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## Nuisance In A Nutshell

Howard L. Oleck\*

“N UISANCE” IS A WORD, and a legal phenomenon, of vague and conflicting nature. It refers to a liability rather than to an act. This article essays to summarize the modern law of nuisance, briefly, and without detailed attempts to indicate the latest points of evolution of the law on the subject.

In general terms, nuisance may be said to be all of the following: A class of wrongs or harms arising from unlawful or unreasonable use of one's property to the injury of others, or from unlawful or unreasonable conduct or omission, to the injury of others, producing such harm to the persons, rights or property of those others as to raise a presumption of damage even where no specific value of damage can be shown.<sup>1</sup> It is anything that endangers life, health, or freedom-from-interference, offends the senses or the morals, or obstructs reasonable and comfortable use of property.<sup>2</sup>

It is generally agreed that the term has such a broad and varied meaning that it cannot be exactly defined.<sup>3</sup> It is used as a “catch-all” term to cover many tortious acts or omissions for which no particular names exist.<sup>4</sup> Even the *Restatement of the Law of Torts* leaves the field quite wide open in classifying and describing “nuisances” as invasions of land interests.<sup>5</sup> This is one of the reasons for the growth, in recent years, of the custom of treating many specific tortious acts, which are “nuisance,” as separate, generically-named matters (viz. “blasting,” “riparian rights,” “lateral support,” “smoke,” “fumes,” etc., etc.). It probably also partly helps to explain the rapid development of “negli-

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<sup>1</sup> See, *City of Phoenix v. Johnson*, 51 Ariz. 115, 75 P. 2d 30 (1938). And see, *Waschak v. Moffat*, 109 A. 2d 310 (Penna. 1955); *Noted*, 8 Vand. L. R. 921 (1955), on intentional interference. But see below, n. 12.

<sup>2</sup> *Black's Law Dict.*, 1214 (4th ed., 1951), cf., *Hall v. Putney*, 291 Ill. App. 508, 10 N. E. 2d 204, 207 (1937). Statutory definitions: Calif. Civ. Code, Secs. 3479, 3880; Burns Ind. Stats. Sec. 2-505; Page's Ohio Rev. Code, Sec. 3767.

<sup>3</sup> *Garrett, Law of Nuisances*, 4 (3rd ed., 1908), *Winfield, Torts*, 442 (5th ed., 1950); *Prosser, Torts*, Sec. 70 (2d ed., 1955); *Seavey, Nuisance*, 65 Harv. L. R. 984 (1952); *Hepburn, Cases on Torts*, Chap. 5 (3rd ed., 1954).

<sup>4</sup> See, *Smith, Torts Without Particular Names*, 69 U. Penna. L. R. 91 (1921).

<sup>5</sup> *Restatement, Torts*, Secs. 822-840; and see, for discussion of the Restatement and English views, *Paton, Liability For Nuisance*, 37 Ill. L. R. 1 (1942).

gence" in recent years. Many things commonly classed in the area of "negligence" today would have been included in "nuisance" in the past. And the two terms and areas of law blend imperceptibly into each other, even more than is true of other types of torts, most (but not all) of which also are largely explainable in terms of negligence.<sup>6</sup>

### Nuisance Distinguished from Other Torts

The principal differential between nuisance and negligence is that of "continuity" of the improper invasion of interests of others. Continuity of such invasion is the essence of nuisance. This is a broader concept than the English rule of strict liability as laid down in *Rylands v. Fletcher*.<sup>7</sup> Accumulated waters on one's own land, it was held in that case, if they burst upon the land of another, constitute a trespass to land, but when they continually seep into the land of another they constitute a nuisance.<sup>8</sup>

The same conduct may be negligence and also nuisance.<sup>9</sup> But negligence is a violation of a relative duty, while nuisance is a violation of an absolute duty.<sup>10</sup> Nuisance-conduct is wrongful in itself, negligence is wrongful only in failure to perform a duty owed to the injured party, though the act itself is not wrongful.<sup>11</sup> If damage is an inevitable consequence or incident of what the defendant does or omits, his conduct is nuisance rather than negligence; but there must be some injury sustained, ordinarily, in order to have a right of private action for nuisance.<sup>12</sup>

The fact that nuisance originally (historically) applied to interference with the free use of land,<sup>13</sup> and then became a

<sup>6</sup> Cardozo, in *McFarlane v. Niagara Falls*, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1 (1928); and see, Winfield, *Torts*, 442 (5th ed., 1950); Harper, *Torts*, 371-374 (1933); Belli, *Modern Trials*, Sec. 70 (1954); Prosser, *Nuisance Without Fault*, 20 *Tex. L. R.* 399 (1942).

<sup>7</sup> *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330 (Engl.). See, Garner, *Trespass, Nuisance and Negligence*, 106 L. J. 35 (1956); Newark, *Trespass or Nuisance or Negligence*, 17 *Modern L. R.* 579 (1954).

<sup>8</sup> Bohlen, *The Rule in Rylands v. Fletcher*, 59 *U. Penna. L. R.*, 298 (1911).

<sup>9</sup> *Terrell v. Alabama Water Serv. Co.*, 245 Ala. 68, 15 S. 2d 727 (1943).

<sup>10</sup> *Flanagan v. Gregory & Poole*, 67 S. E. 2d 865 (W. Va., 1951).

