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THE PRIVATE NUISANCE CONCEPT IN PENNSYLVANIA: A COMPARISON WITH THE RESTATEMENT

By

HON. CHARLES E. KENWORTHHEY*

One legal writer has said that "there is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately from an alarming advertisement to a cockroach baked in a pie . . . Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of the problem."1

In 1861, the Supreme Court of Pennsylvania in the case of Pottstown Gas Company v. Murphy2 rendered a brief opinion which is a good example of this judicial tendency to "seize upon a legal catchword as a substitute for any analysis of the problem."3 There the defendant constructed a sunken tank from which ammonia seeped into Murphy's well, polluting it. Murphy brought an action on the case for nuisance, and at the end of the trial, the gas company submitted a point for charge that it could not be held liable absent a finding of negligence in the construction of the tank and in the carrying on of its works. The lower court refused to so charge, and a judgment for plaintiff was affirmed on appeal, the Supreme Court observing that "the [lower court] was right in saying that this was not a question of negligence, but of nuisance."4

Legal scholars had done little5 to assist the courts in finding their way out of the labyrinth until Chapter 40 of the Restatement of Torts was published in 1939.6 A nuisance, according to Blackstone, was "anything that worketh hurt, inconvenience, or damage [to a man's lands or tenements]."7 Conceivably included within this definition would be a bolt of lightning which destroys a barn or a flood which carries the old homestead downstream. And Professor Cooley described a nuisance as "anything wrongfully done or permitted which injures

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1 PROSSER, LAW OF TORTS 549-550 (1941).
2 39 Pa. 257 (1861).
3 PROSSER, op. cit. supra note 1, at 550.
4 39 Pa. at 263.
5 PROSSER, op. cit. supra note 1, at 551.
6 It was not until 1875 that a treatise was written on the law of nuisance. See the preface to WOOD, LAW OF NUISANCES (1st ed. 1875), where the author states that he was a "pioneer in this 'wilderness' of law. . . ."
7 4 RESTATEMENT, TORTS 214-312 (1939).
8 1 BL. COMM. *215-216.
another in the enjoyment of his legal rights." This definition could well be applied to the cause of action which arises in favor of a husband when another alienates the affections of his wife.9

One of the most recent attempts by the Supreme Court of Pennsylvania to define nuisance appears in *Kramer v. Pittsburgh Coal Co.*10 as follows:

"In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecent, or unlawful personal conduct, working an obstruction or injury to the right of another, or the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage . . . Nuisance is distinguishable from negligence . . . The distinction between trespass and nuisance consists in the former being a direct infringement of one's right of property, while, in the latter, the infringement is the result of an act which is not wrongful in itself, but only in the consequences which may flow from it."11

SOURCES OF CONFUSION

Because the term "nuisance" has been accorded such a diversified meaning by the courts, a proper understanding of the cases requires a preliminary examination of the manner in which the term has been used. This is true even though the scope of this article has been limited to an analysis of the Pennsylvania decisions.

In the introductory note to Chapter 40 of the *Restatement*12 it is pointed out that this diversification of meaning given to the word "nuisance" may be basically attributable to certain well defined causes for confusion. Hence it has been considered appropriate not only to enumerate some of those sources but in addition occasionally to employ the very language which appears in the introductory note to Chapter 40.

Nature of Interest Invaded

A misunderstanding of the scope of private nuisance has sometimes led to the inclusion, within that term, of wrongs which properly are not so classified.

8 3 COOLEY, LAW OF TORTS §398 (4th ed. 1932).
9 For other definitions, see Joyce, LAW OF NUISANCES §2 (1906); 39 AM. JUR., NUISANCES §2 (1942). Compare Winfield, Nuisance as Tort, 4 CAMB. L. J. 189, 190 (1931); SALMOND, LAW OF TORTS 190 (3d ed. 1912).
11 Id. at 381, 19 A.2d at 363. This definition had its inception in Wood, op. cit. supra note 5. For an amusing comparison, see Euclid v. Ambler Realty Co., 272 U. S. 365, 388 (1926): "A nuisance may be merely the right thing in the wrong place, — like a pig in the parlor instead of the barnyard."
12 4 RESTATEMENT, TORTS 215-225 (1939).
Historically, the action for a private nuisance originated in the assize of nuisance, which was complementary to the assize of novel disseisin and was invented to provide redress where the injury did not constitute a disseisin but rather involved an indirect damage to the land through an interference with its use and enjoyment.

Thus, private nuisance is properly limited to an interference with the use and enjoyment of land and is a wrong only to persons who have property rights or privileges in the land.

There are various types of tortious conduct. Generally speaking, liability in tort exists where an act which causes harm is either intentional and unreasonable or unintentional and negligent, reckless or ultrahazardous. But in determining whether tort liability properly belongs in the field of private nuisance, the determination is not governed by the particular type of tortious conduct nor by the nature of the means used to cause the harm. The feature that gives unity to the law of nuisance is the type of interest invaded—the nature of the harm—namely, interest in the use and enjoyment of land.

It is confusing to think of private nuisance as itself a type of liability-forming conduct, and to contrast it with negligence. The Pennsylvania Supreme Court has been a persistent transgressor in its lip service to the dogma: "It is not a question of negligence, but of nuisance." This confusion has undoubtedly arisen from the fact that most tortious interferences with the use and enjoyment of the land are intentional.

