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Mosses from an Old Manse: Another Look at Some Historic Property Cases About the Environment

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MOSSES FROM AN OLD MANSE: ANOTHER LOOK AT SOME HISTORIC PROPERTY CASES ABOUT THE ENVIRONMENT*

Daniel R. Coquillette†

And now it was moved in arrest of judgment, that the building of the house for hogs was necessary for the sustenance of man: and one ought not to have so delicate a nose, that he cannot bear the smell of hogs; for *lex non favet delicatarum votis*: but it was resolved that the action for it is (as this case is) well maintainable; for in a house four things are desired [habitation of man, pleasure of the inhabitant, necessity of light, and cleanliness of air], and for nuisance done to three of them an action lies

—*Sir Edward Coke*¹

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¹ William Aldred's Case, 9 Coke 57b, 58a, 77 Eng. Rep. 816, 817 (K.B. 1611).

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 inhabitants of the town and of the public at large.

—Lord Westbury²

[T]he wisdom of a lawmaker consisteth not only in a platform of justice, but in the application thereof; taking into consideration . . . what influence laws touching private right of *meum* and *tuum* have into the public state, and how they may be made apt and agreeable

—Francis Bacon³

TABLE OF CONTENTS

INTRODUCTION: PROPERTY DOCTRINE AND JUSTICE	763
I. THE NATURAL RIGHTS OF SEISIN DOCTRINE AND	
WILLIAM ALDRED'S CASE (1611)	765
A. <i>Early Private Nuisance Law</i>	765
B. <i>Sic Utere Tuo Doctrine</i>	772
II. THE BALANCING OF UTILITIES DOCTRINE AND ST.	
HELEN'S SMELTING CO. v. TIPPING (1865)	782
A. <i>Balancing of Utilities Doctrine as Dictum in</i>	
<i>St. Helen's Smelting</i>	784
B. <i>Assessing the Balancing of Utilities Doctrine</i>	791
C. <i>Return of the Sic Utere Tuo Rule</i>	792
D. <i>Extension of the Balancing of Utilities</i>	
<i>Doctrine</i>	796
E. <i>Future of the Sic Utere Tuo Rule</i>	797
III. THE RES COMMUNES DOCTRINE: ILLINOIS CENTRAL	
RAILROAD v. ILLINOIS (1892)	799
A. <i>Roman Law and English Law</i>	801
B. <i>American Law</i>	809
CONCLUSION	820

² *St. Helen's Smelting Co. v. Tipping*, 11 Eng. Rep. 1483, 1486 (H.L. 1865).

³ F. BACON, *Of the Advancement of Learning*, in 6 THE WORKS OF FRANCIS BACON 390 (J. Spedding ed. 1870).

INTRODUCTION
PROPERTY DOCTRINE AND JUSTICE

One of the oldest tasks of Anglo-American law has been the resolution of disputes involving conflicting uses of property. Security of property historically has been regarded as a paramount legal need, perhaps *the* paramount legal need.⁴ Such security meant not merely the bare right to title or possession, but also the right to free use of the property.⁵

Thus legal history abounds with environmental litigation concerning rights to property use. *Commonwealth v. Sisson*⁶ is one example. Acting pursuant to a state statute, the Massachusetts Board of Fish and Game Commissioners ordered the defendant sawmill owners to take measures to stop the pollution of an adjoining trout brook with saw dust. The sawmill owners contended that this deprived them of property without compensation or due process.⁷ In *Morgan v. High Penn Oil Co.*,⁸ the parties' roles were reversed. The plaintiff, owner of a trailer park, argued that gases and odors from the defendant's nearby oil refinery wrongfully deprived him of the use and enjoyment of his property.⁹ In each case, a property owner sought court protection from a perceived threat to his right to the use of his property.¹⁰

⁴ For example, the Magna Carta provided that "[n]o free man shall be . . . disseised . . . except by the lawful judgement of his peers or by the law of the land." MAGNA CARTA cap. 39 ("1215 Charter"), reprinted and translated in J. HOLT, MAGNA CARTA 327 (1965). Neo-Marxists and others long debated whether property rights have been treated as paramount to rights of personal liberty. During much of English history, a man's liberty and his relationship to property were interrelated. See generally P. VINOGRADOFF, THE GROWTH OF THE MANOR 332-65 (2d ed. 1911).

⁵ See generally Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 112-24 (A. Guest ed. 1961).

⁶ 189 Mass. 247, 75 N.E. 619 (1905).

⁷ *Id.* at 249-50, 75 N.E. at 620. The court rejected the defendants' argument, holding that the legislature has the power to prohibit the pollution of waterways in order to "protect and preserve edible fish." The legislature can delegate this power to the Board of Fish and Game Commissioners, and the Board need not base its order on sworn evidence or afford a hearing to the persons affected. *Id.* at 251-53, 75 N.E. at 621-22.

⁸ 238 N.C. 185, 77 S.E.2d 682 (1953).

⁹ *Id.* at 187-89, 77 S.E.2d at 684-86. The court held the plaintiff had established that the defendant's actions constituted an actionable private nuisance. The evidence supported a finding that the defendant "intentionally and unreasonably caused noxious gases and odors to escape onto the nine acres of the plaintiffs to such a degree as to impair in a substantial manner the plaintiffs' use and enjoyment of their land." *Id.* at 194-95, 77 S.E.2d at 690.

¹⁰ For a discussion of what can be "property," see note 228 and accompanying text *infra*.

But growth of population and industry has necessarily jeopardized the unencumbered use of property.¹¹ English cities felt this tension at least as early as the sixteenth century.¹² The demand on the legal system, then and now, has been to develop consistent doctrines that both satisfy the needs of society and justify the curtailment of property owners' and possessors' rights. Property rights are too fundamental to be determined on an ad hoc basis.¹³ Outcomes must be rationalized to winners and losers alike in terms of a universal property doctrine that society as a whole accepts as just. This perception of distributive justice can be almost as important as the actual allocation of resources.¹⁴ And legal historians, particularly Maitland, have long recognized that "known general laws" are at least perceived to "interfere less with freedom."¹⁵

With this in mind, this Article will exhume, yet again, three famous cases on Anglo-American property doctrine: *William Aldred's Case*,¹⁶ *St. Helen's Smelting Co. v. Tipping*,¹⁷ and *Illinois Central Railroad v. Illinois*.¹⁸ These cases are remarkable for their multitudinous progeny and commentaries. But they are most remarkable as sources of ideas about history, justice, and the human environment.

¹¹ See, e.g., Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). Cohen noted: To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of owners, enforced by the state as much as the right to exclude others which is the essence of property.

Id. at 21.

¹² See notes 86-90 and accompanying text *infra*.

¹³ The need for a general property doctrine to legitimate both court action and government policy concerned scholars at the dawn of English legal history. The first comprehensive book on English law, written by several hands between 1220 and 1256, was very much concerned with conceptualized, universal property doctrine. See generally 2 BRACTON ON THE LAW AND CUSTOMS OF ENGLAND 39-48 (S. Thorne trans. 1968) [hereinafter cited as BRACTON].

¹⁴ See generally E. MISHAN, COST-BENEFIT ANALYSIS 127-44 (1976); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-1105 (1972).

¹⁵ F. MAITLAND, *A Historical Sketch of Liberty and Equality as Ideals of English Political Philosophy from the Time of Hobbes to the Time of Coleridge*, in 1 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 81 (H. Fisher ed. 1911).

¹⁶ 9 Coke 57b, 77 Eng. Rep. 816 (K.B. 1611).

¹⁷ 11 Eng. Rep. 1483 (H.L. 1865).

¹⁸ 146 U.S. 387 (1892).

I

THE NATURAL RIGHTS OF SEISIN DOCTRINE
AND WILLIAM ALDRED'S CASE (1611)A. *Early Private Nuisance Law*

The early common law took the position that "[n]o plot of land [was] 'intire of itselfe.'" ¹⁹ In addition to the wrong of wholly depriving a man of possession of his land, *disseisina*, the common law recognized the wrong of interfering with property rights by entering on the land, *transgressio*. Beginning at least as early as the twelfth and thirteenth centuries, the law also remedied interference with the use of land from outside that land.²⁰ This last kind of interference was eventually to be called *nocumentum* or nuisance.

Both "nuisance" and "trespass" "began life as ordinary English, or rather French, words with no inherent technical significance."²¹ Nuisance comprises an "annoyance" as opposed to a

¹⁹ C. HAAR, *LAND-USE PLANNING* 124 (3d ed. 1976) (quoting JOHN DONNE, *Devotions Upon Emergent Occasions XVII*, in JOHN DONNE: COMPLETE POETRY AND SELECTED PROSE 538 (J. Hayward ed. 1929)); see Cohen, *supra* note 11, at 21; Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480, 481-82 (1949).

²⁰ See Loengard, *The Assize of Nuisance: Origins of an Action at Common Law*, 37 CAMBRIDGE L.J. 144, 144-47 (1978); Newark, *supra* note 19, at 481-82. The earliest surviving Roman law texts also contain the idea that property was not "intire of itselfe." Gaius, who wrote in the mid-second century A.D., stated that ownership rights existed beyond tangible "corporeal" things "such as land, a slave, a garment." INSTITUTES OF GAIVS 2.13.

Incorporeal are things that are intangible, such as exist merely in law. . . . Incorporeal also are rights attached to urban and rural lands. Examples of the former are the right to raise one's building and so obstruct a neighbour's lights, or that of preventing a building from being raised lest neighbouring lights be obstructed, also the right that a neighbour shall suffer rain-water to pass into his courtyard . . . in a channel or by dripping; also the right to introduce a sewer into a neighbour's property or to open lights over it.

Id. at 2.14.

²¹ J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 351 (2d ed. 1979). See C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 3-4 (1949); Loengard, *supra* note 20, at 158 n.44. In Latin, *nocumentum* simply meant "harm." Newark, *supra* note 19, at 481. See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 89, at 571 n.7 (4th ed. 1971). The multifarious uses of the term "nuisance" have obscured its history as a private wrong against land. For instance, "nuisance" could also refer to various forms of petty crimes and public nuisances actionable only by government officials. Newark, *supra* note 19, at 481-83. See generally 2 F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 520 (2d ed. 1898). The confusion between public and private nuisance apparently dates from Y.B. Mich. 27 Hen. 8, f. 27, pl. 10 (1535), reprinted in C. FIFOOT, *supra*, at 89. In this action for blocking a highway, "[i]nstead of restating the rule that the existence of the remedy of a criminal presentment barred the action [one judge] attempted to rationalise it by saying that to allow the action to one would be to allow it to a hundred." Newark, *supra* note 19,

"direct physical harm."²² At first, such annoyances were probably remedied on an ad hoc basis by the many local courts of medieval England. But eventually some remedies for such harms to another's free tenement developed into a royal *praecipe* ("command") writ, a simple but formal legal remedy. This writ commanded a defendant to permit (*quod permittat*) a plaintiff to exercise a right, or to abate by self-help a hindrance, which interfered with the plaintiff's *seisin* of land, but fell short of actually interfering directly with full land ownership.²³

With the ordinance called the Assize of Novel Disseisin of 1166, Henry II replaced the older "writs of right" by simple, expeditious possessory assizes, with an attractive and novel right to jury trial. Just as these possessory assizes began to replace the older remedies for absolute interference with land, the use of *praecipe* writs for nuisance was also replaced by a new possessory remedy.²⁴ This remedy for nuisance was obtained by using a writ very similar to, and perhaps a kind of subgroup of, that employed to bring an action in *novel disseisin* for the possession of the land itself.²⁵ The plea rolls of John and Henry III show a frequent

at 483. Thus the peculiar private action in public nuisance was born as an action on the case that lies only when the plaintiff suffers "a particular damage . . . which is not common to others." E. COKE, *THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* *56a. This confusion was then picked up in a 16th century case digest. R. BROOKE, *LA GRAUNDE ABRIDGEMENT* (Tottell ed. 1576) (1st ed. London 1573). Following the judicial language, the editor listed the above *Year Book* case under both "nuisance" and "action sur le case," compounding the confusion between public and private nuisance actions.

²² J. BAKER, *supra* note 21, at 351.

²³ "[T]he writs themselves have an *ad hoc* quality which makes categorisation difficult and frustrates attempts at tracing evolution of a form . . ." Loengard, *supra* note 20, at 147. For typical *praecipe* writs defending rights of access to wood, pasture, and proper use of common pasture short of full ownership, see *THE TREATISE ON THE LAW AND CUSTOMS OF THE REALM OF ENGLAND COMMONLY CALLED GLANVILL*, bk. 12, chs. 13, 14, at 142-43 (G. Hall ed. 1965) [hereinafter cited as *GLANVILL*]. *Glanvill* was written between 1187 and 1189. *Introduction to GLANVILL* at xi. See generally C. FIFOOT, *supra* note 21, at 3-23; 3 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 15, 128-30 (1909); F. MAITLAND, *THE FORMS OF ACTION AT COMMON LAW* 23-29 (A. Claytor & W. Whittaker eds. 1936).

²⁴ According to a new and penetrating analysis by Professor Loengard, the use of a possessory assize to remedy nuisance was part of the original scheme behind the ordinance of the assize of *novel disseisin*, and not a mere judicial interpretation or extension of the ordinance. Loengard, *supra* note 20, at 164-66. *But see* H. RICHARDSON & G. SAYLES, *LAW AND LEGISLATION* 109 (1966). See J. BAKER, *supra* note 21, at 352. See also C. FLOWER, *INTRODUCTION TO THE CURIA ROLLS, 1199-1230 A.D.*, 62 *SELDEN SOC'Y* 13, 325-34 (1943); Chew & Kellaway, *Introduction to LONDON ASSIZE OF NUISANCE 1301-1431* at xii-xx (London Record Society repr. 1973); Milsom, *Legal Introduction to NOVAE NARRATIONES*, reprinted in 80 *SELDEN SOC'Y* at xcvi-civ (1963).

²⁵ For the early forms of such writs, see *GLANVILL*, *supra* note 23, at 167-69; *EARLY REGISTERS OF WRITS*, reprinted in 87 *SELDEN SOC'Y* 3, 32 (viscontiel), 70-74, 85, 98, 214-15,

use of this type of writ, called *questus est*, in seeking relief from wrongs to property not amounting to a threat to total possession of *disseisin*, but merely to an interference with the enjoyment of a free tenement.²⁶ The writ required a jury of "twelve free and lawful men of that neighbourhood to view [the disputed area] . . . [a]nd summon[ed] them . . . to be before our justices at the first session."²⁷ The entire action, writ and jury proceeding, became known as the assize of nuisance.²⁸ Only a private party with a "freehold estate" could obtain its relief.²⁹

219, 260-62, 271-72 (1970). By the time of *Bracton*, which was written between 1220 and 1256 (Thorne, *Translator's Preface* to 3 BRACTON, *supra* note 13, at v), there was a conscious comparison of the assize of nuisance with that of *novel disseisin*. In essence, if a wrong arose entirely on the defendant's land, the assize of nuisance was the appropriate remedy, as it "extends to another's estate." *Id.* at 197. But if the wrong was perpetrated on the plaintiff's land or deprived the plaintiff of his "free tenement" absolutely, the proper remedy was the assize of *novel disseisin*. *Id.* at 197. The writ of nuisance and the writ of *novel disseisin* were framed at the same time, if not originally both established, as Loengard suggests, in the ordinance called the Assize of Novel Disseisin. See note 24 *supra*. See also D. STENTON, ENGLISH JUSTICE BETWEEN THE NORMAN CONQUEST AND THE GREAT CHARTER, 1066-1215, at 42 n.59 (1964); Turner, *Introduction to BREVIA PLACITATA*, 66 SELDEN SOC'Y at cxix (1947).

²⁶ See, e.g., 3 BRACTON, *supra* note 13, at 192-93; C. FIFOOT, *supra* note 21, at 20. The writ ran "[q]uestus est nobis talis quod talis iniuste et sine iudicio levavit quandam murum . . . quandam domum, quandam portam . . . in tali villa ad nocumentum liberi tenementi." It translates as "[s]uch a one has complained to us that such a one wrongfully and without judgment constructed a certain wall (. . . 'house,' 'gate,' . . .) in such a vill to the nuisance of his free tenement." 3 BRACTON, *supra* note 13, at 192. For a list of cases involving this writ for injuries less than *disseisin*, or total dispossession, see notes 44-45 *infra*.

²⁷ 3 BRACTON, *supra* note 13, at 194.

²⁸ The word "assize" derives from the Latin word "assidere," "to set together," as in a "legislative enactment." 1 JOWITT'S DICTIONARY OF ENGLISH LAW 148 (2d ed. 1977). As Plucknett stated that:

From this time onwards the word "assize" takes several new meanings; it began by signifying a solemn session of a council or a court, and soon came to mean an enactment made at such a meeting; among the most important of these assizes were those establishing trial by inquisition, and so it soon became customary to describe the inquisition of twelve men as an assize, while the various procedures leading up to this form of trial (which we should now call forms of action [including the assize of nuisance]) were likewise called assizes. Finally, travelling justices were established in the thirteenth century in order to try these assizes more speedily, and these justices were naturally called justices of assize, and their sessions in the provinces were called the assizes [later synonymous with local English trial courts, *i.e.*, "Norfolk Assizes"].

T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 112 (5th ed. 1956).

²⁹ C. FIFOOT, *supra* note 21, at 93. This situation existed before the rise of the action on the case afforded tort relief, even for direct trespass, to plaintiffs who had no property interests. See 3 W. HOLDSWORTH, *supra* note 23, at 11 & n.3. Prosser stated that "the assize of nuisance" was "a criminal writ affording incidental civil relief." W. PROSSER, *supra* note 21, at 572. Legal scholarship other than that cited by Prosser contradicts this view. In particular, see C. FIFOOT, *supra* note 21, at 5-11, 93-96. The assize of nuisance was never a Plea of the Crown, a criminal action in which the King is a party.

The earliest cases of *novel disseisin ad nocumentum liberi tenementi* ("of nuisance to a free hold tenement"), fell into four classes: (1) interference with a variety of "agricultural diversions falling short of total disseisin," such as interference with pasture for cattle or pannage for pigs, (2) obstruction to rights of way, (3) interference arising from the operation of watermills, and (4) interference with rights to hold fairs or markets.³⁰ *Bracton* did contain the notion that the variety of nuisances was infinite.³¹ But the examples given were still strictly tied to servitudes and freehold ownership, and the assizes of both *novel disseisin* and nuisance were thus denied to one who held only in wardship or for a term of years or who was in possession only in another's name.³²

Even during its early development, nuisance, as a wrong against rights in rem, received special treatment relative to wrongs against legal rights in personam. For example, interference with

The ancient, alternative remedy of self-abatement of nuisance illustrates Prosser's error. See, e.g., *Crakehall v. Anon.*, Y.B. Trin. 6 Edw. 2 (1313), reprinted in 36 SELDEN SOCIETY 76 (1918). If the injury was flagrant, the complaining property owner could resort to self-help to eliminate the nuisance. See C. FIFOOT, *supra* note 21, at 9. The period of self-abatement, during which recourse to the judicial system was unnecessary, was limited. *Id.* See 3 BRACTON, *supra* note 13, at 189, 192 (party must take action while "misdeed is still fresh"). If the time period elapsed without any action by the complainant, he had to seek an assize of *novel disseisin* or an assize of nuisance, depending upon the location of the injury. *Id.* But even under the writs of *questus est* and *quod permittat*, the injured party, not the sheriff, abated the nuisance. See 3 W. BLACKSTONE, COMMENTARIES *221-22; 3 W. HOLDSWORTH, *supra* note 23, at 244.

³⁰ C. FIFOOT, *supra* note 21, at 5-7.

³¹ "*Nocumenta vero infinita sunt, secundum quod inferius dicitur, quae omnino servitutes tollunt vel saltem dant impedimentum quo minus commode uti possit servitutibus*" ("nuisances which destroy servitudes completely or, at the least, keep them from being used effectively, are infinite"). 3 BRACTON, *supra* note 13, at 189. Cf. Chew & Kellaway, *supra* note 24, at xxxii ("although not infinite, the nuisances on our rolls are undoubtedly varied").

³² The plaint and remedy by assise does not lie for anyone who is in possession in the name of another, because he does not possess though he is in possession; he possesses in whose name the thing is possessed. To possess is very different from being in possession. These are in possession though they do not possess: a guardian (sometimes) who holds in demesne though not in fee. A procurator. A household. A bondsman, one's own or another's possessed in good faith. A farmer or fructuary, though not one who holds in fee farm. A usuary and a guest. And he who holds at will, from day to day [or] from year to year, though he may vouch a warrantor, according to some, as a usufructuary who holds for a term of years. Such persons will have neither the plaint nor the remedy by assise, because they have no action; the owner has it, and thus, if they sue, the exception of property and free tenement lies against them, no matter by what kind of disseisor it is raised, whether he has the right to eject or not.

