolitan Water Board,*[52] ". . . liability for nuisance without negligence or deliberate act is not readily established. . . ."

Thus in form, at any rate, we have the picture of the broad standard of "reasonableness" being applied in terms of narrower standards worked out in the judicial process.

The emergence of the rule in *Rylands v. Fletcher* [53] providing that "the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape," [54] even as limited to "non-natural user," [55] seemed to be out of step with the general tendency to relax standards of liability. Whatever the exact relation of the rule may be to nuisance,[56] the courts have recently shown that they intend to interpret it restrictively.[57]

Since negligence has become an independent tort, it is of course possible for the same set of facts to ground an action for negligence or nuisance.[58]

Where a nuisance has been committed the injured party may in certain circumstances abate it,[59] but this is a limited remedy never favored by the law [60]

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[48] Adams v. Ursell, [1913] 1 Ch. 269.
[49] Harrison v. Southwark & Vauxhall Water Co., [1891] 2 Ch. 404.
[50] E.g., Matania v. National Provincial Bank, [1936] 2 A.E.R. 644.
[51] See, e.g., Rapier v. London Tramways Co., 1893 2 Ch. 588.
[52] [1948] 2 A.E.R. 834.
[53] L.R. 1 Ex. 265 (1866).
[54] Per Blackburn, J., at 279.
[55] By Lord Cairns, L.C., L.R. 3 H.L. 330, 338-340 (1868). See Stallybrass, 3 CAMB. L. J. 376 (1930).
[56] See Winfield, 4 CAMB. L.J. 192 (1931).
[57] Read v. Lyons & Co., Ltd., [1947] A.C. 156; Bolton v. Stone, [1951] W.N. 280.
[58] On the relation between nuisance and negligence, see Winfield, *The History of Negligence in the Law of Torts,* 2 L. Q. REV. 184, 197-198 (1926); Note, *Incidents of Liability for Nuisance,* 4 MODERN L. REV. 139 (1940-41); Note, *Nuisance and Negligence Again,* 5 MODERN L. REV. 240 (1941-42); Note, *An Alarming Extension of Nuisance,* 7 MODERN L. REV. 155 (1943-44); 17 AUSTR. L. J. 157 (1943).
[59] See SALMOND, THE LAW OF TORTS 192-194 (10th ed. 1945); WINFIELD, TEXTBOOK OF THE LAW OF TORTS 145.
[60] WINFIELD, *op. cit. supra* note 59, at 145.

and not feasible in most nuisance situations today; and the plaintiff will usually avail himself of his right to damages or ask the court for an injunction, which, since the Judicature Act, 1873,[61] the High Court may grant in all cases in which it appears to the court to be just or convenient. It is a discretionary remedy, to be applied where damages, or damages alone,[62] are not adequate.

Without pausing to examine how these rules have been applied in England and skirting the question of how much of the common law was officially "received" by American law and how much was subsequently incorporated, let us look at the practice of the American courts.

The Language of the American Courts

On the assumption that it is meaningful to speak of American law in this field, rather than the law of the various states,[63] the purpose here is to obtain an overall picture or bird's eye view of the relevant rules enunciated by the courts, with the outline of the English law presented above serving as a background framework.

Absolutely Privileged Land Uses

Although the "absolute right" doctrine as a defense to an action for nuisance has little practical significance in England today, it is still regarded as "the law," at any rate with respect to the abstraction of percolating waters. The development by the American courts of the "reasonable use" or "correlative rights" doctrines serves as a formal if not substantial contrast.[64]

Under the "reasonable use" doctrine as it originally evolved, the landowner can take all the percolating water from his land that he can use for reasonable and beneficial purposes in connection with his occupation.[65]

The "correlative rights" rule, also sometimes called the "reasonable use" rule, goes still further. The landowner must consider the needs of his neighbors in the common supply of percolating waters and is permitted to take only his fair share.[66]

While all states do not go that far, in the majority of cases where the malicious abstraction of percolating waters has been litigated, the courts have allowed an action.

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[61] 36 & 37 VICT., c. 66 (1873), now replaced by a similar provision in the Supreme Court of Judicature Act, 1925, 15 & 16 GEO. 5, c. 49.

[62] See note, 10 MODERN L. REV. 317 (1947-1948).

[63] See Pound, *The Development of American Law and its Deviation from English Law*, 67 L.Q. REV. 49 (1951).

[64] See 55 A.L.R. 1390-1420 (1928) and 109 A.L.R. 397-404 (1937). For an interesting policy statement justifying the change of the common law rule, see Erickson v. Crookston Waterworks Power & Light Co., 100 Minn. 481, 482, 111 N.W. 391, 392 (1907), per Jaggard, J.

[65] Sloss-Sheffield Steel & Iron Co. v. Wilkes, 231 Ala. 511, 165 So. 764 (1936).

[66] O'Leary v. Herbert, 5 Cal. 2d 416, 55 P. 2d 834 (1936).

It is interesting to note that the "correlative rights" doctrine has frequently been fortified by appeals to the "sic utere . . ." maxim and that Coleridge, J., employed the same line of argument in his dissenting opinion in *Chasemore v. Richards*.[67] Verily, les extremes se touchent.