An invasion of a person's interest in the private use and enjoyment of land by any type of liability-forming conduct is a private nuisance. The invasion

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18 The assize of nuisance was invented in the twelfth century. 4 Restatement, Torts 218 (1939); McRae, The Development of Nuisance in the Early Common Law, 2 U. of Fla. L. Rev. 27 (1948); Winfield, op. cit. supra note 9.
14 The assize of novel disseisin was available only for an act which interfered with the plaintiff's possession of his land. Winfield, op. cit. supra note 9. Consequently, a land owner was without a remedy for a non-trespassory invasion of his interest in use and enjoyment of land until the assize of nuisance was devised to fill "a gap for which novel disseisin was useless." Winfield, op. cit. supra note 9. The assize of nuisance was limited in scope to actions between freeholders. 3 Holdsworth, History of English Law 156 (1925).
18 Early in the seventeenth century, the assize of nuisance was replaced by an action on the case for nuisance. McRae, op. cit. supra note 9. Compare Barnet v. Ihrie, 17 S. & R. 174 (Pa. 1828), holding that the assize of nuisance still existed in Pennsylvania at that late date.
16 4 Restatement, Torts 219 (1939).
18 Ibid.
18 Id. at 220.
18 Ibid.
19 Id. at 222.
20 In Pottstown Gas Company v. Murphy, 39 Pa. 257 (1861), the "not a question of negligence but of nuisance" rule was formulated. For cases repeating and relying upon this theory, see Stokes v. Pennsylvania Railroad, 214 Pa. 415, 63 A. 1028 (1906); Gavigan v. Atlantic Refining Company, 186 Pa. 604, 40 A. 834 (1898); Hauck v. Tidewater Pipe Line Co., 153 Pa. 366, 26 A. 644 (1893); Farver v. American Car & Foundry Co., 24 Pa. Super. 579 (1904). These cases will be discussed throughout the article.
21 Restatement, op. cit. supra note 15, at 222.
that subjects a person to liability may be either intentional or unintentional. If the invasion is intentional it creates liability if it is unreasonable under the circumstances of the particular case.\(^2\) If it is unintentional it creates liability if it is negligent, reckless or ultrahazardous.\(^3\)

**Actions for Damages Distinguished from Suits for Injunction**

A frequent cause for confusion is the tendency of courts to cite cases in equity as precedents in actions at law without regard for their differences.\(^4\) Considerations often enter into the determination of the right to an injunction that are inapplicable or have less weight in determining the right to damages.\(^5\) It is one thing to say that a defendant should pay damages for the harm his factory is causing, but it is a different thing to say that he must close his factory if the harm cannot be stopped. For the purpose of determining liability for damages for private nuisance, conduct may be regarded as unreasonable even though its utility is great and the amount of harm is relatively small. But for the purpose of determining whether the said conduct should be enjoined, additional factors must be considered. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.\(^6\)

Thus, denial of relief by way of injunction is not always a precedent for denial of relief by way of damages. Consequently, liability for damages should be separately dealt with.

**Private Nuisance - Trespass Distinguished**

Courts have frequently failed to distinguish between the invasion of an interest in the exclusive possession of land and the interest in the use and enjoyment of it. An actionable invasion of the former is a trespass, and was remediable at common law by action of trespass; an actionable invasion of the latter is private nuisance, and was remediable at common law by an action on the case.\(^7\)

Although an invasion of possession of land automatically involves some interference with its use and enjoyment, and liability for trespass has traditionally

\(^{22}\) Ibid.
\(^{28}\) Ibid.
\(^{26}\) \textit{4 Restatement}, op. cit. supra note 13, at 224.
\(^{27}\) Id. at 225.
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included liability for such incidental harms, there are important differences in the two forms of liability. In the interest of clarity, the distinction between them should be preserved.  

Nuisance Per Se and Nuisances in Fact

A nuisance per se has been defined as one which is a nuisance "at all times and under any circumstances." It has been said that a nuisance in fact, on the other hand, is one which becomes such "by reason of [its] location, surrounding circumstances, and the manner in which the acts complained of are done."  

The Pennsylvania courts have employed the terms "nuisance per se" and "nuisance in fact" in a variety of situations. A fertilizer plant and a barbed wire fence have been held to be nuisances per se, while a swarm of bees, a barking dog, and the malicious use of a marimba have been said to be nuisances in fact.

It may well be doubted that any court would say that a fertilizer plant located in the middle of a desert is a nuisance per se in spite of the definition that it is one which is a nuisance "at all times and under any circumstances." And if nuisances per se as well as nuisances in fact are dependent for their existence on surrounding circumstances, the accepted distinction between them is a "filament too fine to be disentangled" by an ordinary mind.