3 BRACTON, *supra* note 13, at 33 (footnotes omitted).

rights in rem did not constitute a single wrong but a continuous wrong which lasted until the status quo was restored.³³ As a result, at least theoretically, an injured party could institute an unlimited number of assizes of nuisance until the wrong had ceased, with damages awarded at each assize.³⁴ This doctrine formed the historical basis of a later and most potent remedy for private nuisance, the equitable injunction.³⁵

To be actionable, a nuisance had to result in both *injuria* (legal injury) and *damnum* (material damage).³⁶ These concepts were distinguished in *Bracton*: If you built a mill on your land, taking customers from my mill, there was *damnum* to me, but no *injuria*.³⁷ A necessary element of *injuria* was *omne id quod non iure fit* ("anything wrongfully done").³⁸ The meaning of this crucial phrase was unclear for centuries;³⁹ perhaps there was no uniform definition. The *Year Book* cases treat these wrongs as interferences with the "natural rights" of the property owner or possessor.⁴⁰ Such "natural rights" arose solely through the operation of the

³³ See *Beswick v. Cunden*, Cro. Eliz. 402, 402, 78 Eng. Rep. 646, 647 (Q.B. 1592) ("the case in 14 & 15 Eliz. Dyer, 319. is good law; for there the Lady Brown made a new nuisance by every turning of the cock, for which she was punishable, although she made it not at the first"); F. MAITLAND, *supra* note 23, at 77-78. This rule was later modified in *Penruddock's Case*, 5 Coke 100b, 77 Eng. Rep. 210 (C.P. 1598), which held that an action may lie directly against the person beginning a nuisance and continue as long as the wrong persists, but that a request to remedy is necessary before the right of action continues against a new neighbor who continues a nuisance begun by another.

³⁴ See F. MAITLAND, *supra* note 23, at 77-78.

³⁵ Occasionally, an early common law court would grant specific performance or issue a writ of prohibition that had almost the same effect as an injunction. See T. PLUCKNETT, *supra* note 28, at 678. Whether these were ever used for a *nocumentum* is apparently unknown. For discussions of the modern use of the injunction as a nuisance remedy, see Chafee, *The Progress of the Law, 1919-1920: Equitable Relief Against Torts*, 34 HARV. L. REV. 388, 392-400 (1921); Note, *Injunctions against Private Nuisances*, 22 HARV. L. REV. 596, 596-97 (1909). For a discussion of the standards for injunctive relief, see *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957); *Elliot Nursery Co. v. Duquesne Light Co.*, 281 Pa. 166, 126 A. 345 (1924).

³⁶ 2 F. POLLOCK & F. MAITLAND, *supra* note 21, at 534.

³⁷ 3 BRACTON, *supra* note 13, at 164, 189, 195-96, 199; 2 F. POLLOCK & F. MAITLAND, *supra* note 21, at 534. See also 2 BRACTON, *supra* note 13, at 140, 267.

³⁸ 2 BRACTON, *supra* note 13, at 140.

³⁹ See generally McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948); Winfield, *Nuisance as a Tort*, 4 CAMBRIDGE L.J. 189 (1931).

⁴⁰ For what Holdsworth called "natural rights incident to ownership," see Y.B. Trin. 18 Edw. 3 (1344), reprinted in ROLL SERIES 210 (1904); Y.B. Pasch. 12 Edw. 3 (1338), reprinted in ROLL SERIES 464 (1883); Y.B. Hil. 35 Edw. 1 (1307), reprinted in ROLL SERIES 456 (1879); Y.B. Mich. 30 Edw. 1 (1302), reprinted in ROLL SERIES 40 (1863); 3 W. HOLDSWORTH, *supra* note 23, at 129. See also J. BAKER, *supra* note 21, at 356-60; C. FIFOOT, *supra* note 21, at 8, 95; Newark, *supra* note 19, at 482.

property law and did not depend on an express grant or prescription.⁴¹ Furthermore, they could not be taken away by express grant or prescription.⁴² For example, there could be no easement of "foul smell" over another's property.⁴³

In 1444, Judge Markham said "[i]f a man builds a house and stops up the light coming to my house, or causes the rain to fall from his house and so undermines my house, or does anything which injures my free tenement, I shall have the assize of nuisance."⁴⁴ The "natural rights" of *seisin* apparently included protection against interference with the owner's residential use or enjoyment of the property together with direct interference with any economic use of the land that was an exclusive legal right of the owner.⁴⁵

Such interference with residential use was enough to constitute an *injuria*, and any resulting *damnum* gave rise to a right of action. The requisite interference could be extremely indirect. For example, *injuria* could result from foul smells, uncomfortable temperature, excessive noise, or the cutting off of light. Moreover,

⁴¹ 3 BRACTON, *supra* note 13, at 163, 189-90. See F. POLLOCK, JURISPRUDENCE AND LEGAL ESSAYS 108 (A. Goodhart ed. 1961); A. SIMPSON, AN INTRODUCTION TO THE HISTORY OF THE LAND LAW 101, 246 (1961).

⁴² Fowler v. Sanders, Cro. Jac. 446, 446, 79 Eng. Rep. 382, 382 (K.B. 1617).

⁴³ A. SIMPSON, *supra* note 41, at 246.

⁴⁴ 3 W. HOLDSWORTH, *supra* note 23, at 129 (quoting Y.B. Mich. 22 Hen. 6, pl. 23 (1443)). See Y.B. Mich. 30 Edw. 1 (1301), reprinted in ROLL SERIES 22 (1863). *But cf.* Bowry and Popes Case, 1 Leon. 168, 74 Eng. Rep. 155 (C.P. 1588) (stopping up recently built window not actionable).

⁴⁵ See Y.B. Trin. 18 Edw. 3, f. 22, pl. 1 (1344), reprinted in ROLL SERIES 210 (1904) (construction of house so that rain fell on plaintiff's house); Y.B. Trin. 18 Edw. 3, f. 22, pl. 2 (1344), reprinted in ROLL SERIES 210 (1904) (construction of house so that drainage of plaintiff's house impaired); Y.B. Pasch. 12 Edw. 3 (1338), reprinted in ROLL SERIES 468 (1883) (construction of wall so that rain fell on plaintiff's house); Y.B. Pasch. 12 Edw. 3 (1338), reprinted in ROLL SERIES 466 (1883) (construction of weir downstream from another); Y.B. Pasch. 12 Edw. 3 (1331), reprinted in ROLL SERIES 464 (1883) (diversion of stream from plaintiff's land); Grave v. Shorne, Y.B. Hil. 8 Edw. 2, pl. 2 (1315), reprinted in 41 SELDEN SOCIETY 1 (1924) (*disseisin* of common pasture); Crakehall v. Anonymous, Y.B. Trin. 6 Edw. 2, pl. 21 (1313), reprinted in 36 SELDEN SOCIETY 76 (1918) (diversion of stream from one mill to another); Burnhill v. Ringtherose, Y.B. Trin. 3 Edw. 2, pl. 30 (1310), reprinted in 20 SELDEN SOCIETY 200 (1905) (failure to have corn from certain land ground at plaintiff's mill); Y.B. Mich. 31 Edw. 1 (1303), reprinted in ROLL SERIES 404 (1863) (construction of weir upstream from mill); Y.B. 22 Edw. 1 (1294), reprinted in ROLL SERIES 568 (1873) (holding of market in same town as existing market); Y.B. 21 Edw. 1 (1293), reprinted in ROLL SERIES 414 (1866) (construction of pool on adjoining land); Wildeker v. Ros, Bracton's Note Book, pl. 685 (1232), reprinted in C. FIFOOT, *supra* note 21, at 16 (*disseisin* of estovers); Abbot of Meaux's Case, Assize Roll 1040, mem. 4, pl. 91 (1219), reprinted in 56 SELDEN SOCIETY 39 (1937) (obstruction of right of way).

it was argued that the *damnum* could be to simple enjoyment.⁴⁶ But, as discussed before, no amount of harm gave rise to actionable damages unless the injury was of a type legally recognized as giving a right of action.

⁴⁶ The issue of "whether the law took any notice of 'things of pleasure' as opposed to things of profit" was a repeatedly contested issue through the sixteenth century. See Baker, *Introduction to 2 THE REPORTS OF SIR JOHN SPELMAN, reprinted in 94 SELDEN SOC'Y 35-36, 234-36* (1977). In 1530 one judge argued that "it is necessary for every man of ability to have pleasures; and when this pleasure is destroyed, is it not reason that he should have damages therefor? (As if to say yes)." Y.B. 21 Hen. 8, Keil. 203, pl. 1 (1530), *translation quoted in Baker, supra*, at 36. Temperature, light, smell and reasonable quiet unquestionably were protected.

[I]f a man makes an oven for making chalk or pots . . . and by the heat of the fire my house becomes so hot that I cannot live there . . . this is nuisance. . . . In the same way, if one makes a forge so near my house that I cannot hear in my house because of the striking of the hammer, it is nuisance. In the same way, if one makes a common slaughterhouse which proves so bad that on account of the evil smell I cannot live in my house, it is nuisance. It is the same of a latrine

Treherne, *Lincoln's Inn Reading on Forest Laws* (1520), *conflated and quoted in Baker, supra*, at 235.

[B]y the Common law, one shall not hurt the Freehold of another, and no greater hurt, greivance, or dammage can be done to any mans Freehold, then to take away the light and ayre thereof, which is comfortable, & commodious for him, for when this light, and ayre are taken from him, his house remaineth as a dungeon.

Hales' Case, [unreported] (c. 1560) (argument, Wraye), *printed in A BRIEF DECLARATION FOR WHAT MANNER OF SPECIALL NUSANCE CONCERNING PRIVATE DWELLING HOUSES, A MAN MAY HAVE HIS REMEDY BY ASSISE, OR OTHER ACTION AS THE CASE REQUIRES 11* (London 1636) [hereinafter cited as *DECLARATION*]; see also J. BAKER, *supra* note 21, at 357 n.13. But in the same case a contrary argument was made by Manwood:

I will agree with you, that if all your windowes were stopped, that an action will lie, and where you say *sic utere tuo ut alienum non ladas*, this is not meant of things of pleasure, but of things of profit. And here is not any part of your house consumed, but herein a let of your pleasure onely, for which your action is not maintaineable.

DECLARATION, supra, at 20-21.

The debate on aesthetics continued into the 18th century in the context of indictment for public nuisance. Lord Mansfield, while reviewing a case in which the defendants had been convicted of a public nuisance "for erecting and continuing their works at Twickenham, for making acid spirit of sulphur, oil of vitriol, and oil of aqua fortis," stated that "it is not necessary that the smell [caused by defendants' operations] should be unwholesome: it is enough, if it renders the enjoyment of life and property uncomfortable." *Rex v. White*, 1 Burr. 333, 337, 97 Eng. Rep. 338, 340 (K.B. 1757). Indeed, in one case mere storage of "great quantities of gun powder" was held to be, *ipso facto*, a public nuisance, without any physical damage at all. *Rex v. Taylor*, 2 Strange 1167, 1167, 93 Eng. Rep. 1104, 1104 (K.B. 1741). Apparently, the anxiety alone was actionable. "So also it will be a nuisance, if life is made uncomfortable by the apprehension of danger . . ." 3 W. BLACKSTONE, *COMMENTARIES* 171 n.3 (19th ed. J. Chitty ed. 1857).

It is unclear whether American nuisance law ever historically accepted purely "mental discomfort" or damage to aesthetics as actionable per se. See Cbafee, *supra* note 35, at 393. Cf. Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35, 42-45 (1906) (advocating such acceptance).

If [the defendant] cannot be prohibited by law from doing it, though he creates a nuisance and causes damage it will not be wrongful, for each may do on his own property [whatever he wishes if] wrongful damages does not accrue to a neighbour, as where one erects a mill on his own land and takes from his neighbour his own suit and that of others; he does his neighbour damages but no *injuria* since he is not prohibited by law or a constitution from having or erecting a mill.⁴⁷

Cutting off a neighbor's light, however, was argued to be actionable even though the *damnum* could be characterized as interfering with enjoyment and not profit.⁴⁸

Anything, therefore, "erected, made, or done not on the soil possessed by the complainant"⁴⁹ that interfered with the "free enjoyment" guaranteed by *seisin* was a wrong that could be remedied by the assize of nuisance.⁵⁰ As *Bracton* stated, there was a "servitude . . . imposed on another's land by law, not by man . . . by which one is prohibited from doing on his own land what may damage a neighbor."⁵¹ The "natural rights" incident to *seisin* were among the earliest legally protected rights, and courts vigorously debated the limitations of *damnum* and *injuria*.

B. *Sic Utere Tuo Doctrine*

Even in 1600 it was still unclear exactly what constituted these "natural rights" of *seisin*.⁵² As in many other areas of the common law, the task of clarification fell to Sir Edward Coke. He undertook this task, like many others, by writing a report of a "case in point," a report which may or may not have accurately reflected the actual case.⁵³

⁴⁷ 3 BRACTON, *supra* note 13, at 164 (footnotes omitted).

⁴⁸ See note 46 *supra*. Substantial blockage of light was actionable, but probably not just some interference with a view. See *William Aldred's Case*, 9 Coke 57b, 58a-58b, 77 Eng. Rep. 816, 817-21 (K.B. 1611) (quoting *Bland v. Moseley*, [unreported] (K.B. 1587) (Wray, C.J.)); *J. Baker, supra* note 21, at 357-58. But see *Bury v. Pope*, Cro. Eliz. 118, 118, 78 Eng. Rep. 375, 375 (Ex. Ch. 1588) (interference with windows not actionable "for it was [the plaintiff's] folly to build his house so near to the other's land"). "[T]he right to clean air, undiverted and unpolluted water, light, and quiet, seems to have been incident to house ownership in general." Baker, *supra* note 46, at 235.

⁴⁹ 2 F. POLLOCK & F. MAITLAND, *supra* note 21, at 53.

⁵⁰ 3 W. HOLDSWORTH, *supra* note 23, at 11. *Novel disseisin*, on the other hand, protected "undisturbed possession" of property. *Id.*

⁵¹ 3 BRACTON, *supra* note 13, at 189-90. See also *id.* at 163-64, 191.

⁵² See C. FIFOOT, *supra* note 21, at 95.

⁵³ Plucknett explained Coke's case-reporting philosophy. "There was no clear boundary in [Coke's] mind between what a case said and what he thought it ought to say A case

The case was *William Aldred's Case*.⁵⁴ The pleadings were simple. The plaintiff brought an action on the case against the defendant for erecting a hog sty near the plaintiff's house. The sty allegedly fouled the air in the house and cut off the plaintiff's light. These allegations were found to be true at the Norfolk Assizes, and damages were assessed.⁵⁵ The defendant appealed to the King's Bench, arguing:

- (1) That there was no *damnum* to the plaintiff in the "corrupted air"—because the law should not favor delicate wishes, "one ought not to have so delicate a nose, that he cannot bear the smell of hogs";⁵⁶
- (2) that the blocking of windows was permitted by a local custom;⁵⁷ and
- (3) "that the building of the house for hogs was necessary for the sustenance of man."⁵⁸

The pleadings present two points of great interest. First, the plaintiff brought an action on the case rather than the older assize of nuisance. As indicated before, the assize of nuisance had from its inception been carefully restricted to plaintiffs seized of a freehold estate. This excluded some important potential plaintiffs, including leaseholders, copyholders, guardians, and holders of rights of commons.⁵⁹ But by 1500, plaintiffs were frequently bringing nuisance actions by use of the new action on the case, which permitted an action on a "case stated" where a remedy was not already available through an older form of action.⁶⁰ This de-

in Coke's *Reports* . . . is dominated by Coke's personality, and derives its authority from him." T. PLUCKNETT, *supra* note 28, at 281. Coke's *Reports* contained other cases that clarified nuisance doctrine. *See, e.g.*, Robert Marys's Case, 9 Coke 111b, 77 Eng. Rep. 895 (K.B. 1613) (interference with commons, action on case by commoner, distinction from public nuisance); Baten's Case, 9 Coke 53b, 77 Eng. Rep. 810 (K.B. 1611) (overhang, abatement, pleading); Williams's Case, 5 Coke 72b, 77 Eng. Rep. 163 (K.B. 1592) (public "common" nuisance); Penruddock's Case, 5 Coke 100b, 77 Eng. Rep. 210 (C.P. 1598) (proper party, continuing wrong, abatement).

⁵⁴ 9 Coke 57b, 77 Eng. Rep. 816 (K.B. 1611).

⁵⁵ *Id.* at 58a, 77 Eng. Rep. at 817.

⁵⁶ *Id.*, 77 Eng. Rep. at 817.

⁵⁷ *Id.* at 58b, 77 Eng. Rep. at 820.

⁵⁸ *Id.* at 58a, 77 Eng. Rep. at 817.

⁵⁹ *See* note 29 and accompanying text *supra*. *See also* C. FIFOOT, *supra* note 21, at 93; Baker, *supra* note 46, at 233.

⁶⁰ *See* Baker, *supra* note 46, at 232-33. At least one school of thought has traced the origins of the action on the case to the *in consimili casu* section of the Statute of Westminster II, 13 Edw. 1, Stat. 1, c. 24 (1285), reprinted in A. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 138-39 (1957). *See* C. FIFOOT, *supra* note 21, at 66-68. This section specifically declared

velopment made a nuisance remedy available to lessees for years and tenants in common, and also confirmed that remedies could be obtained for nuisances caused by nonfeasance or by persons other than the adjacent freeholder.⁶¹ Indeed, the advantages of case, including simplified pleading, damages, and greater expedition, led even those plaintiffs whose cause of action lay within the traditional assize to attempt to use the new form.⁶²

These attempts were resisted on the grounds that the new "case" remedy should never be available if the older assize were appropriate.⁶³ Not long before *William Aldred's Case*, however, all the common law judges, meeting as the Exchequer Chamber, decided in *Cantrel v. Church*⁶⁴ that any nuisance plaintiff could have his election of case or the assize.⁶⁵ Obviously a careful plaintiff

that a *quod permittat* writ for a nuisance "shall not be denied" if the offending "House, Wall, or such" was "aliened to another." A. KIRALFY, *supra*, at 138. The statute provided that "[b]ut from henceforth, where in one Case a Writ is granted, in like Case, requiring like Remedies, the Writ shall be made as hath been used before." *Id.* See E. CORE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *404-05. It is now doubted that the flexible, adaptive action on the case really originated in the statute, but the use of nuisance as a key illustrative example in the Statute of Westminster II remains of interest. See C. FIFOOT, *supra* note 21, at 68.

⁶¹ And if a man levy a nuisance unto the house of another who hath therein an estate but for term of years, then he shall not have an assize of nuisance, but an action upon the case against him, because he hath no freehold: but yet it seemeth, he may enter and abate the nuisance.

A. FITZ-HERBERT, THE NEW NATURA BREVIVM *185. "The function of the Assize was to abate the nuisance; action on the case lay only for damages." McRae, *supra* note 39, at 39. See Baker, *supra* note 46, at 233.

⁶² See *id.* at 233-36. See *Yevance v. Holcomb*, 2 Dyer 250b, 250b n.88, 73 Eng. Rep. 553, 553 n.88 (K.B. 1566). Before 1600 plaintiffs enjoyed only spotty success in alleging case when the assize would have sufficed. See C. FIFOOT, *supra* note 21, at 94-95. Compare *Beswick v. Cunden*, Cro. Eliz. 520, 78 Eng. Rep. 768 (C.P. 1596) with *Alston v. Pamphyn*, Cro. Eliz. 466, 78 Eng. Rep. 719 (Q.B. 1596). See also *Leverett v. Townsend*, Cro. Eliz. 198, 78 Eng. Rep. 454 (Q.B. 1590).

⁶³ "The exercise of a nice discrimination would thus keep the Register tidy; but litigants might be forgiven if they felt the purchase of an archaic writ too heavy a price to pay for the preservation of juristic elegance." C. FIFOOT, *supra* note 21, at 94.

⁶⁴ Cro. Eliz. 845, 78 Eng. Rep. 1072 (Ex. Ch. 1601).

⁶⁵ [The judges] resolved, that the action was well brought, for [the plaintiff] hath election to bring either the one or the other: for although there had a difference been taken, where the way is so stopped up, that he loseth the use thereof altogether, and thereby his common, there an assize shall lie; but where it is estopped but in part, and not totally, that there an action upon 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; especially as this case is, where it appears not that the stopping was made by him who is the tenant of the freehold; but it might be done by a stranger who hath nothing to do with the

would always allege in case, so that lack of a free tenement could not be argued at bar. Thus the assize of nuisance, although it historically preceded all actions on the case, was assimilated into the action on the case after 1601. Following the decision in *Cantrel v. Church*, a person with any possessory interest in land inherited the "natural rights" of *seisin* protected by the historic assize of nuisance, and perhaps more, but under the new guise of action on the case in nuisance. The plaintiff in *William Aldred's Case*, clearly well advised by his lawyer, used the new, safer form of nuisance action.⁶⁶

The second remarkable pleading in *William Aldred's Case*—the defendant's pleading that "the building of the house for hogs was necessary for the sustenance of man"⁶⁷—marks an even greater milestone in the law of nuisance. Never before had a defendant so clearly claimed social utility as a defense to a nuisance action. This pleading in itself makes *William Aldred's Case* a landmark in the law.