Strict Liability

First let us briefly consider the role played by the rule in *Rylands v. Fletcher*[68] in so far as the circles of the rule and nuisance intersect.[69] The American courts accorded the rule a mixed welcome. It was followed,[70] rejected[71] and ignored.[72] Nor has there been strict intra-state consistency in its use.[73] Bohlen, in his brilliant analysis of the rule,[74] explains the American opposition in terms of the difference of policy in England and America and yet approves of the rule.[75] The confusion is perhaps understandable taking into account the following factors: In the American courts the rule is of only persuasive authority and, since the possibility of its extensive interpretation can easily be regarded as obnoxious, it is simply not followed; but where, for some reason or other, it looks attractive, or in line with common law precedents, it is easy to adopt it and interpret it restrictively.[76]

The courts sometimes adopt the standard of strict liability in nuisance cases without using *Rylands v. Fletcher*[77] or even where the rule has been rejected.[78] An express unifying principle in these cases is somewhat elusive.[79] To distinguish these cases the courts have frequently characterized them as instances of "nuisance per se" as opposed to "nuisance in fact" or "per acci-

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[67] 2 Hurlst & N. 186 (Ex. 1857). See note 39 *supra.*

[68] Notes 53 and 55 *supra.*

[69] Winfield, 4 CAMB. L.J. 192. For a distinction between Rylands v. Fletcher (interpreted as equivalent to "ultra-hazardous" activity) and nuisance, see Seavey, *Nuisance, Contributory Negligence, and Other Mysteries,* 65 HARV. L. REV. 984, 985-986 (1952).

[70] Ball v. Nye, 99 Mass. 582 (1868), was the first of a number of Massachusetts cases, and courts in Minnesota, Ohio, and Kentucky quickly followed suit. See Bohlen, *The Rule in Rylands v. Fletcher,* 59 U. PA. L. REV. 298 and 423, 433, n. 105 (1911).

[71] E.g., Brown v. Collins, 53 N.H. 442 (1873), where Doe, C.J., at 448 said that, if enforced, the rule "would put a clog upon natural and reasonably necessary uses of matter and tend to embarrass and obstruct much of the work which it seems to be a man's duty carefully to do".

[72] E.g., Parker v. Larsen, 86 Cal. 236, 24 Pac. 989 (1890), where Rylands v. Fletcher language was used, but the case was not cited.

[73] E.g., in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 125, 6 Atl. 453 (1886), the court was "unwilling to recognize the arbitrary and absolute rule of responsibility", but some years later, in Hauck v. Tidewater Pipe Line Co., 153 Pa. 366, 26 Atl. 644 (1893), the court at 369-370 approved a charge to the jury, the charge being phrased in the language of Blackburn, J.'s, famous dictum.

[74] 59 U. PA. L. REV. 298 and 423 (1911).

[75] *Id.* at 433.

[76] E.g., as in England, Read v. Lyons & Co., Ltd., *supra* note 57.

[77] Notes 53 and 55 *supra.*

[78] See Prosser, *Liability Without Fault,* 20 TEXAS L. REV. 399 (1941).

[79] See, e.g. note in 95 U. PA. L. REV. 781 (1946-1947); Kenworthey *The Private Nuisance Concept in Pennsylvania,* 54 DICK. L. REV. 109, 116-122 (1949-1950); note, 9 OHIO ST. L.J. 164 (1948).

dens." [80] This distinction has, however, not been much help. A "nuisance per se" has been described as an act, occupation or structure which is a nuisance at all times and under all circumstances.[81] But it has been pointed out that somebody must be damaged for there to be a nuisance and this is a very important circumstances.[82] If "nuisances per se" as well as "nuisances in fact" depend on surrounding circumstances, the distinction, it has been suggested,[83] is rather too fine to be useful.

Negligence as a Determinative Element in Nuisance

Where the courts do not apply a strict liability standard on grounds of "nuisance per se", the rule in *Rylands v. Fletcher*,[84] ultra-hazardous activity or other indeterminate bases, must the defendant be negligent to be liable? There is some evidence that the American courts have adopted the English practice of denying that negligence is a test of liability in nuisance,[85] and that even in view of the tendency to base liability on fault, negligence is just one, albeit an important, element of the recognized test of "reasonableness".

However, in some cases the courts have refused to hold the defendant liable without proof of negligence,[86] especially where liability was predicated on omission to abate the nuisance rather than on creating it,[87] and the Restatement provision that if conduct is unintentional, it must be negligent, reckless or ultra-hazardous to be actionable,[88] has had some judicial approval.[89] Professor Seavey suggests [90] that in certain cases [91] where negligence has been held to be unimportant, the defendant was aware [92] of the harmful consequences of his conduct; that is, he acted "intentionally".

Where negligence is regarded as a determinative element in liability for nuisance, it is, of course, natural that contrary to the older common law view,[93]

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[80] E.g., Pennsylvania Co. v. Sun Co., 290 Pa. 404, 138 Atl. 909, 55 A.L.R. 873 (1927).
[81] Note 80 *supra*.
[82] Colton v. S. Dakota Cent. Land Co., 25 S.D. 309, 126 N.W. 507, 28 L.R.A. (n.s.) 122 (1910).
[83] Kenworthey, *supra* note 79, at 113.
[84] Notes 53 and 55 *supra*.
[85] See 39 AM. JUR., *Nuisances* § 24 (1942); 66 C.J.S. § 11, p. 751 (1950).
[86] E.g., Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 Atl. 627 (1934), 56 R.I. 272, 185 Atl. 251 (1936).
[87] Uggla v. Brokaw, 117 App. Div. 586, 102 N.Y. Supp. 857 (1907).
[88] RESTATEMENT, TORTS § 822 (1939).
[89] Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 66 N.E.2d 334 (1946); Taylor v. Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, 155 A.L.R. 44 (1944).
[90] Seavey, *Nuisance, Contributory Negligence, and Other Mysteries*, 65 HARV. L. REV. 984, 988 (1952).
[91] Those cited in United Electric Co. v. Delise Construction Co., 315 Mass. 313, 52 N.E.2d 553 (1943).
[92] Except Bern v. Boston Consol. Gas Co., 310 Mass. 359, 44 N.E.2d 789 (1942), where a statute was in point.
[93] See e.g., 66 C.J.S. § 11, p. 755, n. 27 (1950).

contributory negligence is a defense.[94] It is suggested, however, that negligence and contributory negligence are at present operative only as sometimes more and sometimes less emphasized factors under the syntactical matrix of "reasonableness".