The confusion which centers about the term nuisance per se has not always been helped by attempts to clarify it. In Nesbit v. Riesenman, it was stated that whether a nuisance is a nuisance per se "depends on the evidence showing the

28 Ibid.
30 Amsterdam v. Dupont Powder Co., 62 Pa. Super. 314 (1916); McGuirk, op. cit. supra note 29; 46 C. J., NUISANCES §5 (1928). A third type of nuisance is said to be "those which in their nature may be nuisances but as to which there may be honest differences of opinion in impartial minds." 39 AM. JUR., NUISANCES 16 (1942); McGuirk, op. cit. supra note 29.
32 Bower v. Watsontown Borough, 1 Dist. 116 (Pa. 1892).
35 In Collier v. Ernst, 46 D. & C. 1 (Pa. 1942), the following injunction went out: "1. Respondent ... is hereby perpetually enjoined from playing 'Jingle Bells' with the intention and for the purpose of annoying ... complainant ..."
36 "2. Respondent ... is hereby perpetually enjoined from playing 'When Irish Eyes Are Smiling' ... for the purpose of annoying ... Leo J. Kelly."
37 "3. Respondent ... is hereby perpetually enjoined from playing 'Anchors Aweigh' ... for the purpose of annoying and disturbing any naval officer.
38 "4. Respondent ... is hereby perpetually enjoined from playing 'Little Old Lady' ... for the purpose of annoying and disturbing Mrs. Walter E. Broadbelt ... ."
39 See note 29, supra.
41 This argument seems to have been pressed in Nesbit v. Riesenman, 298 Pa. 475, 148 A. 694 (1930), but with no success.
necessary relation between the acts . . . and the basic principles which underlie nuisances." In Dennis v. Eckhardt,\textsuperscript{40} the distinction between a nuisance in fact and a nuisance per se was said to lie "not . . . in the remedy, but only in the proof of it."

The law of nuisance would probably be much more understandable if the terms nuisance per se and nuisance in fact were forgotten.

**The Restatement**

The approach to the private nuisance problem employed by the American Law Institute represents a return to basic concepts by substituting concise, simple and clear rules for the prevailing vague and often incomprehensible definitions.\textsuperscript{41} The distinction between trespass and private nuisance is faithfully preserved. The rules governing liability for trespassory invasion of another's land are set forth elsewhere in the Restatement\textsuperscript{42} and are referred to in Chapter 40 only by cross reference.\textsuperscript{43} The term "nuisance" has been ruthlessly discarded.\textsuperscript{44}

"The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

(a) the other has property rights and privileges in respect to the use and enjoyment interfered with; and

(b) the invasion is substantial; and

(c) the actor's conduct is a legal cause of the invasion; and

(d) the invasion is either

(i) intentional and unreasonable; or

(ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct."\textsuperscript{45}

A non-trespassory invasion is one which is not incidental to or which does not result from or accompany an unprivileged entry or intrusion on the land.\textsuperscript{46} If A stands on his land and fires a bullet over B's land, that would be a trespassory invasion which would be actionable under another section\textsuperscript{47} of the Restatement; but if A merely stands on his land and beats a brass drum to the annoyance of B, that would be a non-trespassory invasion of B's interest in the use and enjoyment of his land and section 822 would apply.

If A purposely diverts a stream of water upon B's land, flooding it, that would constitute a trespassory invasion of B's interest in unmolested possession.

\textsuperscript{40} 3 Grant 390 (Pa. 1862).
\textsuperscript{41} Restatement, Torts §822 (1939).
\textsuperscript{42} Restatement, Torts §§157-215 (1934).
\textsuperscript{43} Restatement, Torts §§822, comment c (1939).
\textsuperscript{44} 4 Restatement, Torts 215-216 (1939).
\textsuperscript{45} Restatement, Torts §822 (1939).
\textsuperscript{46} Id. §822, comment c.
\textsuperscript{47} Restatement, Torts §158 (1934); Id. §158, comment h.
and incidentally would involve an interference with his interest in the use and enjoyment of property. Nevertheless, \( A \)'s liability to \( B \) would be determined by reference to the section defining liability for intentional trespasses,\(^{48}\) although \( B \) could recover damages for the invasion of his interest in the use and enjoyment of the land.\(^{49}\)

If \( A \) negligently swerves off the highway in his car, crashes into \( B \)'s house causing a kerosene lamp to explode which in turn burns down the house, no one would question that \( B \)'s interest in the use and enjoyment of his property has been invaded; but \( A \)'s liability in this case again would not be determined by section 822\(^{50}\) since the invasion was trespassory in nature. \( B \)'s rights would be governed by section 165,\(^{51}\) the rule defining liability for unintended trespassory invasions.

An intentional, non-trespassory invasion of another's interest in the use and enjoyment of land is actionable under section 822 if it was unreasonable.\(^{52}\) The unreasonableness of the actor's conduct is determined objectively\(^{53}\) through a process of balancing the utility of the conduct against the gravity of harm.\(^{54}\)

In appraising the gravity of the harm, the factors to be considered are the extent of the harm involved,\(^{55}\) the character of the harm,\(^{56}\) the social value which the law attached to the type of use or enjoyment invaded,\(^{57}\) the suitability of the particular use invaded to the character of the locality,\(^{58}\) and the burden on the person harmed of avoiding the harm.\(^{59}\)

The utility of the actor's conduct is evaluated through considering the social value which the law attaches to the primary purpose of the conduct,\(^{60}\) the suitability of the conduct to the character of the locality,\(^{61}\) and the impracticability of preventing or avoiding the invasion.\(^{62}\)

For present purposes our discussion will be limited to a consideration of the rule of section 822 that liability exists where the invasion is either intentional and unreasonable or unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct. Since most invasions of the private use and enjoyment of land are intentional, special emphasis will be placed on the problem of determining when intentional conduct is unreasonable.