Nevertheless, the case has been most famous for its holding. Confronted with these pleadings, the court, according to Coke, dismissed all of the defendant's objections and upheld the award of the Norfolk Assizes. In doing so it made two major statements on the law of nuisance. First, the court stated that any injury to the plaintiff's enjoyment of his land was actionable so long as the injury pertained to a matter of necessity such as wholesome air or light.⁶⁸ Purely aesthetic damage, however, was beyond the scope of the action.

[F]or prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect . . . But the law does not give an action for such things of delight.⁶⁹

land, or by one who hath but a term therein. Wherefore they all resolved, that the action was well brought; thereupon the judgment was affirmed.

Id. at 845, 78 Eng. Rep. at 1072 (footnote omitted).

⁶⁶ The court in *William Aldred's Case* stated that: "The plaintiff in this as in all other possessory actions, may declare upon his possession without alledging the precise estate of which he is seised . . ." 9 Coke at 57b n.(A), 77 Eng. Rep. at 816 n.(A).

⁶⁷ *Id.* at 58a, 77 Eng. Rep. at 817.

⁶⁸ *Id.* at 58b, 77 Eng. Rep. at 821.

⁶⁹ *Id.*, 77 Eng. Rep. at 821 (citing *Bland v. Moseley*, [unreported] (K.B. 1587) (Wray, C.J.), summarized in 2 W. HUGHES, *THE GRAND ABRIDGMENT OF THE LAW* 1369 (London 1662)). For another early precedent, see *Hales' Case*, [unreported] (c. 1560), printed in *DECLARATION*, *supra* note 46, discussed in notes 94-96 and accompanying text *infra*.

This rule placed a clear limitation on the "natural rights" of *seisin*. Courts could insist not only on a legal wrong, but also on damage to a thing of necessity. The question of what constituted such a necessity would be subject to demurrer, a question of law to be decided by the court.⁷⁰

Having accorded itself this much discretion, the court drew the line. In its second major statement, the court in *William Aldred's Case* delineated the rule of *sic utere tuo ut alienum non laedas* (so use your own property as not to injure your neighbors).⁷¹ This rule responded directly to the defendant's allegation in the pleadings that social utility justified some interferences. The court explicitly rejected this defense.

[T]he 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 the house, so that none can dwell there, an action lies for it. So if a man has a watercourse running in a ditch from the river to his house, for his necessary use; if a glover sets up a lime-pit for calve skins and sheep skins so near the said watercourse that the corruption of the lime-pit has corrupted it, for which cause his tenants leave the said house, an action on the case lies for it, . . . and this stands with the rule of law and reason, . . . *sic utere tuo ut alienum non laedas*.⁷²

The decision in *William Aldred's Case* was, therefore, a two-part ruling which, while finding an absolute right to enjoyment of certain property rights, gave the court some discretion to determine the nature of those rights. The necessity rule meant that the court could disallow some kinds of nuisance damages as a matter of law. The stench of the hogs and the cutting off of the light in *William Aldred's Case* interfered with such things of necessity as light ("*necessitas luminis*") and clean air ("*salubritas aeris*"), and the action was good.⁷³

Given actionable damage, the defendant could not, however, ask the courts to balance social utilities. The court did not quarrel with the defendant's argument that a hog building was "necessary

⁷⁰ 9 Coke at 58b, 77 Eng. Rep. at 820-21.

⁷¹ This famous Latin maxim was derived from Ulpian and is related to the general Roman principle "*expedit reipublicae ne sua re quis male utatur*." INSTITUTES 1.8.2 (it is for the public good that no one should misuse his own property). See J. BAKER, *supra* note 21, at 354.

⁷² 9 Coke at 58b-59a, 77 Eng. Rep. at 821 (citing the Prior of Southwark's Case, Y.B. Trin. 13 Hen. 7, f. 26, pl. 4 (1498), reprinted in C. FIFOOT, *supra* note 21, at 87).

⁷³ 9 Coke at 58a, 77 Eng. Rep. at 817.

for the sustenance of man," and it called a lime-kiln "good and profitable."⁷⁴ It simply said that once the defendant's activities threatened something necessary for the enjoyment of another's property, these arguments could not avail at law. To this extent, *William Aldred's Case* forcefully ratified the old "natural rights" of *seisin*.

Two minor points in the decision remain. First, the court did not discuss the hog-keeper's argument that the smell was de minimis: "one ought not to have so delicate a nose that he cannot bear the smell of hogs."⁷⁵ The defense of de minimis was inherent in the original definition of nuisance as one's "doing on his own land what may damage a neighbour."⁷⁶ Even today, one conceptual difficulty of private nuisance is that some significant degree of damage is inherent in the definition of injury. Thus, the classical *Year Book* distinction between *damnum* and *injuria* was somewhat artificial. The court in *William Aldred's Case* evidently considered the requisite degree of damage as a matter of fact already determined by the Norfolk jury's finding that the *injuria* of nuisance existed,⁷⁷ and saw as its task merely to determine, as a matter of law, whether the *damnum* was actionable.

Second, the declaration alleged that the defendant built the sty "maliciously intending to deprive the plaintiff of the use and profit of his house."⁷⁸ The court and parties ignored this pleading probably because the words "maliciously intending" were only words of art, or non-transversible pleadings, carried over into action on the case from its ancestor, the writ of trespass. By 1611, the words were recited as an empty formality, with no apparent connection to the kind of action on the case that was involved or to any other point of law, and they did not mean that an action

⁷⁴ *Id.* at 59a, 77 Eng. Rep. at 821.

⁷⁵ *Id.* at 58a, 77 Eng. Rep. at 817.

⁷⁶ 3 BRACON, *supra* note 13, at 190. See *Amphitheaters, Inc. v. Portland Meadows*, 184 Or. 336, 198 P.2d 847 (1948); *Bridlington Relay, Ltd. v. Yorkshire Elec. Bd.*, [1965] Ch. 436; *Eastern & S. African Tel. Co. v. Cape Town Tramways Cos.*, [1902] A.C. 381; 62 HARV. L. REV. 704, 705 (1949).

For a discussion of what constitutes "damage" in England today and a critique of the extension of the de minimis defense in *Bridlington Relay*, see G. FRIDMAN, MODERN TORT CASES 182-84 (1968). Fridman warns that a too strict view of what constitutes actionable nuisance damage may "lead to a restriction of the utility of that tort as a means of protecting lawful interests in the use of land. That would be to stultify the idea, and reduce the value of liability in nuisance." *Id.* at 184.

⁷⁷ 9 Coke at 58a, 77 Eng. Rep. at 817.

⁷⁸ *Id.* at 59a, 77 Eng. Rep. at 821-22.

on the case in nuisance required malice, or even intent.⁷⁹ The older assize of nuisance, from which the new form of action on the case for nuisance took its substantive inspiration,⁸⁰ never involved questions of fault in the modern sense.⁸¹ As in *William Aldred's Case*, English courts and lawyers, aware of the grafting of the substance of the nuisance assize to the action on the case, did not read the pleadings as requiring a fault element for private nuisance.⁸² In a much later period, however, some American courts became confused by these words of art in the old pleadings and saw them as requiring fault or intent for an actionable nuisance.⁸³

History provides two probable explanations for the *William Aldred's Case* court's decision to change the old *Year Book* rules and to take on more discretion as to actionable harm. First, plaintiffs of a middle-class, yeomen background were employing the action on the case in nuisance in the national courts.⁸⁴ Many of these men were probably tenants for years, or copyholders without the freehold estate or freehold tenure required for the assize of nuisance, but with enough possessory interest in land to satisfy the action on the case requirements of *Cantrel v. Church*, the 1601 case

⁷⁹ See C. FIFOOT, *supra* note 21, at 76-78. For the continuing juristic problem of legal "fault" in nuisance actions, see note 185 *infra*.

⁸⁰ See notes 63-66 and accompanying text *supra*.

⁸¹ See 3 BRACTON, *supra* note 13, at 189-90; A. FITZ-HERBERT, *THE NEW NATURA BREVIVM* *183-85.

⁸² See CLERK & LINDSELL ON TORTS ¶¶ 1393-95, at 781-85 (13th ed. 1969) [hereinafter cited as CLERK & LINDSELL].

⁸³ See 1 F. HARPER & F. JAMES, *LAW OF TORTS* § 1.24, at 67-70 (1956); Prosser, *Nuisance Without Fault*, 20 TEXAS L. REV. 399, 416-17 (1942). See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 102 (1977). Benjamin Cardozo recognized the confusion arising from the old forms of action. See *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 343-44, 160 N.E. 391, 391-92 (1928). He recognized that traditional nuisance doctrine contained no fault requirement; harmful acts amounting to a nuisance were absolutely prohibited.

The primary meaning [of nuisance] does not involve the element of negligence as one of its essential factors One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damages to another Illustrations are abundant. One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions He is not to do such things at all, whether he is negligent or careful.

Id. at 343, 160 N.E. at 391-93. See also *United Elec. Light Co. v. Deliso Constr. Co.*, 315 Mass. 313, 52 N.E.2d 553 (1943) ("A nuisance might exist in the absence of negligence."). For a modern formulation of the American view, see Seavey, *Nuisance: Contributory Negligence and Other Mysteries*, 65 HARV. L. REV. 984, 986-88, 995-96 (1952). Seavey challenged Judge Cardozo's analysis in part, and suggested that the *McFarlane* opinion has been misunderstood and that Judge Cardozo's language has caused confusion. *Id.* at 990-95.

⁸⁴ See C. FIFOOT, *supra* note 21, at 94-95; notes 59-66 and accompanying text *supra*.

that significantly opened the courthouse doors.⁸⁵ Before these plaintiffs had access to the national courts, they apparently had brought their cases before local presentment juries which decided cases informally and probably used rules of thumb similar to the necessity test.⁸⁶ These parties contrast sharply with the priors and "lords of the vill" who fill the *Year Book* cases,⁸⁷ and their property conflicts defy resolution in terms of the aesthetic privileges discussed in older English cases.⁸⁸

The second reason for the new rule probably was the increasing population of British cities and the struggle for space within those cities. For example, between 1400 and 1600, open space in London disappeared dramatically. The population grew from nearly 100,000 in 1554, to 200,000 in 1602.⁸⁹

This combination of new parties with new needs and the increasing population density of the cities prompted a more restrictive rule of nuisance harm than that found in the *Year Books*.⁹⁰ Coke's analysis of *William Aldred's Case* was an attempt to meet these social conditions with a rule that preserved reasonable property rights. Such leading seventeenth century cases as *Jones v. Powell*,⁹¹ *Morley v. Pragnel*,⁹² and even *Turberville v. Stamp*,⁹³ fol-

⁸⁵ Cro. Eliz. 845, 78 Eng. Rep. 1072 (Ex. Ch. 1601). See notes 59-66 and accompanying text *supra*.

⁸⁶ See J. DAWSON, A HISTORY OF LAY JUDGES 268-69 (1960). Professor Dawson notes that a major cause of complaints was, as in *William Aldred's Case*, pigs. *Id.* at 269. Dawson further notes that "'hundreds of folio pages of jury orders relate to swine alone and their numerous misdeeds and nuisances.'" *Id.* at 270 n.210 (quoting S. WEBB & B. WEBB, ENGLISH LOCAL GOVERNMENT FROM THE REVOLUTION TO THE MUNICIPAL CORPORATIONS ACT 104 (1908)). The jurors in Southampton, in despair at the number of pig offenses, declared that: "'we thinck yt mete' that every man in town should keep pigs 'so that when the thinge is as the worste shame may redresse yt.'" *Id.* at 270 (quoting SOUTHAMPTON COURT LEET RECORDS 1, 7, 17 (1550)).

⁸⁷ See note 45 *supra*.

⁸⁸ See note 69 *supra*.

⁸⁹ 2 G. TREVELYAN, ILLUSTRATED ENGLISH SOCIAL HISTORY 4 (1949). The population is also thought to have increased by one-fifth between 1525 and 1545. See Baker, *supra* note 46, at 47.

⁹⁰ Even the pig problems became worse in the cities. See J. DAWSON, *supra* note 86, at 269; see generally DECLARATION, *supra* note 46, at 15 ("Swine are beasts that may cause diseases to be in a City").

⁹¹ Hut. 135, 123 Eng. Rep. 1155 (C.P. 1628).

⁹² Cro. Car. 510, 79 Eng. Rep. 1039 (K.B. 1638). In *Morley*, the plaintiff was an innkeeper. His business was threatened by the "stench" of a neighboring tallow furnace, and he brought an action upon the case. After a jury verdict for the innkeeper, the defendant appealed on the grounds that "he, being a tallow-chandler, ought to use his trade, which cannot be said to be a nuisance." *Id.* at 510, 79 Eng. Rep. at 1040. The King's Bench dismissed the defense. See also H. ROLLE, UN ABRIDGMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY 89, 140-41 (London 1668) (case rejecting utility defence for lead smelting operation).

⁹³ 12 Mod. 151, 88 Eng. Rep. 1228 (K.B. 1697). *Turberville*, however, was an excellent

lowed this *sic utere tuo* rule carefully. In 1636 a book appeared that was directed precisely at the doctrine. This book, entitled *A Briefe Declaration For What manner of speciall Nuisance concerning private dwelling Houses, a man may have his remedy by Assise, or other Action as the Case requires*,⁹⁴ collected four much earlier arguments by Mounson, Plowden, Wray, and Manwood,⁹⁵ and strongly reemphasized the basic issues set out in *William Aldred's Case*.⁹⁶

Critics of the *sic utere tuo* doctrine have rarely appreciated *William Aldred's Case* and the court's careful attempt to preserve an absolute standard of property security, while disqualifying unreasonable damages.⁹⁷ For example, Lord Wright, in the leading

example of the gray area between nuisance law and a developing fault doctrine in negligence. The *Turberville* court stated:

Every man must so use his own as not to injure another. The law is general; the fire which a man makes in the fields is as much his fire as his fire in his house . . . and he must at his peril take care that it does not, through his neglect, injure his neighbour: if he kindle it at a proper time and place, and the violence of the wind carry it into his neighbour's ground, . . . this is fit to be given in evidence. But now here it is found to have been by his negligence . . .

Id. at 152, 88 Eng. Rep. at 1228-29. See C. FIFoot, *supra* note 21, at 156. Problems of fault in "escape" cases finally led to the complex *Rylands v. Fletcher* doctrine. See note 185 and accompanying text *infra*. See also *Rex v. Rosewell*, 2 Salk. 459, 91 Eng. Rep. 397 (K.B. 1699) (self help for wrongfully stopped lights or escaping water).

⁹⁴ DECLARATION, *supra* note 46.

⁹⁵ The arguments were originally set forth in *Hales' Case*, [unreported] (c. 1560), printed in DECLARATION, *supra* note 46. *Hales' Case* involved windows blocked by city building, and city customs similar to those at issue in *Bland v. Moseley*, [unreported] (K.B. 1587), discussed in note 69 *supra*. Whereas *Bland* arose in York, *Hales' Case* arose in London, "the greatest City, and most populous in this Realme, and the more populous the more honourable, & the more buildings, the more populous and honourable will it be." DECLARATION, *supra* note 46, at 23. The four arguments, two on each side of the case, essentially assume the basic necessity test, later incorporated into the rationale of *William Aldred's Case*.

⁹⁶ Mounson stated that: "Therefore who so taketh from man so great a commodity as that which preserveth mans health in his castle, or house, doth in a manner as great wrong as if he deseised him altogether of his Free-hold." DECLARATION, *supra* note 46, at 1-2. Mounson further noted that an owner of property may put his land to productive use subject to the condition that the use not harm anyone else: "The soyle is his owne . . . though it be his owne, he must so use it, that hee hurt not his Neighbour." *Id.* at 2-3. Wray summarized the old rule when he said:

[F]or by the Common law, one shall not hurt the Freehold of another, and no greater hurt, grievance, or dammage can be done to any mans Freehold, then to take away the light and ayre thereof, which is comfortable & commodious for him, for when this light, and ayre are taken from him, his house remaineth as a dungeon.

Id. at 11.

⁹⁷ Courts have made various disparaging comments on the doctrine. See, e.g., *Auburn & Cato Plank Rd. Co. v. Douglass*, 9 N.Y. 444, 446 (1854) (doctrine only a moral precept

case of *Sedleigh-Denfield v. O'Callaghan*,⁹⁸ said of the *sic utere tuo* rule:

This, like most maxims, is not only lacking in definiteness but is also inaccurate. An occupier may make in many ways a use of his land which causes damage to the neighboring landowners and yet be free from liability. . . . Even where he is liable for a nuisance, the redress may fall short of the damage . . .⁹⁹

Wright failed to understand that the *sic utere tuo* doctrine was not an isolated maxim meaning that all harms were actionable. It meant that once the plaintiff had established actionable damages (the necessity rule), no injury could be excused by balancing social utilities (the *sic utere tuo* rule).¹⁰⁰ Modern English and American courts forgot this compromise and its rationale.¹⁰¹

Blackstone, however, understood the *sic utere tuo* doctrine and used *William Aldred's Case* as authority.¹⁰²

[I]f one erects a smelting-house for lead so near the land of another that the vapor and smoke kills his corn and grass, and damages his cattle therein, this is held to be a nuisance. . . . [I]f one does 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 will be less offensive.¹⁰³

The authoritativeness of Coke's *Reports* and Blackstone's *Commentaries* made the *sic utere tuo* rule almost unquestioned law in England and America for more than two hundred and fifty years after *William Aldred's Case*.¹⁰⁴

and "utterly useless as a legal maxim"); *Brand v. Hammersmith & City Ry.*, L.R. 2 Q.B. 223, 247 (1867) (maxim is "no help to decision, as it cannot be applied till the decision is made"); *Bonomi v. Backhouse*, E11.B1.&E11. 622, 643, 120 Eng. Rep. 643, 651 (Q.B. 1858) (maxim is "mere verbiage"), *rev'd.*, E11.B1.&E11. 646, 120 Eng. Rep. 652 (Ex. Ch. 1859), *aff'd.*, 9 H.L.C. 503, 11 Eng. Rep. 825 (1861).

⁹⁸ [1940] A.C. 880.

⁹⁹ *Id.* at 903.

¹⁰⁰ See notes 71-74 and accompanying text *supra*.

¹⁰¹ See notes 105-82 and accompanying text *infra*.

¹⁰² See, e.g., 3 W. BLACKSTONE, COMMENTARIES *216-19.

¹⁰³ *Id.* at *217-18.

¹⁰⁴ Authorities generally accorded the rule respect. See, e.g., *Tenant v. Goldwin*, 2 Ld. Raym. 1089, 1092, 92 Eng. Rep. 222, 224 (K.B. 1705) (Holt, C.J.) ("every one must so use his own, as not to do damage to another"); 8 W. HOLDSWORTH, *supra* note 23, at 470-72.

II

THE BALANCING OF UTILITIES DOCTRINE AND
ST. HELEN'S SMELTING CO. v. TIPPING (1865)

The *sic utere tuo* rule prohibiting courts from balancing the social utility of an alleged nuisance against the injury to the plaintiff was not seriously challenged in England until the middle of the nineteenth century.¹⁰⁵ A few American cases adopted a balancing approach, but these decisions were not greatly influential.¹⁰⁶ Indeed, some American jurisdictions retained the *sic utere tuo* rule until as late as 1890.¹⁰⁷ Yet today, the balancing of utilities doctrine is found in nearly every American jurisdiction.¹⁰⁸

¹⁰⁵ See M. HORWITZ, *supra* note 83, at 74-78; Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403 (1974). According to Brenner, the "case that introduced the change" was *Hole v. Barlow*, 4 Com.B.(n.s.) 334, 140 Eng. Rep. 1113 (C.P. 1858). Brenner, *supra*, at 410. Brenner expresses his indebtedness to Horwitz for the observation that "[p]art of the decision's logic may have lain in the modern association of nuisance with the action on the case, which was being transformed into an action for negligence." *Id.* at 411 & n.21a. According to Horwitz, it was only after *St. Helen's Smelting* "that the courts began to acknowledge that a process of weighing utilities and not the mere existence of an injury for deciding whether a particular use of land constituted a nuisance." M. HORWITZ, *supra* note 83, at 75.

¹⁰⁶ Horwitz cites *Lexington & Ohio R.R. v. Applegate*, 38 Ky. (8 Dana) 289 (1839), as an early example of a court balancing utilities. M. HORWITZ, *supra* note 83, at 74-75. But this American case is not cited in 1 F. HARPER & F. JAMES, *supra* note 83, although *St. Helen's Smelting* is so cited. 1 F. HARPER & F. JAMES, *supra* note 83, § 1.24, at 72 n.34.

¹⁰⁷ In that year, the Maryland Court of Appeals stated:

[The location of the fertilizer factory] may be convenient to the public, but, in the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be a reasonable use, which deprives an adjoining owner of the lawful use and enjoyment of his property.

Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 277, 20 A. 900, 901 (1890). The court refused to consider possible loss to the defendant's business.

The law, in cases of this kind, will not undertake to balance the conveniences, or estimate the difference between the injury sustained by the plaintiff and the loss that may result to the defendant from having its trade and business, as now carried on, found to be a nuisance.