<sup>11</sup> *Blessington v. McCrory Stores Corp.*, 198 Misc. (N. Y.) 291, 95 N. Y. S. 2d 414 (1950).

<sup>12</sup> Inevitable damage: *Bohan v. Port Jervis Gaslight Co.*, 122 N. Y. 18, 25 N. E. 246, 9 L. R. A. 711 (1890). Actual damage: *Ottumwa v. Nicholson*, 161 Iowa 473, 143 N. W. 439 (1913).

<sup>13</sup> Winfield, *Nuisance as a Tort*, 4 *Cambr. L. J.* 189 (1931). Liability now exists (1913), L. R. A. 1916 E. 983.

criminal writ for invasions of land by acts on one's own land,<sup>14</sup> colors it to this day. Its nature as a "purpresture," or interference with property of the Crown,<sup>15</sup> also had a persistent effect. This probably had much to do with the rule (which still exists) that "all nuisances may be abated by the mere act of an (affected) individual"<sup>16</sup> (i.e., "self-help").

Some nuisances exist despite the exercise of all possible care by the defendant. Breach of a duty is not a necessary element in such cases.<sup>17</sup>

Trespass to land, as above pointed out, involves a usually non-continuous, physical invasion.<sup>18</sup> Nuisance includes this, plus continuity in most cases, plus effects of intangibles and only-technically-physical invading mechanisms, such as fumes, noise, and the like.<sup>19</sup>

A nuisance also may be a crime or a misdemeanor, at the same time that it is a civil tort, largely as a result of its old criminal-remedy history, as well as because of its inherent nature.<sup>20</sup>

"Waste," also has many points of resemblance to nuisance; but is a distinct subject in itself. The same might be said of zoning laws or other rules of pure-real-property-law.

### Classification of Nuisances

*Nuisance per se* means conduct, property, or an occupation or calling, which is of itself, at any time and in any circumstances or location, a nuisance.<sup>21</sup> It is something harmful to life, property, morals, or peace of mind, especially as to public rights or property, as distinguished from things named as nuisances by statutes, or things which are nuisances only under particular

<sup>14</sup> Winfield, *Torts*, 442 (5th ed., 1950).

<sup>15</sup> Attorney-General v. Richards, 2 Anstruther 603 (Engl.) Ct. Exch. (1795); Garrett, *Law of Nuisances*, 1 (3rd ed., 1908).

<sup>16</sup> Attorney-General v. Richards, *ibid.*, n. 15; 3 Bl. Comm. 5, 168.

<sup>17</sup> Helms v. Eastern Kansas Oil Co., 102 Kans. 164, 169 P. 208, L. R. A. 1918 C, 227 (1917).

<sup>18</sup> See, Williams v. Pomeroy Coal Co., 37 Ohio St. 583 (1882).

<sup>19</sup> Harper, *Torts*, 374 (1933).

<sup>20</sup> Commonwealth v. Smith, 266 Penna., 511, 109 A. 786, 9 A. L. R. 922 (1920); People ex rel. Bennett v. Laman, 250 A. D. 660, 295 N. Y. S. 728, *aff'd.*, 277 N. Y. 368, 14 N. E. 2d 439 (1938).

<sup>21</sup> Keys v. City of Versailles, 224 Mo. App. 178, 22 S. W. 2d 182 (1929); American Cement Corp. v. Price, 164 Md. 234, 164 A. 545 (1933).

circumstances or in particular places.<sup>22</sup> This (per se nuisance) sometimes also is termed "absolute nuisance."

*Nuisance in fact* means conduct, property, or an occupation or calling, which is not a nuisance per se, but which may become harmful (nuisance) in particular locations, or in particular circumstances.<sup>23</sup>

*Continuing nuisance* means one that continues unceasingly, or so often-recurring as to have a substantially continuous harmful effect.<sup>24</sup>

*Permanent nuisance* means one that will inevitably do more damage if allowed to continue,<sup>25</sup> or one that is difficult or expensive to abate.<sup>26</sup>

*Common nuisance* means the same as "public nuisance."<sup>27</sup>

*Public nuisance* is one that affects an indefinite number of people, or an entire area or community, though its effects on each individual therein may vary.<sup>28</sup> Being an offense against the public, it is a crime. It is not actionable by an individual, but only by the "state," ordinarily, unless and until it injures him personally or directly. Then it becomes also a "private nuisance" as to him.<sup>29</sup> Thus, one injured by an obstruction or hole in a public road is personally damaged in this sense.<sup>30</sup> And thus it is clear that the same conduct may be both a public and a private nuisance.<sup>31</sup> This is treated more fully, below.

<sup>22</sup> *Simpson v. DuPont Powder Co.*, 143 Ga. 465, 85 S. E. 344, L. R. A. 1915 E, 430 (1915); *Whitmore v. Paper Co.*, 91 Me. 297, 39 A. 1032, 40 L. R. A. 377 (1898); *Hundley v. Harrison*, 123 Ala. 292, 26 S. 294 (1899).

<sup>23</sup> *Asphalt Products Co. v. Marable*, 65 Ga. App. 877, 16 S. E. 2d 771 (1941).

<sup>24</sup> *Kafka v. Bozio*, 191 Calif. 746, 218 P. 753, 29 A. L. R. 833 (1923).