\(^{48}\) Ibid.
\(^{49}\) Restatement, Torts 225 (1939); Id. §822, comment c.
\(^{50}\) Restatement, Torts §822 (1939).
\(^{51}\) Restatement, Torts §165 (1934).
\(^{52}\) Restatement, Torts §822 (d) (i) (1939).
\(^{53}\) Id. §826, comment c.
\(^{54}\) Id. §825.
\(^{55}\) Id. §827 (a).
\(^{56}\) Id. §827 (b).
\(^{57}\) Id. §827 (c).
\(^{58}\) Id. §827 (d).
\(^{59}\) Id. §827 (e).
\(^{60}\) Id. §828 (a).
\(^{61}\) Id. §828 (b).
\(^{62}\) Id. §828 (c).
This discussion will furthermore be restricted in scope primarily to actions at law since the confusion is there much more pronounced than in the equity suits.

**THE PENNSYLVANIA CASES**

From the standpoint of the student, who has before him a copy of the result of the labors of the American Law Institute, the Pennsylvania courts have been guilty of errors that fall into four principal categories:

1. Private nuisance has been treated as a separate kind of liability-forming conduct in itself, and has been subjected to an attempt to contrast it with negligence.

2. The distinction between trespass and nuisance has been ignored, and thus private nuisance has not been limited to non-trespassory invasions of interests in the use and enjoyment of land.

3. The courts in actions at law have failed either by definition or rule to focus attention to and place appropriate emphasis upon the unreasonableness of the defendant's intentional conduct in determining liability.

4. The distinction between actions at law and suits in equity has been ignored in the citation of precedents.  

In contradistinction to the precision of the Restatement, the attempts at definition and codification by the Pennsylvania Supreme Court have proven to be unworkable tools. Certainly the recent definition of a nuisance in *Kramer v. Pittsburgh Coal Company* far from concisely describes what the Pennsylvania courts have considered to be a nuisance.

But the failure to provide a rule does not mean that the Pennsylvania courts have left us wholly without any means of discovering, with some degree of certainty, what decision may be expected on a given set of facts. Nor does it follow that the above enumerated errors make it impossible to reconcile many of the decided cases with the Restatement. A skillful workman with imperfect tools may, nevertheless, perform his work creditably.

a. The Natural Use Test

In *Pennsylvania Coal Company v. Sanderson*, it was held that where a mine owner in pumping water from his mine pollutes a nearby stream in the process, he will not be held liable for the pollution to a down-river owner. This decision was predicated upon four propositions: (1) the defendant in mining the coal was making a natural use of the land; (2) coal could not be mined unless water is pumped up from the lower levels; (3) personal inconveniences must yield to

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63 See note 24, supra.
64 341 Pa. 379, 19 A.2d 362 (1941).
65 113 Pa. 126, 6 A. 453 (1886).
the necessities of a great industry; and (4) the rule of *Rylands v. Fletcher* was not applicable, but even if it were, the court was "... unwilling to recognize the arbitrary and absolute rule of responsibility it declares ..." The *Sanderson case* was followed in principle in *Clause v. Crowe*, where the mine operator was held not liable despite the fact that the water which was pumped out flowed over the plaintiff's land and killed the vegetation, the water being acidulous. And a mine owner who withdrew water from a surface owner's spring has been held not liable since the extraction of minerals involves some unavoidable interference with subterranean waters.

Although it apparently was at first thought that the natural use theory would insulate a land owner from all liability, it was soon held that if he negligently permits coal dust to escape onto adjoining land, or deposits culm on a river bank so that it will be washed downstream by ordinary high water, or throws culm directly into a stream, or negligently causes salt water to rise up into the surface owner's well, he must respond in damages. The actor must exercise reasonable care to avoid the injury.

### b. Non-natural Uses

Where the defendant engages in what the courts have denominated as a non-natural use of his land, the question of liability pivots, say the courts, not upon negligence but nuisance. Thus, where smoke fumes from a refinery or zinc plant injure nearby land, or oil seeps from a tank into adjoining soil, or where vibrations and "noisome" smells make a neighbor's enjoyment of his land impossible, the courts have imposed liability on the theory that the question of negligence is not in the case. Similarly, if a person imports coal from off the land on which his coke ovens are situated, he will be held liable without proof of negli-

86 L.R. 3 H.L. 330 (1868).
87 113 Pa. at 154, 6 A. at 463.
89 Coleman v. Chadwick, 80 Pa. 81 (1875).
93 Collins v. Chertiers Valley Coal Co., 131 Pa. 143, 18 A. 1012 (1890).
95 Pottstown Gas Co. v. Murphy, 39 Pa. 237 (1867).
gence for damage to his neighbor’s land. A similar result was reached on the same theory in a case where the defendant purchased limestone elsewhere and pulverized it on his land, causing dust to settle on the plaintiff’s trees and vegetation.

c. The Railroad Cases

In Pennsylvania Railroad v. Lippincott, the plaintiff was a neighboring landowner whose property was constantly buffeted by cinders and smoke from the defendant’s trains. After observing that the railroad would not be liable for damage caused by dust if it moved the freight by dray horses along a dusty road, the court felt that the railroad should not be any more subject to liability if, in using land appropriated under a power of eminent domain, it caused the same amount of damage by a different method. The fact that operating trains involves a non-natural use of the land which would subject the defendant to the rigors of the “not a question of negligence but of nuisance” rule of Pottstown Gas Co. v. Murphy was not discussed, although plaintiff’s counsel contended that the court had before it a nuisance case.