Id. at 282, 20 A. at 902.

¹⁰⁸ See 1 F. HARPER & F. JAMES, *supra* note 83, at 73-74; W. PROSSER, *supra* note 21, at 582, 596-602; RESTATEMENT (SECOND) OF TORTS §§ 822 & Comments, 826 & Comment b, 827, 828 (1977). In deciding whether an action is a nuisance and whether it should be enjoined, courts consider many factors. Those usually given the most weight in balancing utilities are the social value of the interests involved, the suitability of the conduct to the locality, and the relative hardship resulting from granting or denying an injunction. *Id.* §§ 826, 936. The social value of the conduct is measured by its benefit to the public. Thus a court may not enjoin the operations of a major defense plant (*see, e.g., Pritchett v. Wade*, 261 Ala. 156, 73 So. 2d 533 (1954); *Heppenstall Co. v. Berkshire Chemical Co.*, 130 Conn.

The dominance of the balancing of utilities doctrine owes much, both in England and America, to the authority of *St. Helen's Smelting Co. v. Tipping*,¹⁰⁹ the reputed origin of the balancing of utilities rule.¹¹⁰ Although *St. Helen's Smelting* is cited frequently in English cases¹¹¹ and by eminent American authorities¹¹² as establishing the balancing of utilities rule in the common law doctrine of nuisance, these citations were apparently

485, 35 A.2d 845 (1944) or an industry of great economic importance to the community (see, e.g., *Koseris v. J.R. Simplot Co.*, 82 Idaho 263, 352 P.2d 235 (1960); *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957)).

The factor most often considered decisive by the courts is probably the suitability of the conduct to the locality. See *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957) (factory in industrial district not enjoined); *Pendoley v. Ferreira*, 345 Mass. 309, 187 N.E.2d 142 (1963) (piggery in residential neighborhood enjoined); *Mahoney v. Walter*, 205 S.E.2d 692 (W. Va. 1974) (auto junkyard in residential neighborhood enjoined). The Iowa court in *Riter* explained that:

[T]he right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot and other impurities. These statements are especially applicable to one who elects to live in or adjacent to an industrial district. Moreover, the operation of a lawful industry which would be considered a nuisance in a residential section might not be considered such when conducted in an industrial locality A fair test as to whether the operation of such industry constitutes a nuisance has been said to be the reasonableness of conducting it in the manner, at the place and under the circumstances in question.

Id. at 721-22, 82 N.W.2d at 158.

The most potentially far-reaching grounds for denying an injunction are the economic burdens placed on the defendant. See *Koseris v. J.R. Simplot Co.*, 82 Idaho 263, 352 P.2d 235 (1960); *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957). The strength and importance of this approach today is revealed in the leading case of *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970). The plaintiffs had suffered property damages in excess of \$185,000, caused by dust from the defendant's plant. The cement plant was worth \$45,000,000 and employed over 300 workers. In relegating the plaintiffs' relief to damages, the court overruled over 80 years of precedent that, given a nuisance, had granted injunctions as a matter of right. The court explained this departure from prior law when it stated that "[t]he ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction." *Id.* at 223, 257 N.E.2d at 872, 309 N.Y.S.2d at 315. See also *Spur Indus., Inc. v. Del. E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

¹⁰⁹ 11 Eng. Rep. 1483 (H.L. 1865).

¹¹⁰ See J. FLEMING, *THE LAW OF TORTS* 404 (5th ed. 1977); G. FRIDMAN, *supra* note 76, at 182-83; 1 F. HARPER & F. JAMES, *supra* note 83, § 1.24, at 72 n.34; 3 J. KENT, *COMMENTARIES ON AMERICAN LAW* 595 n.b (12th ed. O.W. Holmes ed. 1873); H. STREET, *THE LAW OF TORTS* 216-17, 226-27 (5th ed. 1972).

¹¹¹ See, e.g., *Halsey v. Esso Petroleum Co.*, [1961] 1 W.L.R. 683, 689-92 (Q.B.); *Salvin v. North Brancepeth Coal Co.*, [1874] L.R. 9 Ch. 705, 708-10 (Ch. App.); *Crossley & Sons, Ltd. v. Lightowler*, L.R. 3 Eq. 277, 289 (V.C. 1866).

¹¹² 1 F. HARPER & F. JAMES, *supra* note 83, § 1.24, at 72 n.34; 3 J. KENT, *supra* note 110, at 595 n.b.

made without a careful analysis of the precise holding or peculiar circumstances of the case. Because the premises and value judgments behind *St. Helen's Smelting* have remained largely unexamined, the case bears fresh scrutiny.

A. *Balancing of Utilities Doctrine as Dictum
in St. Helen's Smelting*

William Tipping, the owner of Bold Hall Estate, brought the action in August 1863.¹¹³ The plaintiff's pleaded declaration paralleled William Aldred's complaint: the declaration was (1) an action on the case for nuisance,¹¹⁴ (2) the requested remedy was damages for injury to the beneficial use of land and premises,¹¹⁵ and (3) the alleged injurious act was the release by the defendants of "noxious vapours" which diffused on to the plaintiff's neighboring land.¹¹⁶ As in *William Aldred's Case*, the plaintiff initially brought the declaration before the local assizes court for trial by jury.¹¹⁷ Moreover, the House of Lords faced a similar record on appeal: the jury had found for the plaintiff, the local court had denied a motion for a new trial, and the trial court granted leave to appeal on a point of law.¹¹⁸

The facts, however, reflected the passage of the centuries since *William Aldred's Case*, centuries which included the Industrial Revolution. The noxious fumes came not from pigs, but from a major copper smelting works owned by the St. Helen's Smelting Company.¹¹⁹ The plaintiff's complaint did not focus on the proximity of the defendants' operation, an important factor in *William Aldred's Case*. In fact, the factory was one and a half miles from the plaintiff's estate.¹²⁰ William Tipping was also a different kind of plaintiff than William Aldred. Aldred apparently owned a house and a small plot of land.¹²¹ Tipping owned a

¹¹³ 11 Eng. Rep. at 1483.

¹¹⁴ *Id.* Since the introduction of the famous Hilary rules of 1832, new judicial rules written under legislative authority had regulated the main forms of action. However, the final dissolution of the forms came only after the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66. As *St. Helen's Smelting* shows, courts and practitioners still thought in terms of the old forms of action in 1863.

¹¹⁵ 11 Eng. Rep. at 1483.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1483-84.

¹¹⁸ *Id.* at 1484. The Exchequer Chamber affirmed the jury instructions of Justice Mellor before the defendants appealed to the House of Lords. *Id.*

¹¹⁹ *Id.* at 1483.

¹²⁰ *Id.* at 1486.

¹²¹ 9 Coke at 57b, 77 Eng. Rep. at 816.

manor house and 1,300 acres, described by the judges as "an estate of great value."¹²² To Tipping, the awarded damages, £ 361 18s 4 1/2 d, were probably of little financial significance, especially in light of the potential legal fees.¹²³ Tipping, however, was wealthy enough to pursue economically unreasonable ends. The apparent increase in the cost of legal proceedings between 1611 and 1863 for the average litigant¹²⁴ may be one reason why the more modest plaintiffs of the nineteenth century would not usually challenge the Industrial Revolution in the high courts, but would leave it to the Tippings.

The question of law on appeal in *St. Helen's Smelting* concerned a special finding of fact required by the jury instructions given at trial by Justice Mellor. Tipping testified that the vapors from the smelting company extensively damaged his trees and shrubs and bothered occupants on his estate.¹²⁵ The defense introduced evidence that its copper works was in business at the time Tipping purchased his property, and that several factories operated in the area so that the defendants' factory did not necessarily cause the damage.¹²⁶

With this evidence before the court, Justice Mellor directed the jury that:

[E]very man . . . was bound to use his own property *in such a manner as not to injure the property of his neighbors*; . . . that the law did not regard trifling inconveniences; that everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, arising from noxious vapours, the injury to be actionable must be such as *visibly to diminish the value of the property and the comfort and enjoyment of it*. . . . [I]t was

¹²² 11 Eng. Rep. at 1483, 1486.

¹²³ *Id.* at 1484. Two years passed between the trial and final disposition on appeal. *Id.* at 1483. Furthermore, for the appeal, Tipping hired at least four lawyers. Three barristers' names appeared in the record. 11 Eng. Rep. at 1486. In addition, Tipping needed at least one solicitor, because only a solicitor could engage a barrister for a client. *St. Helen's Smelting Company* had hired the Attorney-General as their barrister. 11 Eng. Rep. at 1484.

¹²⁴ The cost of legal proceedings appears to have risen significantly over this period, although a scientific study has not been done. See H. KIRK, *PORTRAIT OF A PROFESSION* 155-67 (1976); R. ROBSON, *THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND* 28, 41-42 (1959); Prest, *Counsellors' Fees and Earnings in the Age of Sir Edward Coke*, *LEGAL RECORDS AND THE HISTORIAN* 165, 174-75 (J. Baker ed. 1978) (fees and earnings for lawyers in Coke's day uncertain and modest). One of the causes was the abolition of local courts in many areas. See B. ABEL-SMITH & R. STEVENS, *LAWYERS AND THE COURTS* 12-14 (1967).

¹²⁵ 11 Eng. Rep. at 1483, 1484.

¹²⁶ *Id.* at 1484.

clear that in counties where great works had been erected . . . persons must not stand on their extreme rights . . . for if so, the business of the whole country would be seriously interfered with.¹²⁷

Justice Mellor's direction essentially restated the law applied in *William Aldred's Case*. He reiterated the *sic utere tuo* doctrine of injury while limiting damages to what Lord Coke might have called "things of necessity." Yet Justice Mellor's emphasis on concerns over "reasonableness," standing on "extreme rights," and interference with "the business of the whole country" suggests a new judicial mood, a new willingness to compromise absolute principles.

The jury then answered three questions in a special verdict.

The learned judge . . . did ask the jury whether the enjoyment of the Plaintiff's property was sensibly diminished, and the answer was in the affirmative. Whether the business there carried on was an ordinary business for smelting copper, and the answer was, "We consider it an ordinary business, and conducted in a proper manner, in as good a manner as possible." But to the question whether the jurors thought that it was carried on in a proper place, the answer was "We do not."¹²⁸

The trial court entered judgment, with damages, for Tipping. The defendants unsuccessfully appealed to the Exchequer Chamber, alleging that Justice Mellor had incorrectly instructed the jury,¹²⁹ and then sought review in the House of Lords on identical grounds.¹³⁰

The defendants' argument on appeal was simple: the court had misinstructed the jury by failing to instruct that, when a neighborhood is "denaturalised" by industry, "a person who comes into that neighbourhood cannot complain that what was done before he came there is continued."¹³¹ In so arguing, the defendants cited *Hole v. Barlow*,¹³² a lower court case, in which Justice Willes had said:

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.* In 1865, the Exchequer Chamber was an appellate court and consisted of at least five judges from the Common Pleas and the Exchequer. See 1 JOWITT'S DICTIONARY OF ENGLISH LAW 738-39 (2d ed. 1977). It heard important appeals from the Assize Courts regarding alleged errors of law. See Law Terms Act, 1830, 1 Will. 4, c. 70, § 8. Appeal lay directly to the House of Lords. The court was abolished by the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c. 66, pt. 2, § 18(4).

¹³⁰ 11 Eng. Rep. at 1484.

¹³¹ *Id.* at 1485.

¹³² 4 Com.B.(n.s.) 334, 140 Eng. Rep. 1113 (C.P. 1858).

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 of life, and be conducted in a reasonable and proper manner, and in a reasonable and proper place.¹³³

According to the defendants, because the jury found that the smelting company conducted its business in "as good a manner as possible," the court should have asked the jury whether the surrounding neighborhood had been "denaturalised." By failing to submit such a question to the jury, the defendants argued that the court committed reversible error.¹³⁴

The House of Lords, recognizing the importance of the case, had requested the presence of six "learned judges" from the lower courts.¹³⁵ After hearing the defendants' argument, Lord Chancellor Westbury asked the judges if they wished to hear further argument, including that of Tipping's counsel, or if they were ready to answer the Lords' questions regarding the correctness of the jury instructions.¹³⁶ The experts and the Lords agreed that the argument for the defendants misstated the law, and that the lower court decision should be upheld.¹³⁷

This was the true holding of *St. Helen's Smelting*. The case explicitly rejected the balancing of utilities doctrine argued by the defendants on appeal. The House of Lords upheld a direction to the jury which, apart from Justice Mellor's casual remarks about standing on "extreme rights," essentially restated the *sic utere tuo* test of *William Aldred's Case*.¹³⁸ Undoubtedly, *William Aldred's Case* remained uncited on appeal only because the defendants' lawyers alone submitted argument; the House of Lords did not call for argument by the plaintiff's lawyers.¹³⁹

¹³³ *Id.* at 345, 140 Eng. Rep. at 1118.

¹³⁴ 11 Eng. Rep. at 1485-86.

¹³⁵ They were Baron Martin, Justice Willes, Justice Blackburn, Justice Keating, Baron Pigott, and Justice Shee. *Id.* at 1484.

¹³⁶ *Id.* at 1486.

¹³⁷ *Id.*

¹³⁸ See note 127 and accompanying text *supra*.

¹³⁹ The result of *St. Helen's Smelting* disfavored industrial polluters in another way. At trial, defendants' counsel argued that it was impossible to tell how much of the damage to plaintiff's property was caused by its fumes, rather than by fumes produced by other neighboring factories. 11 Eng. Rep. at 1484. Justice Mellor, however, did not instruct the jury to determine how much of the damage was caused by the defendants' plant. Rather he

Many leading authorities have mistakenly cited *St. Helen's Smelting* as supporting the balancing of utilities doctrine,¹⁴⁰ apparently because of the confusing dicta of the case. Lord Westbury was partly to blame for this confusion. He accurately paraphrased the *sic utere tuo* rule and the de minimis limits to damage—found both in Justice Mellor's directions and in *William Aldred's Case*—when he summarized the grounds for the decision in *St. Helen's Smelting*:

[T]he jurors have found the existence of the injury; and the only ground upon which your Lordships are asked to set aside that verdict, and to direct a new trial, is this, that the whole neighbourhood where these copper smelting works were carried on, is a neighbourhood more or less devoted to manufacturing purposes . . . and therefore it is said, that inasmuch as this copper smelting is carried on in what the Appellant contends is a fit place, it may 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. . . . 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. Of course . . . I except cases where any prescriptive right has been acquired by a lengthened user of the place.¹⁴¹

only asked the jury if the use of the plaintiff's land was "sensibly diminished" (11 Eng. Rep. at 1485, 1488), or in the words of an unofficial account of the case, he only required that "the effect of the noxious vapors to a sensible extent can be traced to have come from the [defendants'] works" (12 L.T.R.(n.s.) at 777). The court thus did not force the plaintiff to show "a basis for apportionment of the damage among the various causative factors" as a prerequisite for recovery. See generally Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. CIN. L. REV. 587, 619 (1969). Once the *St. Helen's Smelting* jury had found some substantive damage caused by the defendant, it was allowed to assess the amount of damages at its own discretion. The plaintiff apparently satisfied his burden of proof as to causation simply by showing that the defendants' plant produced a significant amount of "vapors" and that the winds commonly blew them across the plaintiff's land. 11 Eng. Rep. at 1183-84. This rule is in harmony with one recent scholarly suggestion. See Katz, *supra*, at 618. Cf. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (application of similar standard of proof of causation to negligence action). This rule essentially forces a defendant to demonstrate the presence of contributory causes once a plaintiff has shown some causation related to that defendant. See Katz, *supra*, at 618-20. These rules, if followed today, could significantly aid plaintiffs in pollution cases. See *id.*

¹⁴⁰ See notes 110-12 and accompanying text *supra*.

¹⁴¹ 11 Eng. Rep. at 1487. Lord Westbury's assumption that prescriptive use can legalize a nuisance marks a significant change in nuisance law from the days of the *Year Books*. See

But Lord Westbury then introduced, as pure dictum, a new rule for claims of injury only amounting to mere sensible personal discomfort.¹⁴² He essentially stated that personal sensibilities could never constitute strictly protected "natural rights" of *seisin*, but could be subjected to a balancing of utilities by courts. This qualification severely restricted the necessity test of *William Aldred's Case*, which protected such "personal sensibilities" as sensibility to foul smell.

Lord Wensleydale, in his opinion, did not discuss this distinction between personal sensibilities and material damage. He simply voiced his agreement with the decision below, and quoted Justice Mellor's direction that "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."¹⁴³ This was the old and accepted *de minimis* rule which Justice Mellor emphasized when he said that business could not survive if everyone stood on "extreme rights."¹⁴⁴ But Justice Mellor's directions to the jury were consistent with the necessity test set forth in *William Aldred's Case*. He did not advocate a balancing of utilities rule for either material damage to property or significant discomfort to the senses.

Lord Cranworth's opinion is more ambiguous. He stated that Justice Mellor "could [not] . . . have stated the law . . . better than he has done in this case."¹⁴⁵ Yet he gave a now famous example of an unreported case which he may have intended to support a balancing of utilities test.

note 43 and accompanying text *supra* (no easement of "foul smell" obtainable over another's land). According to Simpson, the law of property on this issue was, at some point, confused with the law of torts. A. SIMPSON, *supra* note 41, at 246.

¹⁴² Lord Westbury stated that:

With regard to . . . personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. 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 inhabitants of the town and of the public at large. . . . But when an occupation . . . [causes] a material injury to property, then there unquestionably arises a very different consideration.

11 Eng. Rep. at 1486.

¹⁴³ *Id.* at 1488.

¹⁴⁴ *Id.* at 1484.

¹⁴⁵ *Id.* at 1487.

[T]here was an action for injury arising from smoke in the town of Shields. It was proved incontestibly that smoke did come and in some degree interfere with a certain person; but 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;" because, if it only added in an infinitesimal degree to the quantity of smoke, I held that the state of the town rendered it altogether impossible to call that an actionable nuisance.¹⁴⁶

It is not clear whether Lord Cranworth found for the defendant in that unreported case because of: (1) the balancing of utilities doctrine, (2) a de minimis amount of damage caused by the defendants' acts, or (3) the difficulty in allocation of damages.¹⁴⁷ Lord Cranworth did not explain why the "state of the town" made it "altogether impossible" to find an actionable nuisance. Only the de minimis defense was consistent with the terms of Justice Mellor's jury instructions, which Lord Cranworth voted to uphold.¹⁴⁸

Lord Cranworth never mentioned Lord Westbury's distinction between "personal sensibility" and "material injury." Only by making that distinction could Lord Westbury uphold the jury direction in the case at hand, while advocating a balancing of utilities doctrine for different situations. Since Lord Cranworth's opinion lacked this distinction, his approval of Justice Mellor's instructions gives no support to a balancing of utilities doctrine.

Thus, the balancing of utilities doctrine, for which *St. Helen's Smelting* is considered "authority," was:

¹⁴⁶ *Id.*

¹⁴⁷ For a discussion of the problem posed by "a defendant whose conduct by itself would cause too slight an interference with the plaintiff's use and enjoyment of his property to amount to nuisance, but whose conduct in fact combines with that of others to constitute a nuisance," see Katz, *supra* note 139, at 618 n.66; W. PROSSER, *supra* note 21, §§ 52, 91, at 322-23, 607-08.

¹⁴⁸ See notes 127-39 and accompanying text *supra*. But in Lord Cranworth's day, many courts refused to recognize the de minimis defense for acts harmless on an individual basis when it was clear that the product or conduct of the defendant combined with others to produce a nuisance. See, e.g., *Hill v. Smith*, 32 Cal. 166, 167-68 (1867) (where defendant contributed to pollution of stream, no defense that his acts alone did not cause material injury); *Woodyear v. Schaefer*, 57 Md. 1, 9-10 (1881) (defendant-butcher liable for dumping blood into stream, even if his acts were only minor contribution to nuisance); *Francis v. Alexander Cowan & Sons*, [1866] 5 M. 214, 228-29 (Sess.) (each defendant who materially contributes to pollution of stream liable for nuisance created by all); *Lambton v. Mellish*, [1894] 3 Ch. 163 (where two or more persons make enough noise to create a nuisance, each individually liable for entire nuisance); W. PROSSER, *supra* note 21, § 52, at 322-23; Katz, *supra* note 139, at 618 n.66.

- (1) clearly advocated by only one judge out of three;
- (2) restricted even by that judge to "personal sensibilities" with a strict *sic utere tuo* rule retained for "material injury" to property;
- (3) not a basis for the decision in the case, because material injury to property was involved; and
- (4) absent from the lower court's jury instructions which all three Lords upheld.

In short, the holding of *St. Helen's Smelting* is not precedent for a balancing of utilities doctrine. Except for Lord Westbury's dictum and Lord Cranworth's ambiguous remarks, all of the opinions were clearly consistent with *William Aldred's Case*. Had Tipping's victorious lawyers presented their case, they undoubtedly would have pressed for a ringing and explicit reaffirmance of the *sic utere tuo* rule. But even without such a reaffirmance, *St. Helen's Smelting* did not bury the old rule.