The view that liability for nuisance does not depend on fixed general rules, that it is law of degree and that the test is reasonableness in view of particular circumstances has been expressed by the American courts, as well as by the English courts, time and again.[95]

Injunctive Relief

In what circumstances do the courts enjoin existing or threatened nuisances? The courts have declared that injunctions will be granted where damages are an inadequate remedy. Even where damages can fairly recompense the plaintiff for past injuries, they are clearly inadequate in cases of continuing nuisances, where if the defendant were not ordered to desist from his nuisance-creating conduct, the plaintiff would be forced to resort again and again to action at law.[96]

This is in accord with English practice, but the American courts have on occasions objected to the description of injunction as a discretionary remedy.[97] It has even been said that the weight of authority is against the "discretion" view.[98] It is suggested that courts of equity refer to their remedies as "discretionary" in the sense that they will be granted only where the result will be just, fair, and equitable, taking all the circumstances into account. In practice, their findings will be conditioned but not fully directed by the standards of equity jurisprudence.

Where it is said that the plaintiff is entitled to a remedy "as of right" when he has brought his cause clearly within the rules of equity jurisprudence,[99] the process of deciding whether the plaintiff is entitled to a remedy in any particular case is not substantially different; the greater emphasis on the "rules" does not make them more precise or directive.

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[94] Cardozo, C.J., in McFarlane v. City of Niagara Falls, rejected the common law view, saying, "It would be intolerable if the choice of a name were to condition liability", 247 N.Y. 340, 344-50, 160 N.E. 391 (1928). See 37 ILL. L. REV. 1, ed. note *a* at 2 (1942-43), and 33 MARQ. L. REV. 240, 243 (1949-50).

[95] E.g., Vann, J., in McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907) at 189 N.Y. 46; and see Hofstetter v. Myers, 170 Kan. 564, 228 P.2d 522, 24 A.L.R.2d 188 (1951); Clinic & Hospital v. McConnell, 241 Mo. 223, 236 S.W.2d 384 (1951). De Lahunta v. Waterbury, 134 Conn. 630, 59 A.2d 800, 7 A.L.R.2d 218 (1948); Amphitheaters v. Portland Meadows, 184 Ore. 336, 198 P.2d 847, 5 A.L.R.2d 690 (1948).

[96] Holman v. Athens Empire Laundry Co., 149 Ga. 345, 100 S.E. 207, 6 A.L.R. 1564 (1919).

[97] E.g., Hennessy v. Carmony, 50 N.J. Eq. 616, 25 Atl. 374 (1892).

[98] See note 96 *supra*.

[99] Walters v. McElroy, 151 Pa. 549, 25 Atl. 125 (1892).

What are the rules of equity in this field? Apart from the requirement of inadequacy of damages as a remedy, the courts speak of "irreparable damage" as being a ground for equitable relief.[100] And, of course, if the plaintiff has been guilty of laches, has acted in bad faith, or has been at fault in any other way, he will be denied relief on the basis of the maxims "he who seeks equity must do equity" and "he who comes into equity must come with clean hands".[101] Some courts will not grant an injunction where it appears that the resulting injury would be greater than the one prevented.[102] This has been called the doctrine of "comparative injury" or "balance of convenience" [103] and is often justified on the basis of the discretionary nature of the remedy as being relevant to the determination of the equities of the case.[104] The courts taking the "of right" view could nevertheless apply the doctrine on the ground that it has become part of equity jurisprudence, but in fact they usually reject it or limit its applicability to the granting of interlocutory injunctions.[105]

Equitable relief is not limited to the cases of existing nuisances. The courts may grant an injunction where a nuisance is merely threatened.[106] The courts have at times required the threatened nuisances to be inevitable [107] and at other times they have been satisfied where a reasonable probability of injury could be shown.[108] Naturally the threatened injury must be substantial and damages must be considered an inadequate remedy before an injunction will be granted.

The Anatomy of "Reasonableness"

In this section I will not attempt to deal with all the difficult methodological questions involved in a full examination of legal syntax,[109] but will confine myself to discussing briefly how far the "rules of nuisance" can determine liability in specific instances.

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[100] Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221 (1868); Parker v. Winnipiseogee, 67 U.S. (2 Black) 545 (1862).

[101] Grey *ex rel.* Simmons v. Paterson, 60 N.J. Eq. 385, 45 Atl. 995, 48 L.R.A. 717 (1900); Medford v. Levy, 31 W. Va. 649, 8 S.E. 302, 2 L.R.A. 368 (1888).

[102] Arizona Copper Co. v. Gillespie, 230 U.S. 46 (1912); see 39 AM. JUR., *Nuisances*, §159, n.8 at p. 429 (1939).

[103] See note in 19 NOTRE DAME LAW. 360 (1943-1944).

[104] Edwards v. Allouez Min. Co., 38 Mich. 46, 31 Am. Rep. 301 (1878); 39 AM. JUR., *Nuisances*, § 159, n.9 at p. 429 (1942).

[105] See note 96 *supra;* 39 AM. JUR. *Nuisances*, § 159 (1942).

[106] St. Louis v. Knapp. S. & Co., 104 U.S. 658 (1882). And see notes in 6 ARK. L. REV. 231 (1952); 24 TEMP. L.Q. 449 (1950); 1 BAYLOR L. REV. 378 (1949).

