

principles of justice as set out by Chief Justice Nichols, *supra*, inasmuch as no appeal was allowed in those cases in which a right to a jury trial was had below.

Ohio General Code Section 12224, long since laid to rest after having been declared unconstitutional in *Wagner v. Armstrong* may well serve as a pattern for future legislation establishing the appellate jurisdiction of the Courts of Appeals. Today, after the 1944 amendment to Article IV, Section 6, the legislature has the power to re-enact Ohio General Code Section 12224 and perhaps in the not too distant future this statute granting an appeal in those cases in which the right to a jury trial is denied below, may be discovered and revitalized by the General Assembly so that consistency and stability may be restored in the field of the appellate jurisdiction of the Courts of Appeals in Ohio.

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Absolute and Qualified Nuisance in Ohio

May a plaintiff, in Ohio, recover damages from a defendant city for injuries which she received when a car in which she was riding struck a tree at the edge of a street and in the right of way, no negligence being shown on the part of the city?¹ May a plaintiff, injured when she fell down a flight of stairs on a footbridge while momentarily blinded by a sudden burst of smoke from defendant's locomotive below the bridge, recover without alleging and proving negligence on the part of the defendant railroad?² Is a defendant city liable for damages resulting to plaintiff's warehouse when a water-main, weakened by the city's raising the level of the street containing it, burst, flooding the warehouse, plaintiff basing its action on nuisance, without a showing of negligence?³ The Supreme Court of Ohio, in three recent decisions, answered these questions in the negative, holding that, in none of these cases did defendant's act constitute an absolute nuisance, for which there would be liability without a showing of negligence.

This entire field of nuisance in Ohio has been vague and indefinite and the Supreme Court, particularly in the *Taylor* case, has sought to bring some order to this branch of tort law by setting up two classes of nuisance: those which are absolute or nuisances per se for which liability attaches without fault, and those which

¹*Taylor v. Cincinnati*, 143 Ohio St. 426, 55 N.E.2d 724, 155 A.L.R. 44 (1944).

²*Metzger v. Pennsylvania, O. & D. Ry.*, 146 Ohio St. 406, 66 N.E.2d 203 (1946).

³*Interstate Sash and Door Co. v. Cleveland*, 148 Ohio St. 325, 74 N.E.2d 239 (1947).

are nuisances arising from negligence, where negligence is the gravamen of the action and must be pleaded and proved.

Activities which may constitute a nuisance are commonly divided into two classifications: public or common nuisance and private nuisance. A public nuisance affects an indefinite number of persons and is generally abated in an action by the people, acting through the state or municipality. Types of activity which are abatable as public nuisances are discussed elsewhere.⁴ A public nuisance may become a private nuisance as to a particular individual if he be affected by it in a manner distinct from that in which the public in general is affected. The Restatement of Torts, Chapter 40, page 217, states that "when an individual suffers special damage from a public nuisance, he may maintain an action. This action for special damages arising out of the maintenance of a public nuisance is often confused with the action for private nuisance." Private nuisance is said to be "traditionally restricted to invasions of interests in the use and enjoyment of land," and, on page 220 "The feature that gives unity to this field is the interest invaded, namely, the interest in the use and enjoyment of land." It should be noted, particularly with reference to the *Taylor* case, that the plaintiff relied on Ohio General Code Section 3714, which states in part that "The council shall have the care, supervision and control of streets . . . and shall cause them to be kept open, in repair and free from nuisance." This section obviously looks to the protection of interests other than those arising from the ownership of land.

Some of the confusion involving the tort of nuisance, reflected in several Ohio opinions has come about by early attempts of English courts to qualify the original concept of English law, that anyone who caused harm to another had to make good regardless of fault. With the advance of civilization, the injustice of this rule became apparent and fault came to be regarded as the basis of tort liability. But there were exceptions to this rule, and absolute liability continued to be imposed in certain cases, particularly those concerned with straying of animals and ultra-hazardous activity. Holmes, in his work, *The Common Law*, at page 154, said, "The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community."

A further category in which absolute liability without fault would be imposed was announced in the celebrated English case, *Rylands v. Fletcher*,⁵ where the doctrine was set down that a person who, for his own purposes, brings onto his lands and keeps anything

⁴ 30 OHIO JUR. 324.

⁵ L.R. 3 H.L. 330, 37 L.J. Ex. 161, 19 L.T. Rep. 220 (1868).

not naturally there which is likely to do mischief if it escapes, is answerable for all damages if it does escape, regardless of fault. While at the time (1868) many jurisdictions in this country adopted this doctrine as the common-law rule, others, including Ohio, have refused to adopt it in toto, as being impracticable in an undeveloped country where the public policy was directed more for the encouragement of industrial enterprise than for the protection of property interests.⁶ But in a number of Ohio cases, the rule of *Rylands v. Fletcher* was followed,⁷ although the cases concerned ultra-hazardous activity, involving nitroglycerine, gunpowder, an unexploded bomb, escaping gas, and a public carrier. In only the nitroglycerine case,⁸ was the *Rylands* case alluded to with favor and even then the court apparently was careful that it should not adopt the rule in its broad aspects. In one case, *City of Barberton v. Miksch*,⁹ where the facts were similar to those in the *Rylands* case, and the court could have declared for or against the rule, liability was based instead upon trespass, "for a seeping of water on the plaintiff's land," the seeping being held the same as "casting" for the purposes of the trespass action.

Nuisance, in its ordinary sense, has come to include activity which results in a recurring or continuing invasion of the plaintiff's interests, and therefore is distinguishable from those cases which fall within the rule of the *Rylands* case, although at least one text writer has treated it as an instance of nuisance by broadening the scope of liability therefor.¹⁰ A broad construction of the term nuisance by many American courts has permitted recovery for numerous things under this head which early English courts would not have permitted. In this way, some American courts, purporting to deny the *Rylands* doctrine, have frequently reached the same result.