B. Assessing the Balancing of Utilities Doctrine

St. Helen's Smelting was the last major House of Lords case to face directly the balancing of utilities issue. Its true holding remains the law of England.¹⁴⁹ In 1961, however, in *Halsey v. Esso Petroleum Co.*,¹⁵⁰ an English court again treated Lord Westbury's dictum as if it were the holding of *St. Helen's Smelting*.¹⁵¹ This suggests that there might be merit, quite apart from authority, in Lord Westbury's doctrine. But serious analysis can also lead to the conclusion that Lord Westbury's balancing of utilities test reflected social values unacceptable in a modern democracy, and that Lord Westbury's doctrine, in practice, has protected the sensibilities of the wealthy Tippings of the world, while condemning the poor to damned cities like Lord Cranworth's Shields.

The unfairness of Lord Westbury's doctrine becomes clear when contrasted with *William Aldred's Case*. The *sic utere tuo* rule, unlike the balancing of utilities doctrine, assured the little man that he had inalienable rights of property. While these rights did

¹⁴⁹ See CLERK & LINDSELL, *supra* note 82, ¶ 1433, at 809.

¹⁵⁰ [1961] 1 W.L.R. 683 (Q.B.).

¹⁵¹ *Id.* at 689-90. In holding the defendants liable, the court applied Lord Westbury's distinction between injury to property and damage to personal sensibilities. *Id.* at 691. In considering the issue of liability, the court considered the character of the neighborhood and balanced the rights of the plaintiff and the defendant. *Id.* at 691-93. Balancing, however, played no role in the court's computation of damages following its finding of liability. *Id.* at 702-03.

not include protection from every inconvenience to use of property, they did extend to those things necessary for a decent existence on his property. Such necessities included not only the integrity of his physical premises, but of his basic sensibilities as well. Under the traditional common law *sic utere tuo* doctrine, a man with some stake in property, even just a lease, had individual rights which neither big industrial users nor pig keepers could violate without lawful compensation.

This old common law doctrine was decent and humane compared to the hardened attitudes of the nineteenth century. The balancing of utilities doctrine advocated by Lord Westbury permitted the industrial user to externalize the costs of his pollution. Such a legal doctrine offered no economic incentive for the active user of property to develop technology that would prevent such side effects. This doctrine, combined with the inaccessibility and cost of legal remedy, left industry free to ravage the northern English cities, including Tipping's Liverpool.¹⁵² It was an unjust way of forcing public investment in industrial growth, regardless of how desirable that investment might have seemed.

C. Return of the *Sic Utere Tuo* Rule

The balancing of utilities doctrine remains the established law in America.¹⁵³ But there have been faint signs of a return to the *sic utere tuo* rule. In *Morgan v. High Penn Oil Co.*,¹⁵⁴ the North Carolina Supreme Court confronted a situation similar to those in *William Aldred's Case* and *St. Helen's Smelting*. The defendant's refinery emitted "noxious gases and odors," which restricted the use of the plaintiff's land.¹⁵⁵ The defendant argued that it operated a lawful, socially useful enterprise which should not be subject to liability if "operated properly."¹⁵⁶

Judge Ervin, writing for the court, rejected the defendant's argument of social utility and supported his decision with the ancient doctrine.

¹⁵² The placement of liability for pollution and other social costs will influence wealth distribution and allocational efficiency. See Baker, *The Ideology of the Economic Analysis of Law*, 5 PHILOSOPHY & PUB. AFF. 3 (1975); Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093-96 (1972). Horwitz emphasized this point in his analysis of American legal history. See *Introduction to M. HORWITZ, supra* note 83, at xvi-xvii.

¹⁵³ See RESTATEMENT (SECOND) OF TORTS §§ 822, 828-31 (1977); 1 F. HARPER & F. JAMES, *supra* note 83, § 1.25, at 75.

¹⁵⁴ 238 N.C. 185, 77 S.E.2d 682 (1953).

¹⁵⁵ *Id.* at 194-95, 77 S.E.2d at 690.

¹⁵⁶ *Id.* at 191, 77 S.E.2d at 687.

The law of private nuisance rests on the concept embodied in the ancient legal maxim *Sic utere tuo ut alienum non laedas*, meaning, in essence, that every person should so use his own property as not to injure that of another. . . . As a consequence, a private nuisance exists in a legal sense when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one's neighbor. . . .

. . . [A]ny substantial non-trespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance.¹⁵⁷

Judge Ervin qualified this accurate restatement of the *sic utere tuo* doctrine by adding a "reasonableness" test:

[T]he invasion which subjects a person to liability for private nuisance may be either intentional or unintentional; . . . a person is subject to liability for an intentional invasion when his conduct is unreasonable under the circumstances of the particular case; and . . . a person is subject to liability for an unintentional invasion when his conduct is negligent, reckless or ultrahazardous.¹⁵⁸

Judge Ervin never clarified this reasonableness test. Although it might merely be a disguised balancing of utilities test, it could also comprise a modern version of Coke's doctrine. Coke limited liability to circumstances where the defendant's actions damaged things of necessity.¹⁵⁹ Whether a nuisance was actionable turned on the presence of such damage. Judge Ervin's statements in *Morgan* could support a similar test which focuses, not on the social utility of the defendant's activities, but rather on the nature of the defendant's interference with his neighbor's property. Under such a test, any act that damages a thing of necessity to a neighbor would be unreasonable and comprise an actionable nuisance.

Judge Ervin also encountered a pitfall unique to American nuisance law—a requirement of negligent or intentional damage.¹⁶⁰ English courts never required fault for nuisances because

¹⁵⁷ *Id.* at 193, 77 S.E.2d at 689.

¹⁵⁸ *Id.*, 77 S.E.2d at 689.

¹⁵⁹ See notes 68-77 and accompanying text *supra*.

¹⁶⁰ See generally note 83 and accompanying text *supra*. In addition to a possible misunderstanding of the imported English pleadings (see note 83 and accompanying text *supra*), the American requirement of fault may have arisen because of a desire to promote industry in the nineteenth century (see M. HORWITZ, *supra* note 83, at 74-78, 102), or the influence of Bentham's concepts of individualism (see R. POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 50-57 (1938)) or a combination of these factors.

they historically used nuisance law to allocate property rights between two persons engaged in lawful pursuits.¹⁶¹ The American requirement of fault ignored the history of and the rationale for nuisance as a distinct action. Trespass or negligence can redress intentional or negligent injuries to property.¹⁶² To retain a separate function, nuisance must offer specific guidelines of property protection when all of the conflicting parties are acting in good faith and with reasonable care.¹⁶³

Judge Ervin attempted to solve this problem by eliminating the fault test from intentional nuisance, and then defining "intentional" so broadly as to cover almost any continuous invasion of property rights.

An invasion of another's interest in the use and enjoyment of land is intentional in the law of private nuisance when the person whose conduct is in question as a basis for liability acts for the purpose of causing it, or knows that it is resulting from his conduct, or knows that it is substantially certain to result from his conduct. . . . A person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of the degree of care or skill exercised by him to avoid such injury.¹⁶⁴

His formulation minimizes the role of fault when private ownership interests conflict.¹⁶⁵ Judge Ervin chose this course because only a *sic utere tuo* standard, based objectively on the type and degree of property interference, avoids arbitrariness where one legitimate business conflicts with the operation of another legitimate business. In such cases, the judge's discretion should be lim-

¹⁶¹ CLERK & LINDSELL, *supra* note 82, ¶¶ 1393-94, at 781-84. English courts originally adopted this position because the assize of nuisance was fully developed as a legal remedy long before fault first began to appear as a requirement in any part of the law including trespass to the person. *See Weaver v. Ward*, 1 Hob. 134, 80 Eng. Rep. 284 (K.B. 1616); W. PROSSER, *supra* note 21, § 29, at 141-42; W. PROSSER, J. WADE & V. SCHWARTZ, *CASES AND MATERIALS ON TORTS* 5 (6th ed. 1976).

¹⁶² All that would be required is an extension of trespass to include intangible invasions as well as tangible physical invasions. *See generally* 1 F. HARPER & F. JAMES, *supra* note 83, § 1.23, at 67.

¹⁶³ *See generally* C. HAAR, *supra* note 19, at 124-25; Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 Wis. L. Rev. 440.

¹⁶⁴ 238 N.C. at 194, 77 S.E.2d at 689. *See* RESTATEMENT (SECOND) OF TORTS § 825 (1977).

¹⁶⁵ In addition, Judge Ervin classified some nuisances as actionable per se even without proof of damages to things of necessity. 238 N.C. at 191, 77 S.E.2d at 687. His classification extends to only a few public nuisances, such as houses of prostitution. *See Tedeschi v. Berger*, 150 Ala. 649, 43 So. 960 (1907).

ited to the question of substantial damage to things of necessity. This limitation gives precision to Judge Ervin's otherwise circular definition. This reading also coincides with the clear historical meaning of the *sic utere tuo* doctrine which Judge Ervin cites as his authority.

Such a rule leaves the defendant with several options after a court finds that a nuisance exists. He can, unless the court issues an injunction, continue his operations following payment of damages.¹⁶⁶ He can, in any event, buy the plaintiff's property or acquire the plaintiff's permission to continue his operations. He can always move elsewhere. If a plaintiff demands too great a price and the defendant does not wish to move, he may request eminent domain power from the legislature.¹⁶⁷ But the defendant

¹⁶⁶ See *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970) (where defendant has investment of over \$45,000,000, employs over 300 persons, and cannot correct dust pollution, injunction will be stayed upon payment of permanent damages).

¹⁶⁷ Many nuisances are active, continuing interferences with land use. The wrong continues day-to-day. That earlier tortfeasors may have avoided the cost of such active interference with property use is no reason why the present victim should have no remedy at all, at least for continuing physical interferences with property. This is particularly true because, by the historical development of delegated eminent domain powers, passive property users may be forced to sell out to a socially important, private enterprise at a "fair price" if a legislature agrees, and if the price can survive a court challenge. See *Berman v. Parker*, 348 U.S. 26 (1954); *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906). See also Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES IN AMERICAN HISTORY 329 (1971); Comment, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854 (1973). Cf. M. HORWITZ, *supra* note 83, at 63-66 (eminent domain power used to promote cheap economic development prior to the establishment of the principle of fair compensation). In determining this price, actual purchase prices are always considered, although other factors, including the owner's rights to prevent wrongful interferences with his property, are also considered.

The ultimate evil of a deprivation of property, or better, a frustration of property rights . . . is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed. . . . When [the cost is] successfully concealed, the public is not likely to have objection to the "cost-free" benefit.

Fred. F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 596-97, 350 N.E.2d 381, 387, 385 N.Y.S.2d 5, 11 (1976) (citation omitted).

With appropriate "fair price" safeguards, windfall profits will be uncommon. For a discussion of windfall profits, see Comment, *Internalizing Externalities: Nuisance Law and Economic Efficiency*, 53 N.Y.U. L. REV. 219, 230 (1978). What is unacceptable is de facto expropriation of property rights without any attempt to compensate or to obtain legislative

cannot substantially deprive other property owners of things necessary to the enjoyment of their land without compensation. The *sic utere tuo* rule assures the passive property owner that changes in surrounding land and environment, including those that are beyond his control will not erode his rights. Before *St. Helen's Smelting*, all property owners, including small leaseholders, possessed such rights. Even accepting Lord Westbury's dictum as to personal sensibility, this position remains good law in England when material damage to property occurs.¹⁶⁸

D. Extension of the Balancing of Utilities Doctrine

The common misunderstanding of the *St. Helen's Smelting* holding may be extended further. Professor Street has implied that nuisance law requires a balancing of utilities even for cases of physical injury.¹⁶⁹ Street observed that the other judges in *St. Helen's Smelting* did not support Westbury's dictum distinguishing between physical injuries and harms to only the sensibilities.¹⁷⁰ From this lack of support Street draws his conclusion that a balancing test was meant to apply to both types of damages. A more logical conclusion, however, is that the majority favored the old *sic utere tuo* rule. Moreover, Street's analysis is contradicted by the words of the other judges,¹⁷¹ and is also entirely inconsistent with Justice Mellor's directions to the jury,¹⁷² the very directions the Lords approved.¹⁷³ In addition, none of the lords or judges, except Lord Westbury in his isolated dictum concerning personal sensibility,¹⁷⁴ indicated that he was modifying prior doctrine—a

approval; that is a legacy inherent in the "balancing of utilities." Legal tests turning on economic welfare maximization are legacies that favor "the claimant of the right whose use is productive over one whose use is consumptive" and "the rich claimant whose use is consumptive over the poor claimant whose use is consumptive." Baker, *supra* note 152, at 9 (emphasis omitted). For extensive discussions, see Rice, *Pollution as a Nuisance: Problems, Prospects, and Proposals*, 34 J. AM. TRIAL LAW. A. 202 (1972); Note, *Nuisance Damages as an Alternative to Compensation of Land Use Restrictions in Eminent Domain*, 47 S. CAL. L. REV. 998 (1974); Note, *An Economic Analysis of Land Use Conflicts*, 21 STAN. L. REV. 293 (1969); Note, *The Cost-Internalization Case for Class Actions*, 21 STAN. L. REV. 383 (1969); Michelman, Book Review, 80 YALE L.J. 647 (1971).

¹⁶⁸ See *Halsey v. Esso Petroleum Co.*, [1961] 1 W.L.R. 683, 691 (Q.B.); CLERK & LINDSELL, *supra* note 82, ¶ 1394, at 783-84.

¹⁶⁹ H. STREET, *supra* note 110, at 221-27.

¹⁷⁰ *Id.* at 226.

¹⁷¹ See text accompanying notes 143-46 *supra*.

¹⁷² See text accompanying note 128 *supra*.

¹⁷³ See text accompanying notes 127-39 *supra*.

¹⁷⁴ See text accompanying note 142 *supra*.

course of conduct that normally accompanies a major change in the law, such as the introduction of a balancing of utilities test to nineteenth century England.¹⁷⁵ Extending the balancing test would not only frustrate the true holding of *St. Helen's Smelting*, but also would ignore the long and rational development of the *sic utere tuo* doctrine.

E. Future of the *Sic Utere Tuo* Rule

In light of the predominance of the balancing of utilities test, the future of the *sic utere tuo* rule seems dim.¹⁷⁶ Although *William Aldred's Case* is still widely cited, courts often focus on its limitation of damage to things of necessity, and ignore its most important holding—its refusal to balance utilities.¹⁷⁷ This unwarranted rejection of the *sic utere tuo* rule shows an unwillingness to go behind the confusion of *St. Helen's Smelting* and reconsider afresh the

¹⁷⁵ See text accompanying notes 143-48 *supra*.

¹⁷⁶ Indeed, the spirit of Lord Cranworth's *Shields*, the "denaturalised" neighborhood, lives on. Thus in *Riter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 N.W.2d 151 (1957), the court stated:

Many authorities point out that the right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot and other impurities. These statements are especially applicable to one who elects to live in or adjacent to an industrial district. Moreover, the operation of a lawful industry which would be considered a nuisance in a residential section might not be considered such when conducted in an industrial locality.

Id. at 721, 82 N.W.2d at 158.

¹⁷⁷ See, e.g., J. FLEMING, *supra* note 110, at 400 & n.6, 592 & n.20. But see CLERK & LINDSELL, *supra* note 82, ¶ 1434, at 809 & n.34. *William Aldred's Case* is also cited widely for the proposition that an odor can constitute a nuisance. See CLERK & LINDSELL, *supra* note 82, ¶¶ 1393, 1402, at 783 & n.21, 788 & n.59; 1 F. HARPER & F. JAMES, *supra* note 83, § 1.26, at 78; W. PROSSER, *supra* note 21, § 89, at 592 & n.22.

Unfortunately, many modern courts have exhibited only a very general understanding of the *sic utere tuo* principle. Often courts mention it in support of a duty to exercise ordinary care. See, e.g., *Reynolds Metals Co. v. Thompson*, 381 S.W.2d 536 (Ky. 1964) (duty to use ordinary care in performance of any dangerous act which might endanger others); *Hayes v. Malkan*, 26 N.Y.2d 295, 258 N.E.2d 695, 310 N.Y.S.2d 281 (1970) (dissenting opinion, Fuld, C.J.) (duty to use reasonable care prohibits utility from placing utility pole dangerously close to highway). One court has stretched the maxim's concept of responsibility to others so far as to find that it contains the basis for no-fault insurance legislation. See *Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978). Another court has extended the meaning of the maxim even further in using it to support the notion that a property owner does not have the right to prevent entry on to his land by an entrant seeking to contact the owner's employees for their benefit. See *State v. Shack*, 58 N.J. 297, 277 A.2d 369 (1971). Such loose uses of the maxim only confuse the law. Used as a general rule, the maxim is nearly devoid of content. The *sic utere tuo* doctrine's fullest utility can be realized only if courts understand that its meaning is largely tied to its historical context and origins.

merits of the original doctrine. Only within the context of *William Aldred's Case* does the *sic utere tuo* doctrine become more than an empty maxim.

More courts faced with cases like *Morgan v. High Penn Oil Co.* should give the experience of their own past a fair hearing.¹⁷⁸ They would do well to compare the wise formula set forth in *William Aldred's Case*¹⁷⁹ with the unspoken economic assumptions of

¹⁷⁸ The requirement of damage to things of necessity combines objectivity with limited judicial discretion. See notes 68-70 and accompanying text *supra*. In *Walter v. Selfe*, 4 De G. & Sm. 315, 64 Eng. Rep. 849 (Ch. 1851), Vice Chancellor Bruce described the standard:

[T]his inconvenience [ought] to be considered in fact as more than fanciful, more than one of mere delicacy of 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?

Id. at 322, 64 Eng. Rep. at 852. *Accord*, *Fleming v. Hislop*, 11 App. Cas. 686, 691, 697 (1886).

¹⁷⁹ Indeed some jurisdictions explicitly reject the balancing of utilities test. See, *Jost v. Dairyland Power Coop.*, 45 Wis.2d 164, 172 N.W.2d 647 (1969).

While there are some jurisdictions that permit the balancing of the utility of the offending conduct against the gravity of the injury inflicted, it is clear that the rule, permitting such balancing, is not approved in Wisconsin where the action is for damages. We said in *Pennoyer v. Allen* . . . :

"When such comfort and enjoyment are so impaired, and compensation is demanded, it is no defense to show that such business was conducted in a reasonable and proper manner, and with more than ordinary cleanliness, and that the odors so sent over and upon such adjacent premises were only such as were incident to the business when properly conducted. It is the interruption of such enjoyment and the destruction of such comfort that furnishes the ground of action, and it is no satisfaction to the injured party to be informed that it might have been done with more aggravation. The business is lawful; but such interruption and destruction is an invasion of private rights, and to that extent unlawful. It is not so much the manner of doing as the proximity of such a business to the adjacent occupant which causes the annoyance. A business necessarily contaminating the atmosphere to the extent indicated should be located where it will not necessarily deprive others of the enjoyment of their property, or lessen their comfort while occupying the same."

In *Dolata v. Berthelet Fuel & Supply Co.* . . . , relying on *Pennoyer*, this court concluded that even though a coal yard was operated properly, nevertheless, it, a socially and economically useful business, would be abated if it caused substantial damage to the adjoining plaintiff.

Id. at 174, 172 N.W.2d at 652 (citations omitted). The *Jost* court continued:

We adhere to the rule of *Pennoyer v. Allen*. Although written in 1883, we believe it remains completely applicable under modern conditions. We conclude that injuries caused by air pollution or other nuisance must be compensated irrespective of the utility of the offending conduct as compared to the injury. Nor do we imply that a different rule should apply where the remedy sought is abatement rather than damages. That point is not considered herein. We consider that the rule of *Dolata* continues to be the law in Wisconsin where the action is for abatement.

Id. at 177, 172 N.W.2d at 654.

the balancing of utilities doctrine. The *sic utere tuo* doctrine has never had a record of obstructing economic growth.¹⁸⁰ Furthermore, the judicial discretion favored by the balancing of utilities doctrine has the potential of being equally obstructionist and, in certain instances, has actually been used to block socially desirable developments solely on aesthetic or psychological grounds.¹⁸¹ Balancing utilities gives the courts too much discretion to evade the democratic process and principles of fair compensation. The rule in *William Aldred's Case* most fully protects these values, while encouraging economic rationality.¹⁸²

III

THE RES COMMUNES DOCTRINE: ILLINOIS CENTRAL RAILROAD V. ILLINOIS (1892)

The greatest historical limit on the *sic utere tuo* rule's operation has been the requirement that the plaintiff possess an injured private real property interest.¹⁸³ This prerequisite severely curtails the doctrine's modern utility.¹⁸⁴ Many persons have no in-

¹⁸⁰ Rather, it has never been given a fair trial in modern society. "Only in the twentieth century did official and formal nuisance doctrine incorporate a balancing test." M. HORWITZ, *supra* note 83, at 293 n.73. But, as Horwitz points out, the *sic utere tuo* doctrine was substantially evaded earlier, leaving the question of its true effects, if rigorously applied, unanswered and unanswerable. *See id.* at 74-78. *See also* Brenner, *Nuisance Law and the Industrial Revolution*, 3 J. LEGAL STUD. 403, 431-33 (1974); Kurtz, *Nineteenth Century Anti-Entrepreneurial Nuisance Injunctions—Avoiding the Chancellor*, 17 WM. & MARY L. REV. 621, 670 (1976); Laitos, *The Social and Economic Roots of Judge-Made Air Pollution Policy in Wisconsin*, 58 MARQ. L. REV. 465, 466-74, 514-15 (1975).