[107] Rhodes v. Dunbar, note 100 *supra.*

[108] McPherson v. First Presb. Church, 120 Okla. 40, 248 Pac. 561, 51 A.L.R. 1215 (1926).

[109] For a recent article canvassing these problems, see Stoljar, *The Logical Status of Legal Principles*, 20 U. CHI. L. REV. 181 (1953).

The survey above has shown that, speaking generally, the various minor rules and tests are not singly determinative, but merge in the standard of "reasonableness". What meaning can we attribute to "unreasonable" in the statement that A shall be liable in damages to B for interference with B's use and enjoyment of land only if his interference was unreasonable? Obviously none at all unless some kind of definition is presupposed. Let us go a little further. Contrast the statement, "all conduct having the characteristic X is unreasonable", with the statement, "all X books are blue". Whereas the second is a fact statement and either analytic (implied in or deduced from another fact statement in terms of rules of logic) or synthetic (effectively restricting the frame of possibilities and checkable in terms of rules of empirical procedure), depending on whether the presupposed definition of X books includes the characteristic "blue", the first statement is a value statement and as such analytic and checkable in terms of certain presupposed axiological (value) rules.[110] But value statements can be checked only if the axiological rules are made explicit.

Since it is occasionally maintained that the frame of reference for liability determination is the legal syntax, where in the nuisance syntax are the rules in terms of which the value of "unreasonableness" can be assigned to certain types of conduct of interference? Since the determination of reasonableness in the majority of cases has been held to be a question of fact (as opposed to law) and thus for the jury to decide, it might seem that by the court's own admission these value rules are not part of the law. On the other hand, it is only fair to consider the possibility that the function of the jury is only the actual assignment of value in terms of rules stated to them by the judge as a matter of law. Let us see whether this position can be maintained. The courts sometimes formulate the test of "reasonableness" not in terms of "unreasonable interference" with the plaintiff's right not to be damaged, but in terms of the defendant's "reasonable use" of his land, that is, the defendant's privilege.[111] At first sight the "reasonable use" test might appear to refer to the defendant's conduct exclusive of the damage done, and that apart from "unreasonable use" the separate requirement of substantial damage must be satisfied if the defendant is to be liable. But in practice the "reasonableness" of the "use" has been said to be determined by taking into account the nature and extent of the damage done, and "reasonable use" is thus the converse of "unreasonable interference".[112] Or, in other words, the line between the

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[110] KAUFMANN, METHODOLOGY OF THE SOCIAL SCIENCES, ch. IX (1944).

[111] See Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383 (1917).

[112] Williams, J., in Gulf, etc. R.R. v. Oakes, 94 Tex. 155, 58 S.W. 999 (1900).

plaintiff's right not to be damaged in the use or enjoyment of his property and the defendant's privilege to use his land is drawn in terms of presupposed rules determining in what circumstances the value "unreasonable" is to be assigned to certain types of interference. This has not always been understood by the courts, as can be seen, for example, from the elliptical formulation that "the question of reasonable use is to be determined in view of the rights of others".[113] True, the bigger the right, the smaller the privilege and vice versa, but both are limited at the same time by the same rules.

Whether in terms of "reasonable use" or "unreasonable interference," what do the courts put before the jury to guide them in their decision? They usually give a list of factors, such as the nature and extent of the damage, the nature of the use, suitability of location, priority of occupation, etc., to be taken into consideration, adding that all the circumstances have to be taken into account.[114] Assuming for the moment that the jury can agree on what are all the circumstances to take into account, some of the factors themselves entail value judgments, e.g., suitability of location, and how the various factors are to be related. If the courts do not assign operational indices to these factors, which they do not, the jury is left to its own devices.

But, it may be argued, although the courts frequenlty use broad concepts, in the course of time these are narrowed, defined and refined by the process of judicial analogy.[115] Has not the standard of "reasonableness" in this context been similarly crystallized? To a certain extent it has and in the following ways: (1) the court finds that the interference established constitutes a nuisance as a matter of law, or, in a formulation preserving the syntactical matrix of "reasonableness," is "unreasonable" as a matter of law. The court may do this without resorting to previously decided cases with similar facts as authority, by stating: "As in other matters of degree, a case which is near the line might be sent to a jury to determine what is reasonable. In a clear case it is the duty of the court to rule upon the parties' rights." [116] More often, however, the courts have adopted value judgments made in previously decided cases where the facts are found to be similar in relevant respects.[117] (2) The court does not usurp the function of assessing "reasonableness," but restricts the framework of the jury's deliberations, e.g., by the requirement of negligence.[118]

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[113] Loomis, J., in Hurlbut v. McKone, 55 Conn. 31, 42, 10 Atl. 164 (1887).
[114] See note 95 *supra.*
[115] See LEVI, INTRODUCTION TO LEGAL REASONING (1951).
[116] Holmes, J., in Middlesex Co. v. McCue, 149 Mass. 103, 104, 21 N.E. 230 (1889).
[117] E.g. as regards garages in residential areas, see Ruppin, *Public Garages as Nuisances Per Se,* 81 U. PA. L. REV. 29 (1932).
[118] See *supra.*

The limitations of crystallization in this field are obvious. Where the court decides the question of "reasonableness" as a matter of law, by analogy to previous cases, the process of determining the extent of the "rule" and selecting the "relevant facts" is so flexible that more new rules are likely to be imported than old ones applied. And where the question of "reasonableness" left to the jury has been restricted by the courts, it has often been "reopened" by explicit reference to the wide test, that no single factor is determinative and all circumstances have to be taken into consideration.[119]