<sup>25</sup> *Norfolk & W. R. Co. v. Allen*, 118 Va. 428, 87 S. E. 558, 560 (1916).

<sup>26</sup> *Cumberland Torpedo Co. v. Gaines*, 201 Ky. 88, 255 S. W. 1046 (1923).

<sup>27</sup> *State v. Rodgers*, 91 N. J. L. 212, 102 A. 433 (1917).

<sup>28</sup> *Lansing v. Smith*, 4 Wend. (N. Y.) 30, 21 Am. Dec. 89 (1829); *Chesebrough v. Comm'rs.*, 37 Ohio St. 508 (1882); *Salmond, Torts*, 233 (8th ed., 1934). For modern tests of what is a "public" nuisance, see, *Ballenger v. Grand Saline*, 276 S. W. 2d 874 (Tex., 1955); *Noted 7 Baylor L. R. 468 (1955)*.

Double parking, as nuisance and false imprisonment, *Harnik v. Levine*, 106 N. Y. S. 2d 460 (1951), *Noted*, 13 U. Pitt. L. R. 771 (1952); 4 Ala. L. R. 309 (1952); *criticized*, 51 Col. L. R. 1067 (1951).

<sup>29</sup> *Davis v. Spragg*, 72 W. Va. 672, 79 S. E. 652, 48 L. R. A. (N. S.) 173 (1913); *Kneece v. City of Columbia*, 128 So. Car. 375, 123 S. E. 100 (1924); *Re Debs*, 158 U. S. 564, 15 S. Ct. 900, 39 L. ed. 1092 (1895).

<sup>30</sup> *Downs v. Silva*, 57 R. I. 343, 190 A. 42 (1937); *Smith, Private Action for Obstruction to Public Right of Passage*, 15 Columbia L. R. 1 (1915).

<sup>31</sup> *Harris v. Poulton*, 99 W. Va. 20, 127 S. E. 647, 650, 40 A. L. R. 334 (1925); *Baltzeger v. Carolina M. R. Co.*, 54 So. Car. 242, 32 S. E. 358 (1899).

*Private nuisance* was originally a continuing injury to property rights of another.<sup>32</sup> Its much broader sense, as a "severable" part of a public nuisance, is indicated in the foregoing paragraph. Its essence is "private damage."

*Mixed nuisance* is a term sometimes applied to a nuisance which is both public and private in its effects, as above sketched.<sup>33</sup>

### Pleading Nuisance and Negligence, Alternatively

As this is not an article on pleading, no treatment of the alternative pleading of nuisance and negligence (or other causes of action, or theories of suit) can be given here. That subject is treated in works on negligence forms of pleading.<sup>34</sup> It should be noted, however, that the above-described indistinctness of separation of nuisance from negligence, as theories of law, obviously is responsible for the common practice of lawyers of pleading both causes of action, as a matter of routine, in one complaint.<sup>35</sup>

### Public, and Private Nuisance

"Public nuisance" and "private nuisance" are defined above.

Without attempting to list more than a few of the innumerable possible types of public nuisances, the following are listed as typical:

Obstructing a road.<sup>36</sup>

Smoke or fumes, or pollution of waters.<sup>37</sup>

Bawdy house.<sup>38</sup>

<sup>32</sup> *Whittemore v. Baxter Laundry Co.*, 181 Mich. 564, 148 N. W. 437, 52 L. R. A. (N. S.) 930 (1914). See, Notes, Recent Change in Pennsylvania's Concept of Private Nuisance, 16 U. Pitt. L. R. 384 (1955); Private Nuisance in Louisiana Law, 15 La. L. R. 441 (1955).

<sup>33</sup> *Kelley v. N. Y.*, 6 Misc. (N. Y.) 516, 27 N. Y. S. 164 (1894).

<sup>34</sup> *Oleck, Negligence Forms of Pleading*, 19, 171, 295, 1093, et passim (1956 revision).

<sup>35</sup> *Ibid.*, n. 34, as to alternative pleading, esp. pp. 50, 62, 63; and see, *Belli, Modern Trials*, 492 (1954). For a recent discussion of what must be alleged, see, *Stanolind Oil & Gas Co. v. Smith*, 290 S. W. 2d 696 (Tex. Civ. App., 1956).

<sup>36</sup> *Pilgrim Plywood Corp. v. Melendy*, 110 Vt. 12, 1 A. 2d 700 (1938).

<sup>37</sup> As to smoke or fumes, or dust, etc.: *Page's Ohio Rev. Code*, Sec. 3767.13 et seq.; *State v. United Cork Co.*, 116 N. J. Eq. 4, 172 A. 347 (1934); 3 A. L. R. 312; 11 A. L. R. 1401; 58 A. L. R. 1225. As to pollution: *Page's Ohio Rev. Code*, Sec. 3767.13, et seq.; *Markwand v. Guthrie*, 18 Okla. 32, 90 P. 26, 9 L. R. A. (N. S.) 1150 (1907); *Southland Co. v. McDonald*, 82 S. 2d 448 (Miss., 1955), *Noted*, 27 Miss. L. J. 150 (1956); *Clark v. City of Springfield*, 241 S. W. 2d 100 (Mo., 1953).