¹⁸¹ *See* *Everett v. Paschall*, 61 Wash. 47, 111 P. 879 (1910) (injunction granted against tuberculosis sanitarium which depressed land values); *Managers of the Metro. Asylum Dist. v. Hill*, 6 App. Cas. 193 (1881) (injunction granted against hospital for smallpox and other contagious diseases). *But see* *Shuttleworth v. Vancouver Gen. Hosp.*, [1927] 2 D.L.R. 573 (Can.) (damages denied landowner near hospital even though presence of communicable diseases decreased land values).

¹⁸² *See* note 167 *supra*.

¹⁸³ *See* text accompanying notes 40-41 *supra*.

¹⁸⁴ It is beyond the scope of this Article to discuss the limitations of modern private nuisance doctrine. A substantial body of literature on the subject exists. *See, e.g.*, Chaffee, *supra* note 35, at 394-400; Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Juergensmeyer, *Control of Air Pollution Through the Assertion of Private Rights*, 1967 DUKE L.J. 1126; Katz, *supra* note 139, at 606-22, 641-45; Laitos, *The Social and Economic Roots of Judge-Made Air Pollution Policy in Wisconsin*, 58 MARQ. L. REV. 465 (1975); Larremore, *Public Aesthetics*, 20 HARV. L. REV. 35, 40-45 (1906); McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574 (1924); Newark, *supra* note 19, at 485-90; Rheingold, *Civil Cause of Action for Lung Damage Due to Pollution of Urban Atmosphere*, 33 BROOKLYN L. REV. 17, 24-26 (1966); Rice, *supra* note 167; Warren, *Nuisance Law as an Environmental Tool*, 7 WAKE FOREST L. REV. 211 (1971);

terest in real property other than short term leases, and almost everyone spends considerable time at work or leisure away from his property in which he has an interest. Traditional private nuisance law offers no protection in these situations. Furthermore, the alternative tort doctrines—negligence, public nuisance, trespass, and the rule of *Rylands v. Fletcher*—cannot by themselves protect against all wrongful infliction of injury through the use of property, particularly by air and water pollution.¹⁸⁵ But a fifth common law doctrine can assist private citizens in solving these problems, and that is the ancient property law doctrine of *res communes*.

The *res communes* doctrine provides that some forms of property are legally incapable of exclusive ownership. Instead, the commonalty¹⁸⁶—the people collectively—own them. Such owner-

Winfield, *supra* note 39 (private nuisance, negligence, and trespass compared and contrasted); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 517-24 (1957) (limitation on damages as remedy); Note, *Nuisance Damages as an Alternative to Compensation of Land Use Restrictions in Eminent Domain*, 47 S. CAL. L. REV. 998 (1974).

¹⁸⁵ Negligence, of course, requires proof of carelessness (*see* 2 F. HARPER & F. JAMES, *supra* note 83, § 16.1, at 896-902), and trespass, in most jurisdictions, requires an element of intent or fault (*see* 1 *id.* § 1.4, at 11-16). But the damaging infliction of external costs can be unintentional and unavoidable, despite due care. *See* Wright v. Masonite Corp. 368 F.2d 661 (4th Cir. 1966) ("no negligence" and "invasion . . . unintentional" in harmful release of formaldehyde gas); Juergensmeyer, *supra* note 184, at 1138-48; 62 HARV. L. REV. 704, 704-06 (1949).

Public nuisance requires proof of "special damage" in the use of a public right, a very serious historical hurdle. *See* Bryson & Macbeth, *Public Nuisance, the Restatement (Second) of Torts, and Environmental Law*, 2 ECOLOGY L.Q. 241, 250-64 (1972). For an analysis of the use of public nuisance doctrine in nineteenth century American law to defeat private damage remedies and "to extend to private companies virtually the same immunity from law suits that the state received under the theory of consequential damages," *see* M. HORWITZ, *supra* note 83, at 76-78.

The *Rylands v. Fletcher* doctrine, if it ever really was relevant to injury beyond private real property interests, is now being brought back "closer to [private] nuisance." H. STREET, *supra* note 110, at 255.

The doctrine of *Rylands v. Fletcher* . . . derives from . . . [the] mutual duties of . . . neighbouring landowners and its congeners are trespass and nuisance. If its foundation is to be found in the injunction *sic utere tuo ut alienum non laedas*, then it is manifest that it has nothing to do with personal injuries.

Read v. Lyons, [1947] A.C. 156, 173. For a discussion of the development of §§ 519 and 520 of the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 10, 1964) (abnormally dangerous activities), *see* Katz, *supra* note 139, at 643-44. That author wisely saw the role of strict liability for abnormal activities in technology assessment as being more limited than that of historical private nuisance doctrine. *Id.* at 645.

¹⁸⁶ In the common law, the "commune" or the "commonalty" meant "the people of the whole realm" or "all the Kings subjects," as opposed to the King, the nobles, or the "commons" in Parliament. E. COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND *539.

ship differs from state sovereignty and state ownership in fee, although the state often holds the title in trust for the beneficial ownership interests of the people. In Rome, England, and America, the doctrine has regulated the use of property by both state and private owners. Although not a theory of tort liability, *res communes* as a doctrine of ownership allows for an extension of tort theory to protect commonly-owned property and property rights.

A. Roman Law and English Law

The doctrine of *res communes* originated in Roman law. Although the concept of nonexclusive ownership is found scattered among the writings of several classical Roman jurists, as preserved in the great *Digest*,¹⁸⁷ the fame of *res communes* among English lawyers probably derived from a passage in Justinian's *Institutes*:¹⁸⁸ "By natural law, these things are the common property of all: air, running water, the sea, and with it the shores of the sea."¹⁸⁹

The common definition of *res communes* today is "[t]hose things which, though a separate share of them can be enjoyed and used by everyone, cannot be exclusively and wholly appropriated;

[F]or this word *commune* and *communalitie*: so as [*a le commune*] here signifieth not to the commons of the realm, but to the people of the whole realm; and herewith agreeth our books, that for a common nuisance, which concerns *Le commune, ou le comminaltie, le suit serr' done au roy*, where [*commune*] and [*comminaltie*] include all the kings subjects.

Id. See 1 JOWITT'S DICTIONARY OF ENGLISH LAW 394 (2d ed. 1977). The expression was later used to describe, rationally enough, the body of any society or corporation, as distinguished from its officers. See BLACK'S LAW DICTIONARY 347 (4th ed. 1951).

¹⁸⁷ See DIGEST 1.8.2, 1.8.4, 1.8.5, 1.8.6, 18.1.6, 41.1.14, 41.1.15, 41.1.50, 43.7.1, 43.7.2, 43.8.1, 43.8.2, 43.8.3, 43.8.4, 43.8.5, 43.8.6, 43.8.7, 43.12.1, 43.12.3, 43.13.1, 43.14.1, 43.15.1. One of the earliest Roman references to nonexclusive ownership is in the INSTITUTES OF GAIUS 2.1, 2.10, 2.11. Gaius' treatment of ownership doctrine was, however, in this respect simplistic. "All he does is to divide *res humani iuris* [things subject to human right] into *publicae* and *privatae*. He fails to mention the interesting category of *res communes*." F. DE ZULUETA, THE INSTITUTES OF GAIUS pt. 2, at 56 (1953) (footnote omitted). Cebus and Pomponius, writing even before Gaius, in the period 80-129 (*id.* at x), also had distinguished between things which could be subject to private ownership and things which, because of their "permanent appropriation to public uses," were not so subject (*id.* at 56). This included property and places "such as are not the object of commerce, but are public property, which, while they do not absolutely belong to the people, are used for public purposes, as, for instance, the Campus Martius." DIGEST 18.1.6 (Pomponius).

¹⁸⁸ H. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 502-03 (2d ed. 1954). Although the *Institutes* were designed to be an "introductory text-book" for students, "they have themselves the validity of an imperial statute." *Id.* at 502.

¹⁸⁹ INSTITUTES 2.1.1 (author's translation).

as, light, air, running water.”¹⁹⁰ The words as originally used in Roman law referred to any common property, “[t]hings belonging to two or more owners (co-owners, co-heirs) as a common property.”¹⁹¹ Things which were “‘by natural law . . . the common property of all men’” were called, by the Romans, *res communes omnium*.¹⁹²

In fact, the Roman texts, as transmitted and editorialized by the Byzantine compilers of the Emperor Justinian, never defined *res communes omnium* as clearly as the modern usage. The fertile Roman juristic intelligence had created four other conceptual categories of “things” capable of nonexclusive ownership or incapable of ownership: *res universitatis*,¹⁹³ *res sacrae* or *religiosae*,¹⁹⁴

¹⁹⁰ 3 BOUVIER'S LAW DICTIONARY 2905 (3d rev. 8th ed. 1914). See BLACK'S LAW DICTIONARY 1469 (4th ed. 1951); 2 C. SHERMAN, ROMAN LAW IN THE MODERN WORLD 140-41 (3d ed. 1937). In recent American cases the concept is usually discussed in the context of the residual Spanish civil law ideas in Texas and California. See, e.g., *Luttes v. State*, 159 Tex. 500, 525-26, 324 S.W.2d 167, 182 (1958).

¹⁹¹ A. BERGER, ENCYCLOPEDIA OF ROMAN LAW 677 (1953). See also CODE 4.52, 8.20.

¹⁹² A. BERGER, *supra* note 191, at 677 (quoting DIGEST 1.8.2.pr., 1.8.2.1 (Marcianus)). According to Buckland, “[t]he conception of *res communes omnium* is late. It may be due to Marcian, but is sometimes held to be Byzantine.” W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 182 n.9 (3d ed. P. Stein rev. 1963). Marcian, a good deal of whose writing was preserved in the *Digest*, lived in the first half of the third century A.D. See A. BERGER, *supra* note 191, at 578; H. ROBY, AN INTRODUCTION TO THE STUDY OF JUSTINIAN'S DIGEST at cciv-ccv (1884).

¹⁹³ *Res universitatis* were things “belonging to a corporate body, not to individuals” such as “theatres, race-courses, and other similar places belonging in common to a whole city.” INSTITUTES 2.1.6. See also DIGEST 1.8.6.1. The concept of *res universitatis* is the closest Roman analogy to ordinary modern ownership by a state or state entity. See generally T. SANDARS, THE INSTITUTES OF JUSTINIAN 160 (1876).

¹⁹⁴ *Res sacrae* or *religiosae* were “duly consecrated by pontiffs, as sacred buildings and offerings, properly dedicated to the service of God, which we have forbidden by our constitution to be sold or mortgaged, except for the purpose of purchasing the freedom of captives.” INSTITUTES 2.1.8. See DIGEST 1.8.1, 1.8.8, 1.8.9, 18.1.6, 43.8.2.19. See also W. BUCKLAND, *supra* note 192, at 183-84. The walls and gates of a city were also subject to special protection and called *res sanctae*. See DIGEST 1.8.11; INSTITUTES 2.1.10; INSTITUTES OF GAIVS 2.8; W. BUCKLAND, *supra* note 192, at 184.

¹⁹⁵ *Res publicae* were things “common to all men” such as rivers and ports. INSTITUTES 2.1.2. See DIGEST 1.8.6.1, 18.1.6, 43.7.1, 43.8.2, 43.8.5, 43.8.6, 43.8.7, 43.12.1, 43.12.3, 43.13.1, 43.14.1, 43.15.1. “The word *publicus* is sometimes used as equivalent to *communis*, but is properly used, as here, for what belongs to . . . a particular people, but may be used and enjoyed by all men.” T. SANDARS, *supra* note 193, at 158. The concepts of *res communes* and *res publicae* actually were very similar. W. BUCKLAND, *supra* note 192, at 184-85. But *res publicae* carried the additional implication of state ownership of the concerned property. See *id.* at 183, 185 n.1. *Res publicae* constituted “[p]ublic property such as theatres, market places, rivers, harbors, etc. . . . On the contrary RES COMMUNES OMNIUM were not considered property of the Roman people although their use was accessible to all citizens.” A. BERGER, *supra* note 191, at 679. Perhaps another commentator gave the best articulation

res publicae,¹⁹⁵ and *res nullius*.¹⁹⁶ There was also an extensive law of city hygiene and cleanliness, similar to modern public nuisance law, enforceable by the aediles, a kind of Roman magistrate.¹⁹⁷ Scholars have long debated the nature of the ownership rights in *res communes* and *res publicae*.¹⁹⁸ Although much of this debate centered on whether individuals could sue for damages or an injunction if a *res communes* was damaged,¹⁹⁹ the Romans clearly conceived of a "middle ground" between absolute individual ownership and ownership by the state that was not limited to property owned by no one. It was, in the words of Pomponius, public property "not the object of commerce" and did "not absolutely belong to the people" but was "used for public purposes."²⁰⁰ In modern terms, Roman ownership doctrine permitted more alternatives than state communism, individual private ownership, and anarchy.

of the concept: "[*Res publicae*] were in the ownership of the State, but this was not . . . private ownership at all, but public ownership, subject to special rules . . ." F. SCHULZ, *CLASSICAL ROMAN LAW* 340 (1951).

¹⁹⁶ *Res nullius* were things which "belong to no one" (INSTITUTES 2.1.7), either because they were unappropriated by anyone, such as unoccupied lands or wild animals, or things similar to *res sacrae* or *res religiosae* "to which a religious character prevents any human right of property attaching" (T. SANDARS, *supra* note 193 at 160). See DIGEST 1.8.1, 1.8.2. See also W. BUCKLAND, *supra* note 192, at 184.

¹⁹⁷ See DIGEST 43.10.1, 43.11.1.

¹⁹⁸ VECTING, *DOMAINE PUBLIC ET RES EXTRA COMMERCIMUM* 36-51 (1950). Compare R. LEE, *THE ELEMENTS OF ROMAN LAW* at 109-11 (4th ed. 1956) with W. BUCKLAND, *supra* note 192, at 182-85 and W. HUNTER, *INTRODUCTION TO ROMAN LAW* 65-66 (9th ed. rev. 1965). See Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970); Note, *State Citizen Rights Respecting Greater Resource Allocation: From Rome to New Jersey*, 25 RUTGERS L. REV. 571, 576 (1971). These debates cast doubt on the credibility of one commentator's remarks that: "Where subsequent law is found to differ, proponents of the public trust can hold the original Roman law up as a useful model of doctrinal purity to which we should return." Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 YALE L.J. 762, 764 (1970).

¹⁹⁹ See W. HUNTER, *A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE* 165 (1876); Note, *supra* note 198, 79 YALE L.J. at 788 n.124. But see Sax, *supra* note 198, at 475. The classical texts that have survived simply do not answer the question conclusively, but there is some evidence that a private reparation of injury was possible. According to Ulpian,

[w]here anyone is prevented from fishing in, or sailing upon the sea, he will not be entitled to this interdict, just as in the case of a person who is prevented from taking part in games in a public field, or bathing in a public bath, or being present in a theater; but in all these cases an action for reparation of injury must be employed.

DIGEST 43.8.2.9. See also *id.* 43.8.5, 43.8.6, 43.13.1.9, 43.13.1.10, 43.15.1.3, 43.15.1.5 (evidence of legal relief, both prohibitive and reparative, for individual injury in use of *res communes* or *res publicae*).

²⁰⁰ DIGEST 18.1.6.

The *res communes* doctrine entered English law early. The most important vehicle was probably the treatise called *Bracton*,²⁰¹ which was completed in 1256 or 1257.²⁰² That work clearly reflects the influence of the Romans.²⁰³ *Bracton* preserved the Roman distinctions between public property, property belonging to no one, property belonging to individuals, and property of a common nature.²⁰⁴ *Bracton's* definition of *res communes* included the sea and its shores, air, and running water.²⁰⁵ *Res publicae* included the right to fish in ports or rivers and to use river banks.²⁰⁶ City buildings belonged to the civic corporations as *res universitatis*.²⁰⁷ In various forms, *Bracton's* description found its way into many other great treatises of the common law.²⁰⁸

Although it is not absolutely clear that the Romans had a privately enforceable legal remedy for disturbing the enjoyment of *res communes*,²⁰⁹ the English by the sixteenth century had almost created such a remedy in the laws of the forest.²¹⁰ Obviously, no

²⁰¹ See 2 BRACTON, *supra* note 13, at 39-41.

²⁰² Thorne, *Translator's Preface* to 3 BRACTON, *supra* note 13, at v.

²⁰³ T. PLUCKNETT, *supra* note 28, at 261-62.

²⁰⁴ 2 BRACTON, *supra* note 13, at 39-41.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 40.

²⁰⁷ *Id.*

²⁰⁸ See 2 W. BLACKSTONE, COMMENTARIES *14, 18, 395; 1 BRITTON bk. 2, ch. 2, § 1, at *84b; R. CALLIS, UPON THE STATUTE OF 23 H. 8 CAP. 5 OF SEWERS 78 (2d ed. London 1685) (1st ed. London 1647); J. COWELL, THE INSTITUTES OF THE LAWS OF ENGLAND 54-55 (London 1651); FLETA bk. 3, ch. 1, reprinted in 89 SELDEN SOC'Y 1-2 (1972); 2 J. KENT, COMMENTARIES ON AMERICAN LAW *347-48; J. SELDEN, MARE CLAUSUM ch. 2 (London 1635). See also Wiel, *Natural Communism: Air, Water, Oil, Sea, and Seashore*, 47 HARV. L. REV. 425, 425 n.2 (1934). Wiel, however, viewed the *res communes* theory differently from the earlier writers. See note 273 *infra*.

²⁰⁹ For incomplete evidence that such an action did exist, see note 199 *supra*. The Romans certainly did possess enforceable rights called praedial servitudes that protected private property owners' enjoyment of light within city bounds, and other common rights. B. NICHOLAS, AN INTRODUCTION TO ROMAN LAW 141-44 (1962).

²¹⁰ Ironically, the lust of medieval English monarchs for the hunt led to these first conservation laws, elaborate rules that defined and protected the royal forests. These laws, enforced by an elaborate structure of wardens, foresters, agisters, and a chief justice of the forest, not only punished poaching and exploitation of the royal forests but also exerted a wide authority over the many Englishmen who lived in or next to the royal forests. Under the forests laws, these persons had limited, but valuable, rights to pasture animals in the forest, to cut some kinds of wood, to hunt animals defined as vermin, and to travel in the forest. See Turner, *Introduction to SELECT PLEAS OF THE FOREST*, 13 SELDEN SOCIETY (1899); Young, *The Forest Eyre in England During the Thirteenth Century*, 18 AM. J. LEGAL HIST. 321 (1974). For the classic treatise on the forest laws, see J. MANWOOD, A TREATISE AND DISCOURSE OF THE LAWS OF THE FORREST (London 1598), cited in *United States v. New Mexico*, 438 U.S. 696, 721 (1978) (dissenting opinion, Powell, J.).

private person had a freehold interest in the forest except the King, but injury to those who had rights to use the forest was subject to three nuisance actions, *nocumentum commune*, *nocumentum speciale*, and *nocumentum generale*.²¹¹ The first action protected against "a general hurt and annoyance, as wel unto all the Inhabitants and dwellers within the Forest, as also unto the wild beastes of the same."²¹²

Neither the common law nor the forest law would normally permit an individual to bring a private action for relief. It was argued that this would lead to limitless actions, each alleging no damage greater than that suffered by all of the King's subjects.²¹³ But if a nuisance specifically affected a local community,

The forest laws were technically distinct from the common law. Although Coke stated that "the law of the forest is allowed, and bounded by the common laws of this realm" (E. COKE, *THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* *290), he later acknowledged that "the forest laws differ in many cases from the common laws of England" (*id.* at *315). But the common law courts "exercised a sort of superintendence." See I W. HOLDSWORTH, *supra* note 23, at 348-49. In practice, "there was some intermingling of forest law and common law," including an intermingling of "pleas of the forest and common law pleas." Young, *supra*, at 329-30. One obvious reason for this fact was that "[i]mportant officials were involved in the operations of both kinds of courts" and the cooperation of the sheriff was required to make the forest laws effective. *Id.* at 329-30.

²¹¹ J. MANWOOD, *supra* note 210, fol. 102-03.

²¹² *Id.* fol. 102. *Nocumentum speciale* was a nuisance that "tendeth specially *ad nocumentum ferarum*, to the hurt of the wild beastes of the Forrest." *Id.* *Nocumentum generale* was basically a nuisance to the "Vert" or the trees and plants of the forest, although it also included all Surchargers of the commons, and Agistors of their owne pastures and landes, which by eating up of their pastures and commons so bare, that the Deare can have no feede there left. . . . and all manner of trespasses, that do tend to the hurt or distruction of any herbage of pasture within The Forest.