Let us see whether the Restatement of the Law of Torts [120] offers more helpful guides for the determination of liability for nuisance. "Private nuisance," it is said,[121] "is a field of tort liability. It is not a single type of tortious conduct. The feature that gives unity to this field is the interest invaded, namely, the interest in the use and enjoyment of land. . . . For an accidental invasion there is no liability. Invasions which are intentional, or which are the result of negligence, reckless or ultrahazardous conduct, subject the actor to liability in this field as they do in other fields." Thus far it appears that we do not need to worry about what is reasonable or unreasonable at all. But in a statement of the general rule of elements of liability [122] it is provided that for an intentional invasion to create liability, it must also be unreasonable.[123] It is pointed out that "in respect to intentional invasions of interests . . . there are no broad general principles of liability applicable to different types of interests. In respect to certain types of interests, such as those in bodily security and in the exclusive possession of land, the law has developed strict rules of liability for intentional invasions, qualified by specific privileges. In respect to interests in the use and enjoyment of land, however, the law has developed a broader, more indefinite and comprehensive rule of liability for intentional invasions. This rule is expressed in terms of unreasonableness." [124] Back where we were. But what about unintentional invasions? These must be negligent, reckless or ultrahazardous.[125] When "negligent" and "reckless" are objectively interpreted, they can be linked with "ultrahazardous" in terms of the degree of risk created. And we learn that, "Although the rules for

[119] A serious problem is the discomfort, annoyance and damage caused by airports to neighboring landowners. What evidence of crystallization is there in recent cases? See Leavitt, *The Landowner Versus the Airport*, 50 W. VA. L. REV. 145 (1947), and notes in 29 MINN. L. REV. 38 (1944) and 20 NOTRE DAME LAW. 441 (1944-1945).

[120] Vol. 4, ch. 40 (1939). For a comparison of the English law of nuisance with the Restatement, see Paton, 37 ILL. L. REV. 1 (1942). Since the article was written in 1942, five years before the decision in Read v. Lyons, [1947] A.C. 156, it contains a pardonable overestimation of the scope of strict liability actions under Rylands v. Fletcher, notes 53 and 55 *supra*.

[121] RESTATEMENT, TORTS, vol. 4, ch. 40, p. 220 (1939).

[122] *Id.* § 822.

[123] *Id.* § 822(d)(i).

[124] *Id.* § 822, p. 232.

[125] *Id.* § 822 (d)(ii).

determining negligence and recklessness are the same in respect to invasions of interests in the use and enjoyment of land as they are in respect to invasions of other interests, the fact that the actor's conduct involves a risk of harm through invasion of the interest in the use and enjoyment of land rather than through invasion of some other legally protected interest is often of importance. In order that the actor's conduct may be negligent or reckless, it must involve an unreasonable risk of harm (see §§ 282, 500, vol. II). In determining the unreasonable character of a realizable risk, the value which the law attaches to the interest imperiled is an important factor (see § 293, vol. II). Thus the actor's conduct may have sufficient utility (§ 292, vol. II) to outweigh a certain quantum of risk to another's use and enjoyment of land although it might not have sufficient utility to outweigh a similar quantum of risk to another's bodily security." [126] Back again, except that the Restatement is definite about there being no liability for accidental harm.[127] As we have seen, it is not certain that this conclusion is warranted.

Having stated that an intentional invasion of another's interest in the use or enjoyment of land does not create liability unless the invasion is also unreasonable, the Restatement goes on to say that such an invasion is unreasonable unless the utility of the actor's conduct outweighs the gravity of the harm.[128] Assuming for the moment that the courts were to accept this formulation, how far does it crystallize the standard of "reasonableness"? Factors listed to be considered in determining the gravity of harm are:

(a) the extent of the harm involved;

(b) the character of the harm involved;

(c) the social value which the law attaches to the type of use or enjoyment invaded;

(d) the suitability of the particular use or enjoyment invaded to the character of the locality;

(e) the burden on the person harmed of avoiding the harm.[129]

Factors to be considered in determining the utility of conduct which causes the invasion are:

(a) the social value which the law attaches to the primary purpose of the conduct;

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[126] *Id.* § 822, p. 234.
[127] *Id.* at p. 221.
[128] *Id.* § 826, p. 241.
[129] *Id.* § 827, p. 244.

(b) suitability of the conduct to the character of the location;

(c) impracticability of preventing or avoiding the invasion.[130]

Although this is a more integrated and ambitious list than that usually provided by the courts for the consideration of juries, it suffers from the same structural defects. In the first place, the list of factors is not intended to be exhaustive,[131] and any other factor considered relevant in any particular case may therefore upset all calculations made on the basis of the factors stated. Secondly, the social values which the law attaches to the type of use or enjoyment invaded on the one hand and to the primary purpose of the conduct causing the invasion on the other, are admitted to be "necessarily indefinite,[132] because of the fact that there is often no uniformly acceptable scale or standard of social values to which courts can refer." [133] The values, whatever they may be, which the court finally applies in any particular case are therefore more properly described as "imported" than as previously "attached" by the law. Nor, once "attached by the law," do they necessarily have any great tendency to perpetuate themselves. Quite apart from the difficulties noted above, of deducing value rules which have not been made explicit from cases of specific application, "the courts will consider the community standards of relative social value prevailing at the time and place" as well as "what has traditionally been regarded as the relative social value of various types of human activity." [134] Nor does this reference to traditional views help us very much, because all we are told is that "the use of one's own land for ordinary residential and agricultural purposes, for example, has traditionally been regarded as having high social value," [135] and a few pages earlier it is stated that "uses of land for residential, agricultural, business, industrial, recreational or other beneficial purposes have a general or intrinsic social value." [136] This just leaves a relatively small and shifting sphere of user "for extraordinary or unusual purposes" to be "less highly regarded." [137]