The Lippincott case was subsequently distinguished in Hauck v. Tidewater Pipe Line Co. on the ground that there the oil company was “clothed with no such powers” of eminent domain. So also, in Ganster v. Metropolitan Electric Co., where the defendant had acquired property adjoining plaintiff’s land and erected electrical machinery which caused vibrations which made plaintiff’s home practically uninhabitable, the court held that notwithstanding the fact that the defendant had appropriated its land under a power of eminent domain, the defendant has committed an “actionable nuisance for which it is liable.” Said the Court:

"This case is not ruled by Pennsylvania Railroad Company v. Lippincott, 116 Pa. 472, and Pennsylvania Railroad v. Marchant, 119 Pa. 541, relied on by the defendant’s counsel to support his position. In those cases the injuries were caused by the noise, smoke and dust from the defendant company’s engines and cars used in operating its railroad on a viaduct on its own land on the opposite side of a street from the

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82 Conti v. New Castle Lime & Stone Co., 94 Pa. Super. 318 (1927) ("the use which the defendant is making of its land is an artificial one ...."). For other cases in which the non-natural use test was applied, see Vautier v. Atlantic Refining Co., 231 Pa. 8, 79 A. 814 (1911); Welliver v. Irondale Electric Co., 38 Pa. Super. 26 (1909): "The race is an artificial water course; it is not maintained for the development of natural resources of the land ... but for the purpose of supplying power ...." Id. at 31. Contra: Delaware & Hudson Canal Co. v. Goldstein, 125 Pa. 246, 17 A. 442 (1889) (damages caused by seepage from a canal are "... in the absence of malice or negligence ... damnum adaequum injuria ....").
84 39 Pa. 257 (1861).
85 153 Pa. 366, 26 A. 644 (1893).
86 214 Pa. 628, 64 A. 91 (1906).
plaintiff's premises. Here the defendant company erected its plant on land purchased for the purpose and in immediate contact with the plaintiff's buildings and so constructed the foundation and floor of its building that the operation of the heavy machinery resulted directly in destroying the use of the plaintiff's buildings. It is therefore apparent and needs no argument to show that the defendant's contention in the case in hand finds no support in the Lippincott and Marchant cases. 87

EVALUATION OF THE PENNSYLVANIA TECHNIQUE USED IN NUISANCE CASES

a. Contrasting Nuisance with Negligence

In the Kramer case the court said that "nuisance is distinguishable from negligence," quoting Corpus Juris for this authority. 88 It has already been pointed out that an attempt to distinguish nuisance from negligence involves a failure to recognize that, properly speaking, negligence has reference to a type of conduct whereas nuisance has reference to a type of interest invaded by any kind of liability-forming conduct. Nevertheless, the Pennsylvania courts, not only by accepting the ambiguous definition in the Kramer case but in addition by adhering to the anachronistic rule of Pottstown Gas Company v. Murphy, 89 have definitely committed a basic error in failing to recognize this distinction between a type of conduct and a type of interest invaded.

It is interesting to note the manner in which this "not a question of negligence but of nuisance" rule became embedded in Pennsylvania law. In the Murphy case, the Supreme Court affirmed, in a brief opinion, a judgment for the plaintiff, saying that "the [lower court] was right in saying that this was not a question of negligence but of nuisance, for so is the declaration." 90 Is it possible that a label affixed to a pleading nearly a century ago had something to do with the failure of the Pennsylvania courts to recognize that the thing which gives unity to the field of private nuisance is the interest invaded, not the kind of conduct which injures the plaintiff's interests? 91

In early tort law the rule of strict liability prevailed. An actor was liable for the harm caused by his acts whether that harm was done intentionally, negligently or accidentally. In course of time the law came to take into consideration

87 Id. at 632-633, 64 A. at 93.
88 See note 10 supra.
89 39 Pa. 257 (1861).
90 Id. at 263. Emphasis added.
91 To the effect that this trap has been sprung on courts in other jurisdictions, see Prosser, Nuisance Without Fault, 20 Tex. L. Rev. 399 (1942): "Therefore, as the old reporters would say, Note, reader, that he who seeks recovery in Texas without proof of . . . negligence would do well to cast his petition in the form of an allegation of nuisance." Id. at 426. See, also, Note, Negligence or Nuisance — A Study in the Tyranny of Labels, 24 Ind. L. J. 402 (1949). For other Pennsylvania cases in which it was expressly admitted that the nuisance label requires special treatment, see Forster v. Rogers Bros., 247 Pa. 54, 93 A. 26 (1916); Stokes v. Pennsylvania Railroad, 214 Pa. 415, 63 A. 1028 (1906) ("The action being for damages occasioned by maintenance of a nuisance, the question of negligence is not involved").
not only the harm inflicted, but also the type of conduct that caused it, in determining liability. This change came later in the law of private nuisance than in other fields. Private nuisance was remediable by an action on the case irrespective of the type of conduct involved. Thus, the form of action did not call attention to the change from strict liability to liability based on conduct.92

The development and reaffirmance of the "not a question of negligence but of nuisance" rule of Potstown Gas Company v. Murphy is representative of a failure on the part of the Pennsylvania courts to recognize this change.93 They have fallen into the habit of thinking that a private nuisance involves a separate kind of strict liability. In Stokes v. Pennsylvania Railroad Co.,94 Gavigan v. Atlantic Refining Co.,95 and Farver v. American Car & Foundry Co.,96 it was held that the only questions for a jury to decide in a nuisance case are whether the defendant caused the injury and the extent of the damages. Moreover, in Hauck v. Tidewater Pipe Line Co.,97 the following charge, which, literally was lifted verbatim out of Rylands v. Fletcher,98 was approved:

"Every person who, for his own profit or advantage brings upon his premises and collects and keeps there anything which if it escapes will do damage to another, is liable for all the consequences of his acts, and is bound at his peril to confine it and keep it upon his premises. If he does not, he is answerable for all the damages that result therefrom, without any reference to the degree of care or skill exercised by him in reference thereto."99

Surprisingly, this approval came but five years after the Sanderson case, where the court had said that it was "... unwilling to recognize the arbitrary and absolute rule of responsibility ..."100 formulated in Rylands v. Fletcher.

b. Ignoring the Distinction between Trespass and Nuisance

Again referring to the Kramer case, the Supreme Court there said that "the distinction between trespass and nuisance consists in the former being a direct

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92 4 RESTATEMENT, TORTS 221 (1939).
93 But Chief Justice Kephart recognized this change in 1939 when he said: "In our State, the doctrine of absolute liability has been involved, almost without exception, only in that small group of actions which redress injuries to land, and it is only as to these that it can be fairly said that the doctrine prevails. This liability is a survival of the medieval law dictated by the landlord, in which the protection of the uninterrupted enjoyment of real property was a primary consideration ... It was in the Nineteenth Century that the law of negligence in torts had its development. Personal injury cases then consumed the greater portion of the time of the courts. Cases concerning rights in land yielded their earlier prominence, and the rules of law applicable to them have consequently remained, in the most part, unchanged, even to the present day." Summit Hotel Company v. National Broadcasting Co., 336 Pa. 182, 186-187, 8 A.2d 302, 304 (1939).
94 214 Pa. 415, 63 A. 1028 (1906).
95 186 Pa. 604, 40 A. 834 (1898).
97 153 Pa. 366, 26 A. 834 (1895).
98 L. R. 1 Ex. 265 (1866) ("... the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril ...").
99 153 Pa. at 369-370.
100 113 Pa. 126, 154, 6 A. 453, 463 (1886).
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infringement of one’s right of property, while, in the latter, the infringement is the result of an act which is not wrongful in itself but only in the consequences which may flow from it.”

Since the right of use and enjoyment of land is as much a “right of property” as the right of possession, the definition completely ignores the basic distinction between the two types of injury. Provided the infringement is “direct,” it is, under the definition, a trespass without considering whether it involves possession or use and enjoyment. And the intended meaning of the word “direct” is obscure. One would normally think that most nuisances are “direct” infringements of one’s use and enjoyment of land. The word, therefore, seems to have been ill-chosen. Only if it be interpreted to apply to those situations in which the actor causes some physical thing to infringe the possession of another can the term be said to have been validly used.

Moreover, the Kramer definition of nuisance seems to imply that every act which results in harm, whether wrongful or not, constitutes a nuisance. Clearly this is wrong under the Restatement. And under the Pennsylvania decisions even intentional acts which result in harm are not always actionable nuisances.

But regardless of how this Pennsylvania definition is interpreted, the Pennsylvania courts have failed to adhere to any acceptable distinction between trespass and nuisance.

In Stokes v. Pennsylvania Railroad Co.,101 the defendant’s employees emptied acid jars over a fence onto plaintiff’s land, rendering it arid and killing his cows. Said the court, in reversing a judgment for defendant: “The action being for damages occasioned by maintenance of a nuisance, the question of negligence was not involved.”102 And the court thought that the question of nuisance was involved in Forster v. Rogers Bros.,103 where the defendant stored some dynamite in the plaintiff’s house without her permission; the house was wrecked by an explosion. Here were cases involving a direct infringement of the plaintiff’s possessor rights in the strictest sense but still the court talked nuisance law. The seepage of ammonia into a neighbor’s well,104 the emission of clouds of limestone dust which settles on adjoining land,105 the escape of water from a mill race,106 and the leakage of oil from tanks107 have been described as nuisances, although such invasion definitely would be trespassory under the Restatement and thus not properly nuisances.

101 214 Pa. 415, 63 A. 1028 (1906).
102 Id. at 419, 63 A. at 1030.
103 247 Pa. 54, 93 A. 26 (1915).
104 Pottstown Gas Company v. Murphy, 39 Pa. 257 (1861).
c. The Failure to Focus Attention by Definition or Rule upon the Reasonableness of Intentional Conduct

By far the greater number of Pennsylvania nuisance cases involve intentional harm from the defendant's continuing activity. Although the first invasion may be purely unintentional, conduct which is continued with the knowledge that harm is resulting therefrom constitutes an intentional invasion of the interest of a person whose land is being affected by the activity.\(^{108}\)

This apparent indifference to the reasonableness of the actor's intentional conduct in the imposition of liability stems primarily from a misunderstanding of the decision in the Sanderson case.\(^{109}\) There, it will be recalled, the court pointed out that the mine operator, in pumping out mine water, was making a "natural use" of his land. It is quite apparent, however, that the court was really balancing the gravity of the harm against the utility of the intentional conduct: "The plaintiff's grievance, is for a mere personal inconvenience, and we are of the opinion that mere private personal inconvenience arising this way and under such circumstances, must yield to the necessities of a great public industry, which although in the hands of a private corporation, subserves a great public interest. To encourage the development of the great natural resources of a country, trifling inconveniences to particular persons must sometimes give way to the necessities of a great community."\(^{110}\)

Not long after the Sanderson case was decided, the courts commenced to apply the "not a question of negligence but of nuisance" rule according to whether the defendant was making a natural or non-natural use of the land.\(^{111}\) Most of these cases involved intentional harm from continuing activity. A reliance upon the natural or non-natural use tests seemingly channelized the courts' attention into a highly technical scrutiny of what the defendant was doing in relation to his land, rather than the reasonableness or unreasonableness of his conduct.