<sup>38</sup> *People ex rel. Lemon v. Elmore*, 256 N. Y. 489, 177 N. E. 14 (1931), 75 A. L. R. 1292; *Dyer v. Clark*, 268 Ill. 156, 108 N. E. 994 (1915); *Page's Ohio Rev. Code*, Sec. 3767.01.

Blasting, and noise.<sup>39</sup>

Gambling.<sup>40</sup>

Billiard hall.<sup>41</sup>

Golf course.<sup>42</sup>

Lateral support, blasting, and many other such matters, are problems in real property law, fundamentally.

In many cases, of course, nuisances are both private and public (i.e.: "mixed" nuisances). The question is almost inevitably one of fact, in most cases. And the nuisance may be that even in the absence of fault.<sup>43</sup> It has been well-said that "a nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."<sup>44</sup>

Statutes (such as zoning laws) now usually provide, directly or indirectly, for public nuisances. Usually they include all the common law types and, by not defining a nuisance too clearly, apply to almost any possible type of wrong or harm.<sup>45</sup>

For a private nuisance to arise out of a public nuisance, *special* damage must be shown. Otherwise a private person has no personal right of action for a public wrong, but must leave such action to the public authorities.<sup>46</sup>

<sup>39</sup> Noise: Note, *Noise Nuisances*, 7 Vand. L. R. 695 (1954); *Town of Davis v. Davis*, 40 W. Va. 464, 21 S. E. 906 (1895). And, 33 A. L. R. 725 (amusements); 90 A. L. R. 1207 (factories); 82 A. L. R. 1109 (radio). Blasting: See, Note, 5 Ala. L. R. 78 (1952); *Jones v. Johnson Const. Co.*, 211 Minn. 123, 300 N. W. 447 (1941).

<sup>40</sup> *Regez v. Blumer*, 236 Wis. 129, 294 N. W. 491 (1940) (lottery); *Engel v. State*, 53 Ariz. 458, 90 P. 2d 988 (1939). Or a "Thieves' nest." Page's Ohio Rev. Code, Sec. 3767.12.

<sup>41</sup> 20 A. L. R. 1496; 53 A. L. R. 162.

<sup>42</sup> 23 A. L. R. 447; Bernstein, "Slice" and It May "Hook" You, 15 Phila. Shingle 208 (1952).

<sup>43</sup> See, Prosser, *Nuisance Without Fault*, 20 Tex. L. R. 339 (1942); Noel, *Nuisances from Land in its Natural Condition*, 56 Harv. L. R. 772 (1943); Smith, *Reasonable use of One's Own Property as a Justification for Damage to a Neighbor*, 17 Columbia L. R. 383 (1917).

<sup>44</sup> *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 54 A. L. R. 1016 (1926).

<sup>45</sup> *Engel v. State*, 53 Ariz. 458, 90 P. 2d 988 (1939). For discussion of judicial zoning by nuisance decisions, see, Beuscher & Morrison, Note, in 1955 Wis. L. R. 440; and Zoning Laws, Note, 54 Mich. L. R. 266 (1955). For a typical statute definition of nuisance see, Calif. Civ. Code, Sec. 3479; or Burns Ind. Stats., Sec. 2-505.

<sup>46</sup> *Bouquet v. Hackensack Water Co.*, 90 N. J. L. 203, 101 A. 379, L. R. A. 1917 F. 206 (1917); *Cope v. District Fair Assn.*, 99 Ill. 489 (1881); *Commonwealth v. Smith*, 266 Penna. 511, 109 A. 786, 9 A. L. R. 922 (1920). As to what is "special damage" see, *Oleck, Damages To Persons & Property*, 55, 80 (1956 revision).

Often the statutes also expressly (sometimes, impliedly) give a personal right of action to individuals affected.<sup>47</sup> But if the personal (especially, pecuniary) rights of one of the affected group are injured, he has a "mixed" right of both public and private nuisance.<sup>48</sup> He may have personal rights in negligence, however, even where he cannot show "special" damage in a public nuisance.<sup>49</sup>

Many courts still prefer to award special damages only if a "property right" of some kind can be shown to have been injured, even in private nuisance cases. This tendency stems from the historical development of nuisance as an injury to property. Thus, even the howling of a dog is seized on as an invasion of the private "property" right to peace and quiet, and of "quiet enjoyment."<sup>50</sup>

The "reasonableness of use" of the offender's use of his own property is a factor that tends to cancel out the right of the injured party to complain. This usually is a question of fact, too.<sup>51</sup> Thus, some smoke is bound to come from almost any chimney, or some sounds and noises from any building or home.<sup>52</sup> The standards of the community and of ordinary persons must govern. Public value of the activity always is important, and often will cause a court to refuse injunctive relief that otherwise might be granted.<sup>53</sup> Thus, often a factory employing many per-

<sup>47</sup> Littleton v. Fritz, 65 Iowa 488, 22 N. W. 641, 54 Am. Rep. 19 (1885); Page's Ohio Rev. Code, Sec. 3767.03.

<sup>48</sup> Herold v. Glendale Lodge No. 1289, B. P. O. E., 46 Calif. App. 325, 189 P. 329 (1920); Cope v. District Fair Assn., 99 Ill. 489 (1881). Thus, a crowd regularly outside a restaurant, on the sidewalk. Shamhart v. Morrison Cafeteria Co., 159 Fla. 629, 32 S. 2d 727, 2 A. L. R. 2d 429 (1947); Noted, 26 Chi-Kent L. R. 355 (1947).