Id.

This action was brought before the Lord Chief Justice in Eyre of the Forest through procedure similar to the prosecution of a public nuisance.

²¹³ A contemporary case described the law that may have included the forest courts:

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 person 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, there for that particular injury, he shall have a particular action on the case: and for common nuisances [*i.e.*, public nuisances], which are equal to all the King's liege people, the common law has appointed other Courts for the correction and reforming of them, *scil.* tourns, leets, &c.

Williams's Case, 5 Coke 72b, 73a, 77 Eng. Rep. 163, 164-65 (K.B. 1592). See T. BLOUNT, *NOMO-ΛΕΞΙΚΟΝ* (London 1670) (definition of "nulance"); G. JACOB, *A NEW LAW-DICTIONARY* (3d ed. London 1736) (1st ed. London 1729) (definition of "nulance").

adjoining inhabitants could bring a private action.²¹⁴ For example, a private nuisance action may have been allowed for disturbing a common watering place because the injury specially affected the local users of the water more than the public at large.²¹⁵

Actions to protect a mere right to use property, even when that right was not one of exclusive possession, were very old in England, even in Coke's day. Early *praecipe* and *questus est* writs, and others, protected mere rights of use, when the plaintiffs had no right to exclusive possession of the land or water involved, and the assize of *novel disseisin* could lie to protect any kind of common appurtenant to a free tenement.²¹⁶ Examples included rights of common pasture, rights of fishery, rights of estovers, and rights of way.²¹⁷ Most of these rights, however, required that the plaintiff possess a freehold tenement to which the rights attached, in

²¹⁴ See *Fowler v. Sanders*, Cro. Jac. 446, 79 Eng. Rep. 382 (K.B. 1617); *Robert Marys's Case*, 9 Coke 111b, 113a, 77 Eng. Rep. 895, 898-99 (K.B. 1613). See also notes 59-62 and accompanying text *supra*.

²¹⁵ But though action may not be brought for a common nuisance, but indictment or presentment; yet where the inhabitants of a town had by custom a watering place for their cattle which was stopped by another, it has been held, that any inhabitant might have an action against him, otherwise they would be without remedy, because such a nuisance is not common to all the King's subjects.

G. JACOB, *supra* note 213 (definition of "nuisance"). Such a nuisance could not be justified by prescription. *Fowler v. Sanders*, Cro. Jac. 446, 79 Eng. Rep. 382 (K.B. 1617). *Bracton* suggested that in certain cases, particularly in the context of running water, a wrongful nuisance may arise because of the "common and public welfare" despite a lack of *injuria* to any particular individual. 3 BRACTON, *supra* note 13, at 191. See *id.* at 191-93, 196. See also 3 FLETA, reprinted in 89 SELDEN SOC'Y 112 (1972). Of course, *Bracton* was written before there was a clear delineation between public and private nuisance doctrines, but these statements appear in the sections on possessory assizes.

²¹⁶ See 3 BRACTON, *supra* note 13, at 188-89; GLANVILL, *supra* note 23, at 168-69. As the translation of *Bracton* noted, "[a] nuisance of this kind does not differ substantially from a disseisin, and ought therefore to be removed by the assize, when it is wrongful." *Id.* at 190. Because the assize of *novel disseisin* also lay for an invasion of rights in common land, an injury to common rights appendant to a freehold was also an actionable nuisance. *Id.* at 190-91. See EARLY REGISTERS OF WRITS, reprinted in 87 SELDEN SOC'Y 71-74 (1970).

²¹⁷ Common pasture, for example, was very important before the enclosure of feudal lands. See 1 E. LIPSON, THE ECONOMIC HISTORY OF ENGLAND 78-84, 159 (12th ed. 1959). Enclosure later ensured exclusive private property as the major modern form of property holding, but it was not fully established by 1600. For discussions of enclosure generally, see G. DAVIES, THE EARLY STUARTS, 1603-1660, at 279-82 (2d ed. 1959); A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW 325 (1966); 1 E. LIPSON, *supra*, at 136-50, 159-64; J. MACKIE, THE EARLIER TUDORS 1485-1558, at 448-53, 504-06 (1952). Early land radicals, the "Diggers" or "True Levellers," bitterly fought enclosure and possessed a fickle ally in Oliver Cromwell. See C. HILL, GOD'S ENGLISHMAN 18, 61, 260-61 (1970). For contemporary views on enclosure, see R. POWELL, DEPOPULATION ARRAIGNED, CONVICTED AND CONDEMNED BY THE LAWES OF GOD AND MAN 55-56 (London 1636).

the manner of modern easements appurtenant. The assize of nuisance always recited the free tenement of the plaintiff.²¹⁸

To circumvent this free tenement barrier, plaintiffs began to experiment with action on the case pleadings in the sixteenth century. By *William Aldred's Case*, the action on the case in nuisance had become an acceptable alternative, and a preferable pleading, to the assize of nuisance.²¹⁹ Although the case form demanded some interest in land, the exact nature of the requisite interest remains unclear.²²⁰ Rights of way and similar easements appeared sufficient.²²¹

Had the concept of *res communes* endured in English courts after the widespread adoption of case pleadings, nuisance on the case could conceivably have protected rights to *res communes* just as it protected rights of tenants. Mere undivided ownership, consisting only of a right to use rather than a right to exclusive possession, would not have barred a potential plaintiff. After the development of case, the courts dropped the requirement of a free tenement. The proprietary right to use the *res communes* might have generally sufficed to give standing, as it did for common watering places.²²²

But the development of the *res communes* doctrine halted soon after the writings of Manwood and Coke, probably because ownership theory changed. The success of the enclosure movement hastened the transition to equating true ownership with exclusivity.²²³ Grotius said that *res communes*, being unbounded, could not constitute property,²²⁴ and others made similar statements.²²⁵

²¹⁸ See text accompanying notes 29, 59 *supra*.

²¹⁹ See text accompanying note 60 *supra*. A plaintiff could have an action on the case to recover damages to his rights of common pasture from a defendant whose cattle escaped and ate the grass. *Robert Marys's Case*, 9 Coke 111b, 113a-136, 77 Eng. Rep. 895, 898-900 (K.B. 1613).

²²⁰ See C. FIFOOT, *supra* note 21, at 95.

²²¹ See *id.*

²²² See text accompanying notes 213-15 *supra*.

²²³ See 3 J. KENT, COMMENTARIES ON AMERICAN LAW *403-05. Kent noted that "the change of manners and property, and the condition of society in this country, is so great, that the whole of this law of commonage is descending fast into oblivion." *Id.* at *405. See also note 217 *supra*.

²²⁴ H. GROTIUS, DE JURE BELLI AC PACIS, bk. 2, ch. 2, § 3, at 190-91 (F. Kelsey trans. 1925) (1st ed. Paris 1625).

²²⁵ "[P]roprietorship or dominion is a right whereby the substance, as it were, of something belongs to a person in such a way that it does not belong in its entirety to another person in the same manner." S. PUFENDORF, DE JURE NATURAE ET GENTIUM LIBRI OCTO 533 (C. Oldfather & W. Oldfather trans. 1934) (1st ed. Lund 1672). *But see* E. DE VATTTEL, LE DROIT DES GENS bk. 1, ch. 20 (C. Fenwick trans. 1916) (1st ed. London 1758).

The exclusive ownership theory became dominant in America,²²⁶ where Louisiana and California incorporated it into their civil codes²²⁷ and Oliver Wendell Holmes endorsed it.²²⁸ This trend

²²⁶ In the later eighteenth century, Justice James Wilson wrote:

Exclusive property multiplies the productions of the earth, and the means of subsistence. . . .

By exclusive property, the productions of the earth and the means of subsistence are secured and preserved, as well as multiplied. What belongs to no one is wasted by every one. What belongs to one man in particular is the object of his economy and care.

Exclusive property prevents disorder, and promotes peace. . . .

The conveniences of life depend much on an exclusive property.

J. WILSON, *On the History of Property*, in 2 THE WORKS OF JAMES WILSON 719 (R. McCloskey ed. 1967).

²²⁷ See LA. CIV. CODE ANN. art. 488 (West 1952) (ownership is "the right by which a thing belongs to some one in particular, to the exclusion of all other persons"); CAL. CIV. CODE ANN. § 654 (West 1954) (ownership of thing is "the right of one or more persons to possess and use it to the exclusion of others").

²²⁸ O.W. HOLMES, THE COMMON LAW 246 (1881). Holmes concluded that an "owner is allowed to exclude all, and is accountable to no one." *Id.* Other legal writers offer similar definitions. See, e.g., K. DIGBY, AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY 305 (5th ed. 1897); H. TIFFANY, THE LAW OF REAL PROPERTY 2-3 (3d ed. abr. R. Berman ed. 1970). Calling "exclusive control" the "very center of the concept of private property," Professor Brown concluded that "certain physical things, such as air, light, and running water are by their very nature incapable of being owned" because no one can control them exclusively. R. BROWN, THE LAW OF PERSONAL PROPERTY 7 (2d ed. 1955).

The exclusivity test of ownership remains alive in modern America. One court recently stated that "[a]n essential element of individual property is the legal right to exclude others from enjoying it." *Blaustein v. Burton*, 9 Cal. App. 3d 161, 177, 88 Cal. Rptr. 319, 329 (1970) (quoting *International News Serv. v. Associated Press*, 248 U.S. 215, 250 (1918) (dissenting opinion, Brandeis, J.)). Another court has said that "the traditional test of ownership is the power to exclude others." *Dairy Queen, Inc. v. Commissioner*, 250 F.2d 503, 506 (10th Cir. 1957).

But this test might be yielding to a more flexible standard that would possibly permit the ownership of *res communes*. For example, one court has declared that "the meaning to be given to the word [property] depends upon the sense in which it is used, as gathered from the context and the nature of the things which it was intended to refer to and include." *Fields v. Michael*, 91 Cal. App. 2d 443, 449, 205 P.2d 402, 407 (1949) (quoting *Franklin v. Franklin*, 67 Cal. App. 2d 717, 725, 155 P.2d 637, 641 (1945)). A second court has stated that

[t]he word [owner] usually signifies one who has the legal or rightful title, but this is not always the sense in which it is employed. It is not rigid in meaning, especially in ordinances and statutes. . . . The meaning usually depends, in great measures, upon the context and the subject matter to which it is applied.

Robinson v. Walker, 63 Ill. App. 2d 204, 209, 211 N.E.2d 488, 491 (1965).

This relative test of ownership approaches the original English and Roman concept in which the term "owner" included anyone with an ownership right, such as right to use. Max Rheinstein remarked on the late development of the concept of title in English law: "Only in recent times have the terms 'fee' and, more recently, 'title' assumed a meaning which comes near to that of the Roman *dominium*, which indicates the sum total of all rights and benefits which may be derived from a piece of land (as well as from a chattel)." MAX WEBER ON LAW IN ECONOMY AND SOCIETY 221 n.77 (M. Rheinstein ed. 1954). For Weber's own discussion, see *id.* at 221-22.

overwhelmed the law protecting common areas,²²⁹ and many cities sold such areas in fee.²³⁰ The cities assumed that they could pass good title, free of commonalty claims.

The exclusive ownership theory encouraged developing American industries to exploit the air, running water, sea, and seashores.²³¹ Owned by "no one," these things were theoretically free to all comers, and vulnerable to overuse.²³² Because states hesitated to discourage industry by use of public nuisance powers,²³³ and special damages limitations precluded private suits to protect public users,²³⁴ the overuse continued. Even where special damage to private property occurred, difficulties in determining causation, in apportioning damages, and in overcoming the balancing of utilities test could effectively bar private remedy.²³⁵

B. American Law

Ironically, excessive generosity by a state toward industry led to the surprising American resurrection of the *res communes* doctrine in 1892. In *Illinois Central Railroad v. Illinois*,²³⁶ the Supreme

²²⁹ For example, Massachusetts enacted statutes that provided for the partition of common areas. See 1786 Mass. Acts and Laws ch. 53, at 171-72; 1783 Mass. Acts and Laws ch. 39, at 599.

²³⁰ For example, the present Cambridge Common represents just the tip of a much larger seventeenth century common. The original common extended far to the northwest. See CAMBRIDGE HISTORICAL COMMISSION, SURVEY OF ARCHITECTURAL HISTORY IN CAMBRIDGE, REPORT FOUR: OLD CAMBRIDGE 12-19 (1973).

English commons and manorial wastes suffered a similar fate. See The Commons Act, 1876, 39 & 40 Vict., c. 56, § 2; The Commons Act, 1899, 62 & 63 Vict., ch. 30, §§ 1-3; The Commons Act, 1908, 8 Edw. 7, ch. 44, § 1; The Law of Property Act, 1925, 15 & 16 Geo. 5, ch. 20, §§ 193-94. See also 7 W. HOLDSWORTH, *supra* note 23, at 315.

²³¹ Riparian rights were of course important in early America and "gave rise to the first important legal questions bearing on the relationship of property law to private economic development." M. HORWITZ, *supra* note 83, at 34.

²³² Cf. Demsetz, *Toward A Theory of Property Rights*, 57 AM. ECON. REV., PAPERS AND PROCEEDING 347, 354 (1967) (common property subject to overuse). Demsetz's argument that communal property was generally subject to exploitation has been proven false. Full freedom to exploit communal property rarely existed in any culture, even primitive societies. See Ciriacy-Wantrup & Bishop, "Common Property" as a Concept in Natural Resources Policy, 15 NAT. RESOURCES J. 713, 714-21 (1975). Early English commons were regulated by community customs. See 2 W. HOLDSWORTH, *supra* note 23, at 57-58. Abusing one's share of a common pasture, for example, was remedied by a writ of ad measurement of pasture. 3 BRACTON, *supra* note 13, at 182-89; 1 BRITTON bk. 2, ch. 27, §§ 1-9 at *148b-50. See generally THE LAW OF COMMONS AND COMMONERS (London 1698).

²³³ See note 160 *supra*.

²³⁴ See text accompanying note 185 *supra*.

²³⁵ See Hartquist & King, *A Reprint from Capitol Hill*, 22 HARV. L. SCH. B., Dec. 1970, at 20-22; Katz, *supra* note 139, at 616-18.

²³⁶ 146 U.S. 387 (1892).

Court voided the state's grant in fee to a railroad of a large section of land submerged beneath Lake Michigan in the Chicago harbor. The decision held that the people of the state, not the state itself, were the land's beneficial owners. Justice Field, writing for the majority, declared that the state held the title to the submerged land, but the state held it "in trust for the people of the State."²³⁷ He added that "[t]he State can no more abdicate its trust over property in which the whole people are interested . . . than it can abdicate its police powers."²³⁸ In analyzing the property interests, Justice Field followed the argument of John Miller, counsel for the City of Chicago. Miller had argued that:

The bed of Lake Michigan . . . is held by the people of the State of Illinois in their sovereign capacity, and *de communi jure*, and wholly in trust for the public, and for the public uses, for which it is adapted. And the same was not held by the State in any proprietary or private right or as its demesne, and was not as to a large tract, extending a mile into the deep water of the open lake, and composing the outer harbor, and entrance to the inner harbor of a great commercial city, the subject of a private grant or contract.²³⁹

Miller restated precisely the traditional *res communes* doctrine. Both the Romans and *Bracton* recognized that the state could sell ordinary real property to private parties. But certain things remained incapable of exclusive ownership in fee by the state or by any individual. A private grant that ignored the public interest in the *res* could never dispose of such things because they belonged to the commonalty. For Miller, the Chicago harbor was a *res communes*, and the Supreme Court agreed.

A complete discussion of either the full political background of *Illinois Central*²⁴⁰ or its effect on American property law is beyond the scope of this Article. The debate over the case has raged for nearly ninety years. Recently, Professor Sax, in a lead-

²³⁷ *Id.* at 452. Justice Field clearly saw a trust in the true property sense, because he distinguished between lands the state owned in fee and lands in which the state held legal title in trust for the people as beneficial owners. *Id.* This statement reflects the traditional view that the commonalty, not the state, owns property of a *res communes* nature. Justice Field himself stated that "[the holding of this case] follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested." *Id.* at 456.

²³⁸ *Id.* at 453.

²³⁹ *Id.* at 421.

²⁴⁰ One commentator has hinted at the potential corruption behind the case. See Sax, *supra* note 198, at 490-91.

ing article, attempted to separate the public trust rationale of *Illinois Central* from traditional property doctrine, including *res communes*, by transforming it into a principle of administrative law.²⁴¹ The Supreme Court of Illinois, in *Paepcke v. Public Building Commission*,²⁴² cited Sax's article,²⁴³ but continued to find the basis of a public trust in a public ownership interest in a *res communes*.²⁴⁴ The Illinois Supreme Court chose the right course. The use of a *res communes* property doctrine in defending the environment will bear more fruit than Professor Sax's approach.

Contrary to Professor Sax's view, the property doctrine of *Illinois Central* is inseparable from the remainder of the case. Not only did the arguments²⁴⁵ and the majority opinion²⁴⁶ focus on the property question, but the Court's use of property doctrine was the primary target of the dissenters' attack. Justice Shiras, dissenting, wrote:

That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.²⁴⁷

Sax argued against viewing the public trust in *Illinois Central* as a true property trust because the Court refused to prohibit absolutely conveying title to such property.²⁴⁸ Instead, the Court instructed lower courts to determine a grant's validity in light of the circumstances.²⁴⁹ Sax reasoned that the public trust doctrine tests the validity of government action as a matter of administrative law, rather than as a question of *res communes* property doctrine.²⁵⁰

²⁴¹ Sax, *supra* note 198.

²⁴² 46 Ill. 2d 330, 263 N.E.2d 11 (1970).

²⁴³ *Id.* at 336-38, 263 N.E.2d at 15-16.

²⁴⁴ *Id.* at 341, 263 N.E.2d at 18.

²⁴⁵ In reference to other lake front land owned by the city, Miller described the City of Chicago as "owner in fee, in trust for public uses." 146 U.S. at 419.

²⁴⁶ See text accompanying notes 236-39 *supra*.

²⁴⁷ 146 U.S. at 465.

²⁴⁸ Sax, *supra* note 198, at 489.

²⁴⁹ *Id.* at 489-91.

²⁵⁰ *Id.* Sax stated:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon *any* governmental conduct which is calculated *either* to reallocate that resource to more restricted uses *or* to subject public uses to the self-interest of private parties.

Id. at 490 (emphasis in original).

This argument rests on the false notion that the state cannot alienate the title to a *res communes*. As Justice Field explained, the state can dispose of the *res* under circumstances that protect any beneficial interests of the public.²⁵¹ The public trust vests legal title to *res communes* in the state as a convenience in most cases, but other groups can also hold the title. Indeed, private boards held titles to many New England commons, subject to the public trust for the commonalty.²⁵²

Sax's argument is close to the position taken by Professor Trelease in an earlier article²⁵³ on *Ivanhoe Irrigation District v. All Parties and Persons*.²⁵⁴ Following *Illinois Central*, the California Supreme Court in *Ivanhoe Irrigation* used property doctrine to support a public trust. The court said:

[T]he state is not the owner of the domestic water of the state in the sense that it has absolute power and dominion over it to the exclusion of the rights of those who have the beneficial interest therein. The title is an equitable one residing in the water users of the state. The state as an entity is the holder of the legal title as trustee for the benefit of the people of the state, all of whom in the last analysis, are the water users of the state.²⁵⁵

In *Ivanhoe Irrigation*, as in the *Illinois Central*, the dissenting judges explicitly opposed the majority's knowing use of a property doctrine.²⁵⁶ To explain such language while avoiding a *res communes* property doctrine, Trelease argued that the courts called something a "trust" merely to "put across the thought more forcefully" when they only meant it was "like a trust."²⁵⁷ Sax and Trelease,

But the *Illinois Central* Court's holding rests on completely different ground. The Court never held the government's conduct questionable in the abstract. Instead, the case turned on the nature of the property interest involved. In addition, Sax never clearly explains what he means by "considerable skepticism." Professor Jaffe implies that Sax really has no clear meaning. See Jaffe, Book Review, 84 HARV. L. REV. 1562, 1566-68 (1971) (reviewing J. SAX, DEFENDING THE ENVIRONMENT (1971)).

The Court in *Illinois Central* set out to determine title, and it did. 146 U.S. at 433, 463. It did not exercise judicial review, but determined where the property interests lay as a matter of law. The Court never scrutinized the government's actual conduct in deciding the ownership issue.

²⁵¹ 146 U.S. at 452-53.

²⁵² See note 229 *supra*.

²⁵³ Trelease, *Government Ownership and Trusteeship of Water*, 45 CALIF. L. REV. 638 (1957).

²⁵⁴ 47 Cal. 2d 597, 306 P.2d 824 (1957), *rev'd sub nom.* *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958). The Supreme Court found it unnecessary to deal with the question of ownership. 357 U.S. at 290-91.

²⁵⁵ 47 Cal. 2d at 625, 306 P.2d at 840.

²⁵⁶ *Id.* at 648, 306 P.2d at 855.