A Reconciliation With the Restatement

Unquestionably the defendant in the Sanderson case knew to a substantial certainty that when he pumped mine water into the stream, he would render it unfit for drinking purposes. But the primary purpose of the conduct, the extraction of a great mineral resource, was high in social value to the Pennsylvania community. Similarly, mining coal was suitable to the character of the locality. So also, the defendant pointed out that he could not get rid of the mine water except by pumping it into the stream. On the other hand, however, the gravity of the harm to the plaintiff was not serious. Presumably, drinking water was available elsewhere; and the fact that plaintiff was deprived of the pleasure of

\(^{108}\) Restatement, Torts 1825, comment b (1939).
\(^{109}\) Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 A. 453 (1886).
\(^{110}\) Id. at 149, 6 A. at 459.
\(^{111}\) See notes 65-82 supra.
having fish in her backyard pool was of little importance when contrasted with the tremendous economic benefit accruing to citizens of Pennsylvania through the exploitation of their great mineral resources. Hence, the court balanced the utility of the conduct against the gravity of the harm.

It was not long after the Sanderson case that the court held that merely because the exploiter of the mineral estate is engaged in an activity of great utility, it does not imply that he will not be held to a standard of due care in his conduct. Hence, if he bombards his neighbor's land with coal dust from a breaker, he must use all practical care to avoid the injury. Similarly, the decision in Elder v. Lykens Valley Coal Co. and Hindson v. Markle would have required the same result under section 165 of the Restatement since those trespassory invasions were caused by negligent conduct.

Pennsylvania Railroad v. Sagamore Coal Co. involved intentional, unavoidable harm to other riparian owners. There the coal company, like the defendant in the Sanderson case, pumped mine water into a stream, polluting it. The railroad and two water companies used the stream to supply trains and the public with water. A suit in equity was brought to enjoin the pollution, and the injunctive process was issued. Thus when the interests of a large segment of the public were coupled with the interests of an industry of equal stature to coal mining, the court found that the defendant's continued activity was unreasonable under the circumstances. In other words, the gravity of the harm outweighed the utility of the defendant's conduct.

In the non-natural use cases, where the courts have applied the rule of Pottstown Gas Company v. Murphy, the invasions were almost without exception caused by intentional conduct since the defendants knew that harm was flowing from their activity. Hence, the decisions in those cases will be tested by balancing the utility of the conduct against the gravity of the harm, to ascertain whether the same result would have been reached under the Restatement.

(1) The Smoke Damage Cases

In many of the smoke and fume damage cases which were examined, the statement of facts was not sufficiently comprehensive to permit an application of all the factors enumerated in sections 827 and 828. A good example is Robb v. Carnegie Bros. There the defendant was engaged in farming but the facts failed to show whether the area was predominantly agricultural. The court did, however, point out that the site selected by the defendant to construct his coke oven was "as well adapted to the business, and as remote from dwellings as any

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115 281 Pa. 233, 126 A. 386 (1924).
in that region." Fumes from the ovens, for which coal was imported from off the land, attacked the plaintiff's fruit trees and vegetables. In this case, therefore, the factors on the side of the plaintiff were that the harm was substantial, that he was engaged in farming to which the law has traditionally accorded a high social value,\textsuperscript{117} and that he could not have avoided the harm.

For the defendant it was apparent that he could not have avoided the harm except at prohibitive cost,\textsuperscript{118} that he was engaged in manufacturing to which the law also ascribes a high social value, and that the conduct apparently was suited to the locality.

Hence, the factors in favor of each are relatively equal. However, the Restatement points out that the enumerated factors are by no means intended to be exclusive,\textsuperscript{119} but that the reasonableness of the invasion may be determined objectively through an analysis of the particular facts of each case.\textsuperscript{120}

The court held the defendant liable and relied upon the fact that the defendant selected the site for his activity, knowing that the plaintiff was certain to be harmed thereby. In this way and others the Sanderson case was distinguished.

Since the Restatement permits in the determination of reasonableness the application of factors not specifically enumerated, an adoption of the factor relied upon by the court in the Robb case could produce the same result under the Restatement.

At this point it is pertinent to observe that in the smoke fume cases, as in other cases to which the non-natural use theory has been applied, the courts will exclude evidence from the defendant that he used all practical means to avoid the injury.\textsuperscript{121} This follows as of course from an application of the "not a question of negligence but of nuisance" rule. Since these cases involved injuries from intentional conduct, negligence is not in them.\textsuperscript{122} Even under the Restatement, evidence offered by defendant to show that he had exercised due care would not be admissible, although evidence of the expense and inconvenience of avoiding the injury would be admissible as a factor in determining reasonableness.