Further, although "it is only when the conduct [causing the invasion] has utility from the standpoint of all the factors that its merit is ever sufficient to outweigh the gravity of the harm it causes," [138] the gravity of harm "is the

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[130] *Id.* § 828, p. 250.
[131] *Id.* § 827, p. 244.
[132] This statement refers explicitly only to the social value attached to the purpose of the conduct causing the invasion, but I assume that it applies equally to the social value of the use or enjoyment invaded.
[133] RESTATEMENT, TORTS § 828, pp. 250-251 (1939).
[134] *Id.* at p. 253.
[135] *Id.* at pp. 253-254.
[136] *Id.* at p. 247.
[137] *Id.* at p. 254.
[138] *Id.* at p. 251.

product of all relevant factors. There is no general rule as to the relative weight of the particular factors in all the ever-varying cases." [139] That is to say, the problem of how these factors are to be related is left unsolved. At present, the factors are meaningful only as classificatory or comparative concepts, e.g., "great harm," "greater harm," "high value," "higher value," and in complex situations it is difficult to articulate the process of how a conclusion is reached by weighing a number of factors, other than with the help of quantitative concepts. Very briefly this can be explained as follows: Rules are workable, and statements of fact as well as rules are meaningful to the extent that they are capable of intersubjective control (i.e., control of "events" which is based on communication between human beings and cannot be satisfactorily predicated without reference to the thought processes of the participants). Different areas of intersubjective control require different levels of meaning (in terms of degree of precision). Concepts of low level meaning are quite sufficient for many of our everyday activities. For example, when I go into a restaurant and order a cup of coffe with cream, the desired result is usually achieved without further specification. I might indeed specify further by making use of a wide range of workable (i.e., achieving the desired communication) meanings, e.g., by asking for strong coffee, or that it should be served in a blue cup. Next I might transcend the socially set frame of reference by objecting when I get my coffee, that I had been misunderstood; that I did not want water with my coffee which "meant" ground coffee beans or even the whole bean. Although I would be considered rather eccentric at this stage, I could clearly express my desires, but suppose I had on some previous occasion been served with coffee the taste of which I had particularly liked, and I wish to order a cup of coffee which will have the same taste. Now I might find it difficult to express what I want. The words "bitter," "sweet," etc. and their comparatives would just not be sufficiently precise. All might not yet be lost. If I knew exactly how this miraculous cup of coffee had been prepared, the desired result might be achieved by repeating the same process of preparation. But in all probability I would not know the elements of preparation precisely enough for my purpose. And even if I could "exactly" reproduce the process of preparation, perhaps the particularly desirable taste was partly the result of a specific physical reaction on my part.

The point I am trying to make is that the extent to which legal syntax is directive depends not only on the words used but also on the sphere or frame of reference in which it operates. A category of multiple reference like "reasonableness," in terms of conformity to standardized conduct, will be a

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[139] *Id.* at p. 244.

workable test in certain spheres, for example, if it were limited to the issue of whether I had a right to expect to be served whole coffee beans when I asked for a cup of coffee in the restaurant. Legal syntax may be mediately as well as immediately directive by referring to another set of rules to be "let in." But when the concepts with which it operates are inadequate in any particular sphere, such as the field of nuisance, it not only fails to direct, but conceals the need for clarification of the standards sought to be applied, because the rules, standards or considerations in terms of which a specific case is decided, can be masked by rationalization of the decision in terms of the inadequate concepts of the law.

In the light of the above examination of the structure of the rules in terms of which nuisances are "established at law," I think it is unnecessary to add anything about the structure of the rules in terms of which courts with equity jurisdiction will or may issue injunctions once nuisances have been established or are threatened. Naturally "something more" is required; no jury is to be charged and the language in which courts of equity make their deliberations is somewhat different,[140] but in the degree of guidance given "equity follows the law."

POLICY CONSIDERATIONS

It is clear then that the rules in terms of which the value "reasonableness" is assigned to various types of interference are largely extraneous to the legal syntax, and since they are seldom made explicit, it would be somewhat surprising if the same rules were consistently applied by judges and juries throughout the United States.[141] Indeed, the lack of uniformity in the cases is less intriguing than the unanimous agreement reached on a considerable number of occasions by different sets of twelve good men and true.

Further, the analysis of valuation in terms of presupposed axiological rules should not blind us to the hazy, vague, almost intuitive manner in which value judgments are often made in practice, and judges and juries may not be entirely immune to this process, which makes valuation as a rational discipline a mere pretense.

It is therefore impossible in the vast majority of nuisance cases to discover the "real" grounds of decision at the most concrete level, i.e., when "all the revelant circumstances have been taken into consideration."

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[140] See *supra*.

[141] For illustrations of the lack of uniformity in the cases and generally, see MCDOUGAL AND HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 426-446 (1948).

In contrast, let us approach the problem from another point of view: What policy considerations are relevant in this field? To delimit the scope of the present and necessarily fragmentary examination I want to discuss briefly what interests and whose interests have been considered relevant in the assessment of "reasonableness."

In 1917, Professor Jeremiah Smith argued that a source of confusion in the nuisance cases consisted in the employment of the word "reasonable" in two different senses: "Reasonable user may mean (1) reasonable from the defendant's point of view; i.e., reasonable if the interest of the defendant alone is to be regarded, without reference to the damage thereby caused to adjacent owners. Or, it may mean (2) reasonable, not solely in view of the defendant's interest and convenience, but if considered also in view of the interest of surrounding landowners." [142] He rejected the first definition and argued that the second was the correct test in this context.[143] Unfortunately, his formulation of the test is not clear. But it appears that the surrounding landowners' interests are to be considered only to the extent that their interests in the use and enjoyment of their land have been invaded,[144] i.e., the interests of the parties alone are to be considered.