<sup>49</sup> Kneee v. City of Columbia, 128 So. Car. 375, 123 S. E. 100 (1924).

<sup>50</sup> Restatement, Torts, Sec. 822, Comment c; Hubbard v. Preston, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249 (1892).

<sup>51</sup> Restatement, Torts, Secs. 826-831; McCarty v. Natural Carbonic Gas Co., 189 N. Y. 40, 81 N. E. 549, 13 L. R. A. (N. S.) 465 (1907). *Sic utere tuo ut alienum non laedas* (use what is yours so that you do not injure another's). Campbell v. Seaman, 63 N. Y. 577, 20 Am. Rep. 567 (1876).

Question for jury: Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N. E. 354 (1909). But may be so clear as to be a matter of law: Snow v. Parsons, 28 Vt. 459, 67 Am. Dec. 723 (1856).

<sup>52</sup> Holman v. Athens E. Laundry Co., 149 Ga. 645, 100 S. E. 207, 6 A. L. R. 1564 (1919); Smith, Reasonable Use as a Justification for Damage to a Neighbor, 17 Columbia L. R. 383 (1917).

<sup>53</sup> State v. Rumpke, 130 N. E. 2d 243 (Ohio App., 1955); 65 C. J. S., Negligence, Sec. 176; Brede v. Minnesota Crushed Stone Co., 143 Minn., 374, 173 N. W. 805, 6 A. L. R. 1092 (1919); Payne v. Johnson, 20 Wash. 2d 24, 145 P. 2d 552 (1944); Collins v. Wayne Iron Works, 227 Penna. 326, 76 A. 24 (1910).



sons, or a public utility, will be favored in this way. Usually such decisions are based on the equitable principle of "balancing of hardships."

### Reasoning of a Nuisance Decision

*Dawson v. Laufersweiler*<sup>54</sup> is an excellent recent illustration of the reasoning of a court in handling the fundamentally factual problem of a nuisance. In that case, the court's decision said, in part:

"The question for decision is whether construction of a funeral home across the street from plaintiffs' residence should be enjoined as a threatened nuisance. . . .

The intersection 3d Avenue South and 12th Street where plaintiffs live and defendant wants to build the funeral home is surrounded at varying distances by residences. Many of the older and better homes in the city are near by. However, the main business district to the north and west has expanded to within a block from this intersection. . . .

The authorities agree that undertaking is a lawful and necessary business and a funeral home is not a nuisance per se. However, it may become a nuisance from the manner in which it is conducted and, according to many authorities, because of its location. There is no fixed rule governing all cases of this kind—each must be determined upon its own facts. See *Beisel v. Crosby*, 104 Neb. 643, 178 N. W. 272, 273; *Hatcher v. Hitchcock*, supra, 129 Kan. 88, 281 P. 869, 872; *Cunningham v. Miller*, 178 Wis. 22, 189 N. W. 531, 534, 23 A. L. R. 739, 742; *O'Malley v. Macken*, 182 Minn. 294, 234 N. W. 323, 324; *Jack v. Torrant*, 136 Conn. 414, 71 A. 2d 705, 709; Anno. 87 A. L. R. 1061.

When it is sought to establish a funeral home in a purely residential district it is held by many decisions to be a nuisance. In *Bevington v. Otte*, 223 Iowa 509, 273 N. W. 98, we held a funeral home in a purely residential district was a nuisance. In the cited case no business was located within four or five blocks of the place. Two plaintiffs lived much nearer defendants' establishment than plaintiffs do here. The driveway where bodies were loaded and unloaded was only about 19 feet from the Bevington residence. The Otte funeral home was not soundproof. No permit had been issued for it. As stated, issuance of a permit pursuant to ordinance is a proper matter to consider on the question of nuisance al-

<sup>54</sup> *Dawson v. Laufersweiler*, 241 Iowa 850, 43 N. W. 2d 726 (1950). For a quite recent case on the same point see, *Jones v. Trawick*, 75 S. 2d 785 (Fla., 1955); Noted, 1 Wayne L. R. 225 (1955). Also, *Frederick v. Brown Funeral Homes, Inc.*, 62 S. 2d 100 (La., 1953), Noted, 10 W. & L. L. R. 235 (1953).

though it is not conclusive. We think *Bevington v. Otte* is not controlling here.

In any event, we are not now prepared to hold, as plaintiffs apparently would have us, that every funeral home, even when properly maintained and operated is necessarily a nuisance merely because it is located in a residential district. Of course it may become a nuisance under the facts of a particular case. . . .

Plaintiffs' main objection to defendant's establishment is that it would have such a depressing effect upon the members of the family as to impair the comfort and enjoyment of their home and depreciate its value. It is true many cases have upheld similar objections where it is proposed to put a funeral home in a purely residential district. In effect they hold a funeral home in a strictly residential district is a nuisance per se because of the inherent nature of the business, although conducted in an approved manner, without unpleasant odors or disease germs. See *Laughlin, Wood & Co. v. Cooney*, 220 Ala. 556, 126 So. 864; *Leland v. Turner*, 117 Kan. 294, 230 P. 1061; *Kundinger v. Bagnasco*, 298 Mich. 15, 298 N. W. 386, and citations; *Streett v. Marshall*, 316 Mo. 698, 291 S. W. 494; *Jordan v. Mesmith*, 132 Okl. 226, 269 P. 1096. We are not in agreement with this view.