The court, in the *Taylor* case, *supra*, page 432, speaking through Judge Hart, categorized the several types of tortious conduct, list-

⁶ *Armour & Co. v. Ott, Adm'x.*, 117 Ohio St. 252, 158 N.E. 189 (1927); *O'Day v. Shoumlin*, 104 Ohio St. 519, 136 N.E. 289 (1922); *Langabaugh v. Anderson*, 68 Ohio St. 131, 67 N.E. 286 (1903); *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N.E. 86 (1901); *Defiance Water Co. v. Olinger*, 54 Ohio St. 532, 44 N.E. 238 (1896); *Huff v. Austin*, 46 Ohio St. 386, 21 N.E. 864 (1889); *Ruffner v. Cincinnati, H. & D. Ry.*, 34 Ohio St. 96 (1877).

⁷ *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N.E. 528, 71 Am. St. Rep. 740, 45 L.R.A. 658 (1899); *City of Tiffin v. McCormack*, 34 Ohio St. 638 (1878); *Cleveland v. Ferrando*, 114 Ohio St. 207, 150 N.E. 747 (1926); *Gas Fuel Co. v. Andrews*, 50 Ohio St. 695, 35 N.E. 1059, 29 L.R.A. 337 (1893); *The Iron Ry. v. Mowery*, 36 Ohio St. 418, 38 Am. Rep. 597 (1881).

⁸ 60 Ohio St. 560, 54 N.E. 528, 71 Am. St. Rep. 740, 45 L.R.A. 658 (1899).

⁹ 128 Ohio St. 169, 190 N.E. 387, 12 Ohio L. Abs. 245 (1934).

¹⁰ SALMOND, *TORTS* 257 (6th ed. 1924).

ing, as class 3, "non-culpable acts or conduct resulting in accidental harm for which, because of the hazards involved, the law imposes strict or absolute liability notwithstanding the absence of fault." Save for the emphasis on ultra-hazardous activity, this statement, although it should be classified as dictum, may be said to be an endorsement of the *Rylands* doctrine. At least it is in line with the gunpowder, nitroglycerine, and unexploded bomb cases already referred to. Class 4, of Judge Hart's category, is more significant, however. This type of tortious conduct involves "culpable acts of inadvertence involving unreasonable risks of harm." Into this class plaintiff's claim, in any of the three main cases, would have fallen, if he had been able to establish negligence on the part of the defendant. This broad class of conduct, loosely referred to as nuisance, really depends upon the negligence of the actor and such nuisances are properly controlled by ordinary doctrines of the law of negligence. Hence contributory negligence is a good defense to an action for nuisance resulting from negligence and plaintiff must show care proportioned to the danger. In a leading case on the subject,¹¹ Justice Cardozo pointed out that in the primary meaning of nuisance, negligence is not a factor although the line between nuisance and negligence is a narrow one. But nuisance can grow out of negligence. Thus, an act lawful in itself, may become unlawful because of the manner in which it is being done.

The absolute nuisance, or nuisance per se, sometimes arises from continuing activity which is unlawful in itself. It is also often used where the occupation is lawful, but because of the locale where it is done, the actor becomes an insurer for all persons who may be damaged thereby. Here arises the elusive *sic utere tuo* doctrine, which Justice Holmes has said teaches nothing but a benevolent yearning and which has been qualified as meaning, that a person must use his own property so as not to injure the *rights* of another. Thus the statement is meaningless unless the rights of the other person are established.¹² In an Ohio case¹³ involving fine dust blown over plaintiff's land from defendant's stone-cutting business, the court said, "Major use to which the district is put must establish its character, as regards existence of private nuisance." Thus, a man who runs a poultry business which emits noxious fumes, may be held liable for maintaining an absolute nuisance even though he may show he came up to the highest possible standard of care in its operation, because, with respect to the location the business

¹¹ *McFarlane v. Niagara Falls*, 247 N.Y. 340, 160 N.E. 391, 57 A.L.R. 1 (1928).

¹² RESTATEMENT, TORTS § 826 (1939). "The utility of the actor's conduct must be weighed against the gravity of the harm."

¹³ *Graham & Wagner, Inc. v. Ridge*, 41 Ohio App. 288, 179 N.E. 693 (1931).

should not have been there in the first place. Standard of care is an element of negligence and has no application in the field of absolute nuisance. "A nuisance does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care."¹⁴

It will be observed that the activity of the defendants, in the three principal cases was lawful and, not being of an ultra-hazardous type, could not be classed as absolute nuisances. Thus, liability could be imposed only by showing that the acts became nuisances through the negligent manner of their performance.

Finally, although the field of nuisance in Ohio must remain in doubt pending further judicial interpretations, the *Taylor* case has been particularly helpful in its discussion of this field. A clear-cut distinction, however, has been made in all three cases between absolute nuisance and nuisance arising out of negligence, and the law at the present may be said to be as follows:

1. Absolute liability will continue to be imposed for damages resulting from the defendant's ultra-hazardous activity (nitro-glycerine, gunpowder, etc.).
2. Where defendant's activity is unlawful, per se, he becomes an absolute insurer as to any harm which results therefrom.
3. Where defendant's activity is lawful, and not ultra-hazardous, and the plaintiff is injured thereby, plaintiff will be required to show that defendant's activity had become a nuisance because of the negligent manner in which it was done.
4. Where the nuisance is one which has resulted from negligence, the plaintiff, although pleading nuisance, will be required to show care proportioned to the danger, and contributory negligence will be a good defense.

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¹⁴ 20 R.C.L. § 3, p. 381.