Since for the regulation of the parties' conflicting land use interests there must be a tertium comparationis and only their interests are to be considered, it appears that it is the parties' interests in general which are considered relevant. This has also been the attitude of some courts of equity in their formulation of the doctrine of comparative injury. Assuming the parties to be isolated from society, with the exception of the obliging presence of a disinterested arbitrator, the maneuver of the regulation of their conflicting land use interests might be feasible in terms of value rules based on their overall general interests. Within society, however, where private interests are protected by the law only in their role of social interests this theory is exceedingly unlikely to be applied in practice. Expressions of opinion which seek to "free" such regulation from public interest considerations like the adage that "the public interest is best served by the protection of private rights" seem to leave out of account that the content of the private rights is determined by public interest considera-

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142 Smith, *Reasonable Use of One's Own Property as a Justification for Damage to a Neighbor*, 17 COLUM. L. REV. 383 390 (1917).

143 *Ibid.*

144 Note the words "without reference to the damage thereby caused to adjacent owners" in the first definition of "reasonable" as apparently contrasted with the meaning in the second definition and Smith's approving quotation from Carpenter, J.'s, opinion in Rindge v. Sargent, 64 N.H. at 294 and 295, 9 Atl. 723 (1886), to the effect that "in determining the question of reasonableness, the effect of the use upon the interests of both parties, the benefits derived from it by one, the injury caused by it to the other, and all the circumstances affecting either of them are to be considered."

tions. Similarly, the notion that the extent of a person's land use privilege can be determined by reference to his neighbor's right not to be damaged is, as we have seen, an illusion.

Has, then, the whole of the legal machinery in this field been "a mistake," useless from the start? So far our analysis has largely been one of structure, of relations of meanings. In this section we are concerned to a large extent with matters of fact and can, therefore, adopt a historical perspective. The legal language we have been discussing developed in a relatively simple, agricultural community. When an occupier of land interfered with his neighbor's use and enjoyment of his land, the impact of this event and its consequences on the interests of the other members of the community was far less severe than its modern counterpart today. In the first place, the interference, be it the escape of noxious matter or something else, would far less often be of such a nature that if it were stopped, the plaintiff would have to restrict part or stop all of his business operations. Secondly, even if a court of equity were to enjoin the defendant from carrying on his business, far fewer people would be seriously affected than by the stoppage of a large modern industrial user.

It is understandable, therefore, that the problem of regulation should be formulated in terms of the interests of the parties, the interests of the community as a whole having no doubt been responsible for the creation of certain social standards which were used as tests of liability, but which were too remote to deserve mention.

Further, in the analysis of "reasonableness," I pointed out that in certain simple situations, where behaviour was sufficiently standardized, "reasonableness" in terms of conformity to those relatively simple standards would be an adequate test.[145] It is evident, therefore that in England as late as the 19th century the test of "reasonableness" was capable of, at any rate, a wider meaningful application than it is today, both in England and in the United States.

However, this historical "justification" of the legal apparatus does not solve the problems of today and it is clear that a different approach is required.

The Restatement, as we have seen, recognizes that "reasonableness" must be assessed in terms of community standards relative as to time and place,[146] and there has also been some judicial recognition of the liability-determining character of policy considerations in this field. In the case of *Rose v. Socony-*

[145] See *supra*.
[146] See *supra* and note 134.

Vacuum Corp.,[147] where waste matter escaped from the defendant's oil refinery by way of water percolating in undefined channels to the plaintiff's farm land and polluted his well, causing considerable damage, Murdock, J., considered the legal issue before him to be whether the defendant was to be held liable for causing a nuisance without any negligence on his part. He declined to adopt the rule in *Rylands v. Fletcher*,[148] surveyed cases from various jurisdictions dealing with the abstraction and diversion, as well as the pollution of percolating waters and, finding them to be in conflict,[149] said:

> "A query arises as to whether the divergence of views expressed in these cases is not due to the influence of the predominating economic interests of the jurisdiction to which these apply; in other words, whether these opinions do not rest on public policy rather than legal theory. On the question of public policy as a ground of judicial decision, see an article by Mr. Justice Holmes in 8 Harvard Law Review, 1.[150]
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> "It will be observed that in jurisdictions holding that even though there is no negligence there is liability for the pollution of subterranean waters, the predominating economic interest is agricultural.
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> "Defendant's refinery is located at the head of Narragansett Bay, a natural waterway for commerce. This plant is situated in the heart of a region highly developed industrially. Here it prepares for use and distributes a product which has become one of the prime necessities of modern life. It is an unavoidable incident of the growth of population and its segregation in restricted areas that individual rights recognized in a sparsely settled state have to be surrendered for the benefit of the community as it develops and expands. If, in the process of refining petroleum, injury is occasioned to those in the vicinity, not through negligence or lack of skill or the invasion of a recognized legal right, but by the contamination of percolating waters whose courses are not known, we think that public policy justifies a determination that such injury is damnum absque injuria." [151]

I feel that Mr. Justice Murdock is to be congratulated for so frankly stating the grounds of his decision, rather than resorting to the more usual obscurantist maneuvers of syntax manipulation. But perhaps judges cannot be blamed too much for not sticking their necks out in a similar manner. How would Murdock, J., as trial judge, have charged a jury in this case? How did he "find" the contents of the governing public policy? Was he trying to "deduce" a principle of economic interpretation from previous decisions?[152] Whose ideas did he seek to express in its application, the views of the citizens

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[147] 54 R.I. 411, 173 Atl. 627 (1934).
[148] Notes 53 and 55 *supra.*
[149] See *supra.*
[150] *The Path of the Law* (1896-97).
[151] Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 Atl. 627 (1934).
[152] If so, was he right? See Pound, *The Economic Interpretation of Torts*, 53 HARV. L. REV. 384 (1939-40); but see also 4 HASTINGS L.J. 173.

of Rhode Island as a whole, or of the planning experts, or just his own? Did he take all relevant factors into consideration, and if so, did he weigh them properly? Does this standard apply when a community is switching over from agricultural to industrial interests? What happens when the industrial and agricultural interests are evenly balanced?