²⁵⁷ Trelease, *supra* note 253, at 648 (emphasis in original).

in their eagerness to avoid a property basis for the public trust doctrine, had to rewrite the courts' clear language.

Sax offered two reasons for discarding the property background to the public trust doctrine. First, Sax noted:

At most, the government may resolve that certain resources will be used for specific purposes—for instance, that land is to be set aside as a park. But it is reasonable to assume that such decisions imply that the specified uses shall be available only until the legislature decides to devote the land to some other public purpose.²⁵⁸

He reasoned that it is fruitless to try to demonstrate whether the government conveys a complete title or merely designates a specific, if transitory, purpose when the government grants a resource to the general public. Second, Sax believed that “[i]t makes economic sense to prevent the government from taking the property of an individual owner, but it is difficult to understand why the government should be prevented from taking property which is owned by the public as a whole.”²⁵⁹ He concluded that the use of the government's condemnation power is not an appropriate way to rededicate public land to a new use. Basically, Sax believed that governments should not be bound to irrevocable commitments through the *res communes* doctrine.

Sax's arguments are unpersuasive. The first argument begs the question of whether the state or the commonalty initially owned the *res*. But this question is exactly what courts must decide. The second argument assumes that the state can never convey title to *res communes* and that every act of the government which distributes costs equally over the entire commonalty is fair. But states can alienate *res communes*, and courts must often serve as the ultimate arbitrators of the fairness of such transactions even when the public shares the costs equally. In fact, courts played just that role under the public trust doctrine in *Illinois Central* and *Ivanhoe Irrigation*.²⁶⁰

Professor Jaffe has also criticized Sax's concept of the public trust doctrine as being so vague as to introduce virtual de novo court review into all administrative matters.²⁶¹ This result could be prevented by restricting the public trust doctrine to its original

²⁵⁸ Sax, *supra* note 198, at 479.

²⁵⁹ *Id.*

²⁶⁰ See text accompanying notes 236-52 *supra*.

²⁶¹ Jaffe, *supra* note 250, at 1566-68.

base of property concepts and thus focusing on the clear and well-established rules of property law. Jaffe's criticism helps to reveal what may be the real reason Sax and Trelease have attempted to separate the public trust doctrine from its original property background—to make it more palatable to the courts. But Sax himself admits that “[t]he most common theory advanced in support of a special trust obligation is a property notion.”²⁶² Jaffe correctly points out that a vague, apparently limitless doctrine of public trust, neither clearly nor historically based, stands far less chance of court acceptance than one firmly founded on ancient property notions.²⁶³

The recent *Paepcke* case²⁶⁴ illustrates that a public trust doctrine tied to property concepts is more acceptable. The central question in this case was whether Chicago taxpayers had standing to challenge the decision of the city to build schools in two city parks.²⁶⁵ The court held that such taxpayers had an “equitable interest . . . in the public property” sufficient for standing because of the public trust doctrine.²⁶⁶ Like the courts in *Ivanhoe Irrigation* and *Illinois Central*, the Illinois court explained its decision in terms of property doctrine:

Upon serious reconsideration of this question we now believe that portion of the opinion in *Droste* dealing with the right and standing of the plaintiff to sue should be overruled, as should any other former decisions of this court holding that a citizen and taxpayer has no right, in the absence of statute, to bring an action to enforce the trust upon which public property is held unless he is able to allege and prove special damage to his property. If the “public trust” doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who are the beneficiaries of that trust, must have the right and standing to enforce it.²⁶⁷

The adoption of a public trust theory did not restrict the flexibility of the court's review. In fact, the court ultimately approved the building of the schools. In so doing, it cited Sax's article, not for the proposition that a property-based public trust doctrine was infeasible but to support the proposition that no property doc-

²⁶² See Sax, *supra* note 198, at 478.

²⁶³ See Jaffe, *supra* note 250, at 1567-68.

²⁶⁴ 46 Ill. 2d 330, 263 N.E.2d 11 (1970).

²⁶⁵ *Id.* at 340-41, 263 N.E.2d at 18.

²⁶⁶ *Id.* at 341, 263 N.E.2d at 18.

²⁶⁷ *Id.*, 263 N.E.2d at 18 (emphasis added).

trine which "prohibit[s] the government from ever accommodating new public needs by reallocating resources" could be supported.²⁶⁸ The public trust doctrine did not prevent the state from changing a *res communes* from one beneficial use to another.²⁶⁹ The state reallocated the property in a way which, as a practical matter, attempted to protect the collective interests of the public beneficial owners,²⁷⁰ with judicial review available as a further safeguard.

The *Paepcke* court decided that the change in property use was made "in good faith and for the public good," and was thus within the state's discretion as trustee of the public trust property held for the public's benefit.²⁷¹ The decision, therefore, rested upon a strong foundation of traditional property trust doctrine. The court found that this *res communes* property doctrine provided standing for members of the public who possessed no private ownership interests and also a basis for careful judicial review of a state's decision with regard to the parks in question. The case reveals that a *res communes* property basis for public trust review is both palatable to courts and useful to environmentalists.

But change-in-use and alienation cases do not provide the only possibilities for the constructive use of this ancient doctrine. First, it could give standing for citizens or users to sue for pollution injuries to a *res communes*. Second, it might cause a shift in the burden of proof required to prevent the use of *res communes* in ways contrary to the public's beneficial ownership interest.

Public nuisance doctrine has long blocked the standing of private citizens to bring pollution suits. Unless an individual can show special damages, only the state, at its discretion, can sue for public nuisance.²⁷² But beneficial owners of a *res communes* under a state public trust should have standing to bring a mandamus suit against the state to force a public nuisance suit to protect the trust because "[a] trust imposes an affirmative duty upon the trustee to hold and use the property for the exclusive benefit of the beneficiary, and where that benefit involves conservation objectives, the government must act affirmatively to achieve its realization."²⁷³ This approach would reduce the discretion enjoyed

²⁶⁸ *Id.* at 337, 263 N.E.2d at 16 (quoting Sax, *supra* note 198, at 482).

²⁶⁹ See text accompanying notes 251-52 *supra*.

²⁷⁰ See *Illinois C.R.R. v. Illinois*, 146 U.S. 387, 453 (1892).

²⁷¹ 46 Ill. 2d at 347, 263 N.E.2d at 21.

²⁷² See W. PROSSER, *supra* note 21, § 88, at 586-87.

²⁷³ Berlin, Kessler & Roisman, *Law in Action: The Trust Doctrine*, in *LAW AND THE ENVIRONMENT* 171 (M. Baldwin & J. Page eds. 1970).

by some state attorneys general. At present, they can choose not to bring a public nuisance suit, even where the facts would support one.²⁷⁴ Under the *res communes* doctrine, a member of the public should at least have standing to bring a mandamus action to demand such a suit when a *res communes* is threatened.

Despite the advantages of the doctrine, several natural limitations would prevent it from resulting in excessive litigation. First, a *res communes* must be at stake. Whether the particular property in question constitutes a *res communes* would be a question of law for the court's determination. Samuel Wiel provided some guidance in defining the characteristics of a *res communes* by comparing the lists of items considered to be *res communes* in various American and English jurisdictions.²⁷⁵ Even radio and television airwaves may be described as *res communes*, and efforts to buy them in fee, despite any interest of the commonalty, have been rejected.²⁷⁶ Second, the expense of bringing a mandamus action

²⁷⁴ See Jaffe, *Standing to Sue in Conservation Suits*, in LAW AND THE ENVIRONMENT 131 (M. Baldwin & J. Page eds. 1970). See also Katz, *supra* note 139, at 622. Statutes in Wisconsin and Florida allow private citizens to sue in the name of the state to enjoin a nuisance. FLA. STAT. ANN. § 60.05 (West 1969 & West Supp. 1979); WIS. STAT. ANN. § 823.02 (West 1977).

²⁷⁵ Wiel, *supra* note 208. Wiel's article, however, is limited to the "four natural commonisms" (air, running water, sea, and seashore), and does not attempt a general analysis of ownership rights. Wiel also summarily rejected ownership ideas such as a public trust because the theory would turn "negatives into some resembled positive." *Id.* at 426. His rejection of ownership by the commonalty results in no ownership of *res communes*. *Id.* at 426. See Wiel, *Running Water*, 22 HARV. L. REV. 190, 190-96 (1909). But Wiel's own copious examples, particularly those regarding rights to light, airport access, and radio waves, show that equitable interests recognized by property law do accurately describe the public's interest in *res communes*.

Other authorities disagree with the proposition that no one owns *res communes*. The Supreme Court discussed *res communes* in *Geer v. Connecticut*, 161 U.S. 519, 525 (1896). Justice White cited the Napoleonic Code as summing up an "unbroken line of law and precedent" on *res communes*. *Id.* at 526. The passage cited from the Napoleonic Code states that "[t]here are things which belong to no one, and the use of which is common to all." *Id.* In the next paragraph, Justice White refers to this as "the principle of common ownership." *Id.* Importantly, Justice White recognized that although *res communes* belong to no one, this does not mean that they are ownerless or owned by the state, but rather it means that they are owned in common. Just because *res communes* "cannot be exclusively and wholly appropriated" does not mean they cannot be owned in common, unless one assumes the exclusivity test discussed earlier. See text accompanying notes 223-30 *supra*.

²⁷⁶ See Wiel, *supra* note 208, at 429-30. Wiel concluded that, at any time, "about the closest to common right in *Air is Radio*." *Id.* at 456 (emphasis in original). The concept of radio waves as *res communes* is consistent with federal legislation and recent Supreme Court decisions. See 47 U.S.C. § 301 (1976) (United States shall "control" such waves and shall permit "use" but not "ownership" by persons for limited periods of time). The Supreme Court has indicated on several occasions that such control is to be governed by the public interest. See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 394 (1969); *Ashbacker*

would inhibit litigants from undertaking an action for trivial reasons.²⁷⁷ In addition, if the state had undertaken other affirmative action to protect the *res communes* in question, the courts could find a public nuisance suit unnecessary to enforce the public trust. Like any trustee, the state would be liable for abuse of discretion.²⁷⁸ Finally, even a successful mandamus action would not spell ultimate victory, but only access to a trial on the merits.

Beyond opening courts to environmental litigants, using *res communes* property doctrine may furnish plaintiffs with another significant advantage—a favorable burden of proof. When private property is condemned, the owner normally bears the burden of showing that the government acted arbitrarily. Although no cases have established a different rule for the reallocation of *res communes*, the recent New Jersey decision of *Texas Eastern Transmission Corp. v. Wildlife Preserves, Inc.* forecasts a shift in the burden in favor of environmental plaintiffs.²⁷⁹ In that case, the court instituted a special burden of proof rule when the state attempted to condemn a pipeline right of way through a privately owned wetland wildlife preserve.²⁸⁰ The court distinguished this situation from “that of an ordinary property owner”²⁸¹ because “defendant’s devotion of its land to a purpose which is encouraged and often engaged in by government itself gives it a somewhat more potent claim to judicial protection against taking . . . by arbitrary action of a condemnor.”²⁸² The more favorable burden of proof rule may have tacitly reflected the public *res communes* interest in the unique environmental value of the preserve’s wetland,²⁸³ without discriminating unfairly between private owners. Favoring

Radio Co. v. FCC, 326 U.S. 327, 333 (1945); FCC v. Sanders Radio Station, 309 U.S. 470, 475 (1940). These statutes and cases are consistent with the concept of common beneficial ownership of the airwaves by the public with the title held in trust by the national government, which controls the use of the *res communes* for the public benefit. If this is true, sales of airwaves to private concerns by the government would have to meet the standards of *Illinois Central*. See text accompanying note 239 *supra*.

²⁷⁷ See *Scenic Hudson Preservation Conf. v. Federal Power Comm’n*, 354 F.2d 608, 617 (2d Cir. 1965) (“experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken”), *cert. denied*, 384 U.S. 941 (1966).

²⁷⁸ See G.G. BOGERT & G.T. BOGERT, *HANDBOOK OF THE LAW OF TRUSTS* 322-24 (5th ed. 1973).

²⁷⁹ 48 N.J. 261, 225 A.2d 130 (1966).

²⁸⁰ *Id.* at 275, 225 A.2d at 138.

²⁸¹ *Id.* at 268, 225 A.2d at 134.

²⁸² *Id.* at 273, 225 A.2d at 137.

²⁸³ The preserve had been described by expert witnesses as “‘the finest inland, natural fresh water wetland in the entire Northeastern United States.’” *Id.* at 270, 225 A.2d at 135.

the preserve in this case could easily end in unfair results if the preserve's owners used its position to defeat the condemnation proceedings and then sold the wetland to the pipeline company at a higher price. In any event, if such a private owner merits a special burden of proof rule, a *res communes* case, which more clearly involves public ownership interests, would certainly deserve at least this advantage.²⁸⁴

Res communes doctrine may soon enter the public spotlight. Ralph Nader's *Study Group Report on Water Pollution* has alleged that a major polluter of water is the government itself.²⁸⁵ Nader, in a press conference preceding the report's release, denounced federal and state government agencies for treating water resources as "their private sewers." Nader asserted: "water belongs to no one—except the people."²⁸⁶ This is the spirit of the *res communes* doctrine. *Res communes* interests would serve as a disincentive to governmental as well as private misbehavior.

In a 1979 landmark decision, *Boston Waterfront Development Corp. v. Commonwealth*,²⁸⁷ the Supreme Judicial Court of Massachusetts made a bold return to the spirit of *Illinois Central*. At issue was the ownership of land "covered by the seaward end of a wharf constructed over filled land, partly occupied by the corner of an ancient granite building now renovated into modern shops, offices, restaurants, and condominiums."²⁸⁸ Holding that the title to the land was not an ordinary fee simple but was "subject to the condition that it be used for a public purpose related to the 'promot[ion of] trade and commerce'"²⁸⁹ the court stated:

The essential import of this holding is that the land in question is not, like ordinary private land held in fee simple absolute, subject to development at the sole whim of the owner, but it is impressed with a public trust, which gives the public's representatives an interest and responsibility in its development. This concept is difficult to describe in language in complete harmony with the language of the law ordinarily applied to privately owned property. We are not dealing with the allocation

²⁸⁴ The court implied as much when it compared the wildlife preserve with more public enterprises. *Id.* at 268, 225 A.2d at 134.

²⁸⁵ See D. ZWICK & M. BENSTOCK, *WATER WASTELAND* 340-65 (1971).

²⁸⁶ Boston Evening Globe, Apr. 12, 1971, at 5, col. 1.

²⁸⁷ [1979] Mass. Adv. Sh. 1992.

²⁸⁸ *Id.* at 1993.

²⁸⁹ *Id.* at 2023.

of property rights between private individuals when we are concerned with a public resource such as Boston Harbor.²⁹⁰

In support of this holding, the court specifically referred to the Roman property doctrine of *res communes*,²⁹¹ the property doctrine of *Illinois Central*,²⁹² and the English law of *jus privatum* and *jus publicum* in relation to the shoreland.²⁹³ According to the court:

Legislative awareness of this historical background is evident, for example, in an 1850 report of the Senate Joint Committee on Mercantile Affairs and Insurance concerning the flats in Boston Harbor, in which the committee stated: "By the law of all civilized Europe, before the feudal system obtained in England, there was no such thing as property in tide waters. Tide waters were *res omnium*, that is, they were for the common use, like air and light In England, the fiction of a fee in the Crown, and the control of the trust in Parliament, we understand to have been a mode, suited to the times and the

²⁹⁰ *Id.* at 2017.

²⁹¹ The court stated that:

Throughout history, the shores of the sea have been recognized as a special form of property of unusual value; and therefore subject to different legal rules from those which apply to inland property. At Roman law, all citizens held and had access to the seashore as a resource in common; in the words of Justinian, "they [the shores] cannot be said to belong to anyone as private property." Institutes of Justinian, 2.1.1-2.1.6 cited in Note, The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.J. 762, 763 (1970), see David A. Rice, Final Report: A Study of the Law Pertaining to the Tidelands of Massachusetts, 1971 House No. 4932, at 17-18.

Id. at 1994.

²⁹² Extensively quoting *Illinois Central*, the court stated that:

This requirement, that such lands be granted only for public purposes, was held by the Court to be central to the notion of governmental power. "The State can no more abdicate its trust over property in which the whole people are interested," the Court stated, "so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace."

[1979] Mass. Adv. Sh. at 2014 (quoting *Illinois Central R.R. v. Illinois*, 146 U.S. 387, 453 (1892)).

²⁹³ The *jus privatum/jus publicum* distinction in regard to shoreland property was carried over to the new world, so that the company's ownership was understood to consist of a *jus privatum* which could be "parcelled out to corporation and individuals . . . as private property" and a *jus publicum* "in trust for public use of all those who should become inhabitants of said territory"

[1979] Mass. Adv. Sh. at 1997 (quoting *Commonwealth v. City of Roxbury*, 75 Mass. (9 Gray) 451, 483-84 (1857)) (footnote omitted). The same distinction was made regarding

genius of the feudal law, for insuring to the State the control over tide-waters. The Commonwealth succeeds to this right of control."²⁹⁴

The court concluded that "[t]he land below low water line can be granted by the State only to fulfill a public purpose, and the rights of the grantee to that land are ended when that purpose is extinguished."²⁹⁵ This is close to the classic *res communes* property doctrine.²⁹⁶

CONCLUSION

Honoré observed that "a mature system of law" limits uses of property that cause harm to others because "without them, 'ownership' would be a destructive force."²⁹⁷ During the nineteenth century, however, the law "hewed to an ideal of competitive self-assertion."²⁹⁸ As Morton Horwitz has established, both English and American courts relaxed their protection of the more passive uses of property, and, in effect, subsidized developing industry by forcing the cost of its by-products on society in general.²⁹⁹ In this atmosphere, the rationale of *St. Helen's Smelting* was misconstrued as establishing a balancing of utilities doctrine that overrode the previous absolute *sic utere tuo* guarantees of the common law to the passive property holder.³⁰⁰ In addition, the relaxation of the *sic utere tuo* guarantee removed an important incentive for industrial control of pollution by improved technology.

The older common law, in contrast, constantly concerned itself with the concrete relations between individuals, especially in its development of property doctrine. Lime kilns, tallow furnaces, pig sties, and dyeing vats, although important to the social well-being of seventeenth century England,³⁰¹ were viewed by the

the ownership of shorelands in colonial New Jersey. See *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 411-13 (1842).

²⁹⁴ [1979] Mass. Adv. Sh. at 1996-97.

²⁹⁵ *Id.* at 2013.

²⁹⁶ All the more remarkable is that the *res communes* issues were arguably not raised below, and that the relevant Massachusetts statute contained no explicit conditions for making the grant in question. *Id.* at 2024-25 (dissenting opinion, Braucher, J.).

²⁹⁷ Honoré, *supra* note 5, at 123.

²⁹⁸ Pound, *A Comparison of Ideals of Law*, 47 HARV. L. REV. 1, 15 (1933).

²⁹⁹ M. HORWITZ, *supra* note 83, at 63, 74-78.

³⁰⁰ See notes 105-182 and accompanying text *supra*.

³⁰¹ J. DAWSON, *supra* note 86, at 269-70.

courts in the context of the costs they inflicted on neighboring property owners and not as isolated under ideal conditions.³⁰² Similarly, the earlier common law protected certain things of importance to the entire community from private exploitation by individual owners.³⁰³ These *res communes*, in theory, gave even the humblest person a legal interest in a part of his environment. The realization that the nineteenth century laissez faire ideals are not inextricably a part of our civilization or our rule of law is an important lesson that legal history can teach well.

In 1894, Professor John T. Dillon of Yale predicted that American property law would see "important changes of substance and form" as it adapted to the new values in American society.³⁰⁴ Appropriately, the *res communes* doctrine, one of property law's oldest elements, may assist in this change. The courts can use it to clarify the protectable interests in things once considered freely exploitable, thus preventing social conflict by fairly identifying and allocating the costs of life in a crowded world.

The *sic utere tuo* or the *res communes* doctrines should not necessarily be restored to the present law in their old forms, or in any form. But a historical perspective on law can often give "a more significant perspective on legal reality than the logician's analytic intelligence."³⁰⁵ When looking out on those neighborhoods that, in nineteenth century balancing of utilities terms, have become "denaturalised,"³⁰⁶ the politician, the economist, the engineer, and the lawyer can find inspiration in the roots of our legal heritage.

The reason and spirit of cases make law; not the letter of particular precedents.

—Lord Mansfield³⁰⁷

³⁰² See text accompanying notes 67, 71-72 *supra*.

³⁰³ See text accompanying notes 183-235 *supra*.

³⁰⁴ J. DILLON, THE LAWS AND JURISPRUDENCE OF ENGLAND AND AMERICA 385 (1894).

³⁰⁵ Howe, *Introduction* to O.W. HOLMES, THE COMMON LAW at xix (M. Howe ed. 1968).

³⁰⁶ *St. Helen's Smelting Co. v. Tipping*, 11 Eng. Rep. 1483, 1485 (H.L. 1865).

³⁰⁷ *Fisher v. Prince*, 3 Burr. 1363, 1364, 97 Eng. Rep. 876, 876 (K.B. 1762).