However, we think these and similar decisions are not applicable here. . . .

A number of courts have refused to enjoin establishment of a funeral home in a location close to the business district or in a state of transition from residences to commercial uses. *White v. Luquire Funeral Home*, 221 Ala. 440, 129 So. 84; *Fentress v. Sicard*, 181 Ark. 173, 25 S. W. 2d 18; *Moss v. Burke & Trotti*, 198 La. 76, 3 So. 2d 281; *Dutt v. Fales*, 250 Mich. 579, 230 N. W. 948; *O'Malley v. Macken*, supra, 182 Minn. 294, 234 N. W. 323; *Meldahl v. Holberg*, 55 N. D. 523, 214 N. W. 802; *Linsler v. Booth Undertaking Co.*, 120 Wash. 177, 206 P. 976. See also *Kirk v. Habis*, 215 Iowa 769, 246 N. W. 759, 87 A. L. R. 1055, where we refused to enjoin a funeral home in a district zoned for commercial purposes although residences were apparently close by.

The statutory definition of nuisance in Minnesota and in North Dakota is almost identical with our (Iowa) section 657.1, Codes, 1946, 1950, I. C. A.

The mere fact the location of the funeral home would depreciate the value of plaintiff's property for residence purposes does not entitle them to relief. *O'Malley v. Macken*, supra, 182 Minn. 294, 234 N. W. 323; 39 Am. Jur., Nuisances, section 28, 46 C. J., Nuisances, section 56. Location near them of any one of numerous lawful businesses might depreciate the value of their property. Any increase in auto-

mobile traffic which would result from operation of the new home is clearly insufficient basis for injunctive relief. . . .

Injunctions are granted sparingly, with caution and only in clear cases. A threatened nuisance will be enjoined only where it clearly appears a nuisance will necessarily result from the thing it is sought to enjoin. *Amdor v. Cooney*, Iowa, 43 N. W. 2d 136, 137, 141, and citations. See also *Dutt v. Fales*, supra, 250 Mich. 579, 230 N. W. 948, 949; *White v. Old York Road Country Club*, supra, 322 Pa. 147, 185 A. 316, 318. After careful consideration we feel this is not such a case.

Reversed.

[The decision was 5 to 2, with one other judge abstaining.]

(One dissenting justice said:)

I respectfully dissent from the majority opinion. However, I desire to express my disapproval of it.

The case of *Bevington v. Otte*, 223 Iowa 509, 273 N. W. 98, 102, should be, and in my opinion is, controlling in the case here reviewed. But the majority opinion states it is not. I believe it should not be distinguished."<sup>55</sup>

### Remedies for Nuisance

The private remedies for injury or damage resulting from nuisance are:

1. Self-help; abating the nuisance personally, by the use of reasonable force only.<sup>56</sup> But no breach of the peace must be the result.<sup>57</sup> And usually notice, and opportunity to cure the nuisance, must be given.<sup>58</sup>

2. Action for damages, with jury trial.<sup>59</sup> This is the basic remedy.

<sup>55</sup> *Dawson v. Laufersweiler*, 241 Iowa 850, 43 N. W. 2d 726 (1950). For a quite recent case on the same point see, *Jones v. Trawick*, 75 S. 2d 785 (Fla., 1955); Noted, 1 Wayne L. R. 225 (1955). Also, *Frederick v. Brown Funeral Homes, Inc.*, 62 S. 2d 100 (La., 1953), Noted, 10 W. & L. L. R. 235 (1953).

<sup>56</sup> *Hubbard v. Preston*, 90 Mich. 221, 51 N. W. 209, 15 L. R. A. 249 (1892) (dog); *Meeker v. Van Rensselaer*, 15 Wend. (N. Y.) 397 (1836) (disease); *Humphrey Oil Co. v. Liles*, 262, 1058 (Tex. Civ. App.), aff'd., 277 S. W. 100 (Tex. Com. App., 1925).

<sup>57</sup> *People v. Severance*, 125 Mich. 556, 84 N. W. 1089 (1901).

<sup>58</sup> *State v. Brown*, 191 No. Car. 419, 132 S. E. 5 (1926).

<sup>59</sup> *Cumberland Torpedo Co. v. Gaines*, 201 Ky. 88, 255 S. W. 1046 (1923). As to jury trial (constitutional right), see, *People ex rel. Lemon v. Elmore*, 256 N. Y. 489, 177 N. E. 14 (1931); 75 A. L. R. 1292. Measure of damages ordinarily is the same as in a negligence action. *Kentucky, W. Va. Gas Co. v. Lafferty*, 174 F. 2d 848 (C. C. A. 6, 1949), 10 A. L. R. 2d 661; and see generally, *Oleck, Damages To Persons & Property* (1956 revision).

3. Equity or statutory injunction (mandatory or prohibitory injunction or order).<sup>60</sup> As to this, see the preceding section for a practical modern illustration. Here too, "special injury" must be shown, in cases of public nuisance, in order for an individual to obtain an injunction.<sup>61</sup> This is also because Equity will not enjoin a crime, because of constitutional rights of the accused person.<sup>62</sup>

Calendar priority usually is granted by modern statutes, such as Ohio Rev. Code, Sec. 3767.05. As in most Equity matters, the action must be at law, for damages, unless "irreparable" injuries make the remedy of damages at law inadequate.