Making the grounds for a nuisance decision explicit exposes some of the difficulties which may otherwise be assumed as nonexistent or as solved by esoteric legal magic.

This focuses attention on another point. If, as I suggest, the standard of "reasonableness" is to be applied with reference to the interests of the community as a whole, whose views on this matter are relevant? This may appear at first sight to be a stupid question, especially in view of previous references and tacit assumptions of the applicability of "community standards," but although it is evident that the courts have sought to reflect the dominant views of the community, for example, by delegating the function of assessing "reasonableness" to the jury as representatives of the citizens as a whole, the question bears further investigation. It has been suggested above [153] that in a relatively simple agricultural community the test of "reasonableness" was meaningful and adequate in terms of community standards which appeared to be almost "given" where the interests directly involved were simple and few. But in our modern, industrial, closely integrated community the complexities of a typical land use clash situation are so great and far-reaching, that the "man in the street" cannot be expected accurately to gauge all the factors and possible consequences involved, and even if he and eleven other members of a hypothetical jury were to agree, or appear to agree on "the facts," would not the whole complicated process of valuation be such that reasonable men with different predispositional backgrounds might be expected to differ?

In our consideration of the methods by which the courts and the Restatement have sought to concretize the standard of "reasonableness," I tried to show that the guides provided do not guide, because the concepts used are not adequate to achieve the desired result. Here I am suggesting that the regulation of conflicting land use interests is sought to be achieved in terms of generally accepted social standards which simply do not exist. Generally accepted ideas of "fairness and "justice" in this respect are not sufficiently refined.

If there is no policy in this field in the sense of accepted social views, what policy should the courts express?

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[153] See *supra*.

It may indeed be argued that the courts are asked to do a job for which they are not suited: "It may bear emphasis that in these 'nuisance' cases the courts, however conscious or unconscious of their function, are in fact planning and determining the actual land use patterns of their communities and that in most of our communities this is the only kind of planning for which the community institutions make provision. The student will wish to observe not only the utter physical chaos of our contemporary communities, the interdependence in terms of effects on private and community values of all uses of land, and the doctrines which are supposed to guide the courts in their retrospective, retroactive planning, but also the whole institutional context in which this planning takes place, and to question its adequacy to secure commonly accepted community objectives. It may be noted that the courts come in after the damage is done, that they decide only as between the two parties and between them only so long as there has been no substantial change in conditions, that they do not have the staffs or technical aids necessary to efficient and continuous performance of planning functions, and that the only technical standards at their command are the elusive tort doctrines." [154]

From this point of view it appears that policy considerations demand that we look at the whole field of land use planning and look for improvement of the situation to legislative and administrative agencies, giving up the courts as a bad job. While agreeing with the general sentiment expressed in the passage quoted, I think it is painfully obvious that before all the "community chaos" will be cleared up, a great deal of damage will be done and the courts will have to decide who is to bear the loss. It is desirable, therefore, that they do so as satisfactorily as possible.

It may be argued that the defendant's liability in damages should not depend on whether the utility of his conduct happens to be deemed great enough to outweigh the gravity of the harm caused to the plaintiff.[155] This may be considered in certain circumstances to amount to a private taking for the public benefit without compensation.[156] Against that it may be argued that private enterprise should not be discouraged from engaging in highly useful activity by the need to insure against necessary risks. It is difficult to avoid the conclusion that where the public interest requires the plaintiff to be exposed to risk of damage, the public should be responsible for his compensation when damage ensues, a solution which the courts cannot adopt.

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[154] McDOUGAL AND HABER, *op. cit. supra* note 141.
[155] See, e.g., Bowman v. Humphrey, 124 Iowa 744, 100 N.W. 854 (1904).
[156] *Cf.* United States v. Causby, 328 U.S. 256 (1946).

Short of this solution, there may yet be room for improvement. This paper will have achieved its purpose to the extent that it prompts a reconsideration of the policy issues involved in this field. For example, the courts might consider whether a fairer allocation of loss could be achieved by taking into account the risk-bearing capacity of the parties, rather than by an application of either the enterprise (strict liability) or fault principles.[157] That is to say, that where the plaintiff has suffered damage a good reason for demanding that the defendant should compensate him may be that in the particular circumstances he is the superior risk-bearer.[158]

Further, a thorough acquaintance with the full impact of the facts in any particular case is a prerequisite to an adequate implementation of policy by the courts, both in awarding damages and in granting injunctions. The highly technical knowledge required for this purpose may make it desirable to devise a procedure for consulting planning experts. In these and other ways it may be profitable to inject new life into the standard of "reasonableness" so as to meet more effectively the needs of the present.

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[157] For a general discussion, see Williams, *The Aims of the Law of Tort*, 4 CURRENT LEGAL PROBLEMS 113 (1951).

[158] See Morris, *Hazardous Enterprises and Risk Bearing Capacity*, 61 YALE L.J. 1172 (1952).