(2) Seepage of Oil or Water

Hauck v. Tidewater Pipe Line Co.\textsuperscript{123} was a case in which the facts suggest that the defendant continued its activity although it knew that harm was resulting

\textsuperscript{117} Restatement, Torts §828, comment e (1939).
\textsuperscript{118} This point was not enunciated by the court but the facts suggest it.
\textsuperscript{119} Restatement, Torts §827, comment a (1939).
\textsuperscript{120} Id. §826, comments b and d (1939).
\textsuperscript{121} See, e.g., Vautier v. Atlantic Refining Co., 231 Pa. 8, 14, 79 A. 814, 815 (1911): "The third and eighth assignments relate to the exclusion of evidence that the defendant used the most effective and approved appliances. But the excluded evidence would be material only as to the question of negligence; and, as we have pointed out, that is not important here."
\textsuperscript{122} Restatement, Torts §828, comment g (1939).
\textsuperscript{123} 153 Pa. 366, 26 A. 644 (1893).
therefrom. Oil from the defendant's tanks seeped into the plaintiff's land, ruining some springs and a fish pond. The court held the defendant liable without proof of negligence.

The seepage of oil, in this case, into the plaintiff's land amounted to a trespassory invasion of his interest of possession, with incidental damage to his interest in the use and enjoyment of land. Hence this trespassory factor would require an application of section 158, rather than section 822. Under section 158, every intentional, trespassory invasion is actionable unless the defendant can point to a privilege to avoid liability. Since there appears to be no privilege to avoid the imposition of liability, it follows that had the rules of the Restatement been applied, the result would have been harmonious with that reached by the court.

The court in Pennsylvania Railroad v. Lippincott\(^\text{124}\) predicated its decision upon the ground of eminent domain and thus placed itself in a rather tenuous position for subsequent cases in which non-railroad defendants attempted to invoke the eminent domain rule to obtain immunity from damages.\(^\text{125}\) However, the result seems correct in principle when tested by the rules of the Restatement.

When a railroad is chartered to construct a line between two points, it is limited in choice as to what land should be appropriated in its path. In this respect, therefore, the construction and operation of a railroad is essentially similar to the extraction of coal from the earth; the site of the activity is restricted by nature in the former and by physical requirements in the latter. It is quite likely that the court in the Lippincott case was strongly influenced by this factor even though the opinion emphasizes eminent domain.

Another, and even stronger, reason for non-liability in the Lippincott case is the fact that the railroad industry has unquestionably played a major role in the economic development of the State of Pennsylvania. And, of course, to award damages in that case for unavoidable harm caused by the operation of a railroad would have set a dangerous precedent for every landowner along the line who fancied that his property was depreciating at an inordinate rate by virtue of smoke from passing trains. A decision in favor of liability in the Lippincott case might have resulted in putting the railroad out of business.

Accordingly, it may well be concluded that in the light of these facts the Lippincott decision stands for no more than that the harm caused by the defendant's activity was not unreasonable under the circumstances.

**Summary**

Consistently in cases in which the defendant is engaged in a natural use of his land and in the railroad cases, the Pennsylvania courts have refused to apply

\(^{124}\) 116 Pa. 472, 9 A. 871 (1887).

the rule of strict liability; the Supreme Court has expressly repudiated the doctrine of *Rylands v. Fletcher*. And although they seem to have been consistent in their adherence to the rule of strict liability in non-natural use cases, analysis reveals that this adherence is partly artificial. The courts have avoided the application of the strict rule by ignoring the basic concept that nuisance law is limited in its application to but includes all cases which involve an invasion of the right of use and enjoyment of land; they have frequently applied the rule "not a question of negligence but of nuisance" in reverse by treating as negligence cases many of which are properly nuisance cases. And they have applied the rule of strict liability in cases which they regarded as nuisance cases but which were in reality trespass cases.

Moreover, the Pennsylvania courts have, in a crude and somewhat clumsy way, permitted such valid questions as the utility of defendant's conduct and the counterbalancing gravity of harm to the plaintiff to be smuggled into the case by submitting to the jury the issues of nuisance under a charge which often, although not always, presents to them the question of reasonableness.\(^{126}\)

We believe that the Pennsylvania courts could accept and use the rules of the *Restatement* without doing violence to precedent, without much concern about *stare decisis*. These rules are much better implements than the awkward, vague and often inadequate tools which the courts have been using.

The adoption of the rules of the *Restatement* would result in the trial of cases involving the invasion of the right of use and enjoyment of land on the basis of rules which would be as clearly understood as the rules applicable to other branches of tort law. As in those other branches, it would mean that the vast majority of cases would involve issues of fact for the jury or for the judge, sitting without a jury. It would mean the abandonment of the artificial significance that has been attached to the natural use of land as distinguished from its non-natural use. The emphasis would shift to an inquiry into the utility of the defendant's conduct evaluated by testing broader concepts of social value, suitability and practicability of prevention. It would recognize that manufacturing in its many phases has risen to an economic stature equal to that of mining and railroading. In a word, it would help to remove from the Pennsylvania law of nuisance the cloak of mystery which now envelops it.

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\(^{126}\) See, e.g., the charge which was approved in *Amsterdam v. Dupont Powder Company*, 62 Pa. Super. 314 (1916): "Now you will see, therefore, that nuisance as we are talking about it, as it was used in this case, and as being used by me is that harm and injury which one does to another, must be an unreasonable and unwarrantable injury." Id. at 316.