Of course statutes now usually also provide for penalties such as fines or imprisonment in convictions for public nuisance. Ohio's Revised Code (Sec. 3767.99) is typical, setting fines ranging from \$25 to \$1000, and imprisonment ranging from 30 days to six months for various specified offenses.

It is interesting to note that Ohio Rev. Code (Sec. 3767.23) specifically provides that a corporation may be prosecuted and punished criminally for nuisance.

### Defenses

Reasonableness of use of one's own property always is a defense to a charge of nuisance; and so is the fact that the conduct or thing complained of would not affect the average, normal person.<sup>63</sup>

"Privilege," or "authorization" (e.g.: by licensing, compliance with zoning laws, etc.) also may be a defense.<sup>64</sup> But this still requires reasonable care, especially to avoid a charge of neg-

<sup>60</sup> *Edmunds v. Duff*, 280 Penna. 355, 124 A. 489, 33 A. L. R. 719 (1924); *Amsterdam Knitting Co. v. Dean*, 162 N. Y. 278, 56 N. E. 757 (1900); *Herold v. Glendale Lodge No. 1289*, B. P. O. E., 46 Calif. App. 325, 189 P. 329 (1920); injunction and damages, *Spaulding v. Cameron*, 239 P. 2d 625 (Calif., 1953), Noted, 26 So. Calif. L. R. 338 (1953). Statutory: Page's Ohio Rev. Code, Sec. 3767.04 details the procedure.

<sup>61</sup> See, above, discussion of "public" and "private."

<sup>62</sup> *State v. Ehrlich*, 65 W. Va. 700, 64 S. E. 935, 23 L. R. A. (N. S.) 691 (1909). Enforcement is based on equity or statutory contempt rules. See, Page's Ohio Rev. Code, Sec. 3767.24.

<sup>63</sup> See, above, last paragraph of discussion of "public" and "private," as to reasonableness. As to effect on "average person," see, Restatement, Torts, Sec. 822, Comment g.

<sup>64</sup> *Sadler v. City of N. Y.*, 40 Misc. (N. Y.) 78, 81 N. Y. S. 308 (1903); *Hannum v. Oak Lane Shopping Center*, 119 A. 2d 213 (Penna., 1956) (parking lot, conformity to zoning laws).

ligence.<sup>65</sup> That is, a valid defense against possible injunction may be insufficient defense to prevent an award of damages for negligence. Nor is the licensor-city liable, unless it had notice, or the licensed activity was inherently dangerous.<sup>66</sup>

Similar nuisances by others are no defense.<sup>67</sup>

Contributory negligence usually is not a defense in a purely-nuisance case.<sup>68</sup> But sometimes it is, where negligence is the basis of the case, as where one deliberately permits his cattle to drink polluted water.<sup>69</sup> Or, when the contributory negligence actually constitutes assumption of risk or "avoidable consequences," as in willfully running into a visible obstruction in a road.<sup>70</sup>

But one who acquires property as to which a known nuisance already exists is not estopped thereby from charging nuisance,<sup>71</sup> unless prescriptive rights have arisen, or he bought it only for the purpose of bringing suit.<sup>72</sup>

Riparian rights may allow an upper owner of land along a stream to use a reasonable amount of water, and to make other reasonable use of it.<sup>73</sup> And actual damage must be shown.<sup>74</sup>

The English doctrine of "ancient lights" (eg.: light and air) is not recognized in the United States, except where malicious interference (e.g., tall spite fence) is shown.<sup>75</sup> Zoning statutes now usually cover this problem.

<sup>65</sup> *Hakila v. Old Colony Broken Stone & C. Co.*, 264 Mass. 447, 162 N. E. 895 (1928).

<sup>66</sup> *Wheeler v. Plymouth*, 116 Ind. 158, 18 N. E. 532 (1888); and see, *East Coast Freight Lines v. Consolidated G., E. L. & P. Co.*, 187 Md., 385, 50 A. 2d 246 (1946).

<sup>67</sup> *Birch v. Boston & M. R. R.*, 259 Mass. 528, 156 N. E. 859 (1927); *Jordan v. United Verde Copper Co.*, 9 F. 2d 144 (D. C. Ariz., 1925).

<sup>68</sup> *McFarlane v. City of Niagara Falls*, 247 N. Y. 340, 160 N. E. 391, 57 A. L. R. 1, 7 (1928); *Sheeler v. Waterbury*, 138 Conn. 111, 82 A. 2d 359 (1951). Contra: *Brown v. Alter*, 251 Mass. 223, 146 N. E. 691, 38 A. L. R. 1036 (1925).

<sup>69</sup> *Indiana Pipe Line Co. v. Christensen*, 195 Ind. 106, 143 N. E. 596 (1924); *Denny v. Garavaglia*, 333 Mich. 317, 52 N. W. 2d 521 (1952); Seavey, *Nuisances: Contributory Negligence and Other Mysteries*, 65 Harv. L. R. 984 (1952).

<sup>70</sup> *McFarlane case*, n. 68, above; Seavey article, *supra*, n. 69.

<sup>71</sup> *Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567 (1876).

<sup>72</sup> *Edwards v. Allouez Mining Co.*, 38 Mich. 46, 31 Am. Rep. 301 (1878).

<sup>73</sup> *Baker, Fleming & Hubert v. Brown*, 55 Tex. 377 (1881); *Stratton v. Mt. Hermon Boys' School*, 216 Mass. 83, 103 N. E. 87, 49 L. R. A. (N. S.) 57 (1913).

<sup>74</sup> *Hazen v. Perkins*, 92 Vt. 414, 105 A. 249, 23 A. L. R. 748 (1918).

<sup>75</sup> *Flaherty v. Moran*, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183 (1890). "Ancient Lights" doctrine: see, *Martin v. Price*, L. R. (1894), 1 Chancery 276.

Particular defenses for particular types of claims of nuisance in such specific matters as blasting, smoke, chemicals, explosives, etc., would require too much space to permit discussion here.

### Attractive Nuisance Doctrine

The doctrine of "attractive nuisance," which is followed by most states, and rejected by some, is actually not a matter of nuisance law, fundamentally. Today it is treated rather as a matter of negligence and "due care."<sup>76</sup>

### Philosophy of the Law of Nuisance

Sound pragmatic development of the law of nuisance is evident in the foregoing summary. How profound that law is is another matter. In any event, it reflects the elastic adaptability of the common law. But it shows, too, the characteristic paucity of "projective" thinking that is the great weakness of the common law. Only quite recently has any notable general tendency towards judicial thinking-into-the-future become apparent in Anglo-American jurisprudence.

No branch of our law more clearly shows the real nature of our legal philosophy than does the law of nuisance and negligence. Typically, it is an amalgam of case decisions based on somewhat conservative social views, overlaying a piecemeal growth of limited legislation, on a core of feudal concepts of property rights.

Broadest of all the elements apparent here is the philosophic principle which Kant termed *the categorical imperative*. That philosophy says, in essence: "Act according to a maxim which

<sup>76</sup> See, in this issue of C-M. L. R., Debevec article: "Is The Attractive Nuisance Doctrine Outmoded?" For recent literature and cases on attractive nuisance see, Munkman, Accidents To Straying Children, 105 L. J. 675 (1955); Note, Liability to Infant Trespassers in New York, 7 Syracuse L. R. 137 (1955); Fridman, Dangerous Objects and the Trespassing Child, 23 Sol. 65 (London, 1956); Oleck, Negligence Forms of Pleading, 202 et passim (1956 revision); Kahn v. J. Burton Co., 126 N. E. 2d 836 (Ill., 1955) (building material suppliers), Noted, 10 SW. L. J. 207 (1956); Mayer v. Temple Properties, 122 N. E. 2d 909 (N. Y., 1955), Noted, 21 Bklyn. L. R. 287 (1955); 34 Tex. L. R. 667 (1956); Louisville & N. R. R. Co. v. Spence's Admr., 282 S. W. 2d 826 (Ky. App., 1955); Hoff v. Natural Ref. Pdts. Co., 118 A. 2d 714 (N. J. App., 1956); Beaston v. J. Julian, Inc., 120 A. 2d 317 (Del., 1956) rejecting the doctrine; Restatement, Torts, Sec. 339; Smith v. Evans, 284 P. 2d 1065 (Kans., 1955) accepting the doctrine; Commercial Union F. Ins. Co. v. Blocker, 86 S. 2d 760 (La. App., 1956) accepting it; 65 C. J. S., Negligence, Sec. 29, pp. 456-480. Ohio, Md., Mass., N. Y., Vt., and Va. reject the doctrine. See Debevec article referred to above.

can be adopted at the same time as a universal law." This is more than the doctrine of *stare decisis*.

Of course the Kantian idea really is just a special form of expression of the Golden Rule. But our law of nuisance and negligence expresses that *ethos* primarily in terms of *here and now*. Viz.: *Sic utere tuo (now) ut alienum non laedas (now or in the near future)*.

It was Justice Holmes who most clearly indicated the pragmatic nature of our modern law of nuisance and negligence. Austin's view had prevailed, before that—namely, that civil liability in tort is basically a sanction (i.e., a penalty for disobedience of a rule imposed by the sovereign). In place of this Holmes set the chief rule of the common law—that *experience* is the best determinant of what conduct the law can and should demand of the "average reasonable man."

From both basic philosophies there were evolved the ideas of *duty* and *foreseeability*, crystallized and expounded by Justice Cardozo. *Rylands v. Fletcher* became *Buick v. Macpherson*.

Of course, changes in public policy have affected parties and courts in this as in other areas of law. But in the past 50 years one new final factor has become vitally important. It is yet to be fully amalgamated. This is the factor of scientific advance. As yet its full effects on the law clearly are only a fraction of what they should be.

Here then lies the weakness of the present law. That law well reflects Kantian orderliness, Holmesian pragmatism, and Cardozo morality. But it fails, as yet, to reflect adequately the sweeping advances of scientific knowledge. Therein, despite its otherwise sound syllogisms, it must often err in particular cases.

Undoubtedly current interest in medico-legal and other science-law advances will produce profound effects, in time. As yet however, as the foregoing summary indicates, the lack of a proper proportion of scientific advance is only beginning to be cured.

Until that lack is fully cured, the legal syllogism of this branch of law is unlikely to be completely sound.