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PRIVATE ACTION FOR PUBLIC NUISANCE

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A PUBLIC or "common" nuisance is always a crime. It may also be a tort, provided that the plaintiff can plead and prove that he has suffered some "special" or "particular" damage. The reference is not to any specific type of damage, but to damage of any kind individual to the plaintiff, as distinguished from that which he shares with the rest of the public. Since "special damage" has connotations as to the kind of damage in connection with the pleading and proof of other types of actions, notably in defamation, "particular" is obviously the better word,[1] and it will be used hereafter. It is the purpose of this Article to inquire into the nature of the particular damage which will transform the crime into a tort.

Nuisance is a French word which means nothing more than harm. It entered the English law at a very early date[2] as the name of a tort against land. A nuisance, whatever the fascinating variety of orthography attached to it,[3] was an interference with the use or enjoyment of land, or with a right of easement or servitude over the land. It was distinguished from disseisin in that the plaintiff was not dispossessed, and from trespass in that there was no entry, the defendant's acts occurring outside of the land. For this kind of interference a special remedy was developed early in the thirteenth century in the form of the assize of nuisance, which was a criminal writ, affording

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1 FLEMING, TORTS 368-69 (3d ed. 1965); Smith, *Private Action for Obstruction to Public Right of Passage*, 15 COLUM. L. REV. 1, 9-11 (1915). "It is not necessary to prove special damage in this action. It is sufficient to prove particular damage." Rose v. Groves, 5 Man. & G. 613, 616, 134 Eng. Rep. 705, 706 (C.P. 1843) (Cresswell, J.).

2 Both Bracton and Glanville were well acquainted with nuisance, and assigned a definite legal meaning to the term. See BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 557 (1880); GLANVILLE, THE LAWS AND CUSTOMS OF THE KINGDOM OF ENGLAND 337-38 (1812).

3 "Nusance," "nucanse," and even the Latin "nocumentum" are rife in the early cases; and in the Statute of Bridges, 1530, 22 Hen. 8, c. 5, the word is "Annoyance."

incidental civil relief. In time this was superseded by the much more convenient action on the case for nuisance, which became the sole common-law action.[4] It was limited strictly to interference with the use or enjoyment of rights in land,[5] and thus became the progenitor of the law of private nuisance as it stands today.

Long before it had acquired any such limited legal meaning, "nuisance" began to appear in connection with the entirely separate principle that an infringement of the rights of the crown was a crime. The earliest cases involved purprestures, which were encroachments upon the royal domain or the king's highway,[6] and so might be redressed by the king's justice in a criminal proceeding. The purpresture, incidentally, is not unknown even today.[7] There was sufficient superficial resemblance between the obstruction of a private right of way and the obstruction of a public right of passage to content the judges with calling the latter a nuisance as well; and "thus was born the public nuisance, that wide term which came to include obstructed highways, lotteries, unlicensed stage-plays, common scolds, and a host of other rag ends of the law."[8] By the time of Edward III the principle had been extended to cover such other invasions of the rights of the general public as interference with a market, smoke from a lime-pit, and diversion of water from a mill; moreover, "nuisance," which still remained largely undefined, was carried over by analogy and applied to these matters too.[9] By degrees the class of offenses recognized as "common nuisance" was greatly expanded to include any "act not warranted by law, or an omission to discharge a legal

4 The history is traced in 1 STREET, THE FOUNDATIONS OF LEGAL LIABILITY 212-13 (19[illegible] WINFIELD, TORTS 536-39 (6th ed. 1954); McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948); Winfield, *Nuisance as a Tort*, 4 CA[illegible] L.J. 189 (1931).

Especially valuable is Newark, *The Boundaries of Nuisance*, 65 L.Q. REV. 480 (19[illegible] I have drawn extensively upon Professor Newark's article, and take this occasion to acknowledge a considerable debt.

5 Thus the action on the case for nuisance was always local in character. Warren v. Webb, 1 Taun. 379, 127 Eng. Rep. 880 (C.P. 1808).

6 GARRETT & GARRETT, NUISANCES 1 (3d ed. 1908).

7 Modern examples of purprestures are Sloan v. City of Greenville, 235 S.C. 277, [illegible] S.E.2d 573 (1959); Adams v. Commissioners of the Town of Trappe, 204 Md. 166, [illegible] A.2d 830 (1954); Long v. New York Cent. R.R., 248 Mich. 437, 227 N.W. 739 (19[illegible] Woods v. Johnson, — Cal. App. 2d —, 50 Cal. Rptr. 515 (Dist. Ct. App. 1966).

8 Newark, *supra* note 4, at 482.

9 GARRETT & GARRETT, *supra* note 6, at 2; JEUDWINE, TORT, CRIME AND POLICE IN MEDIAEVAL BRITAIN 218 (1917).

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SALMOND, TORTS 229 (9th ed. 1936

13 See notes 163-80 *infra* and a

14 See, *e.g.*, People v. Lim, 18
Ariz. 458, 90 P.2d 988 (1939); Peo
Coal & Lumber Co. v. Johnston, 1

duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects."[10]

There are, then, two and only two kinds of nuisance,[11] which are quite unrelated[12] except in the vague general way that each of them causes inconvenience to someone, and in the common name, which naturally has led the courts to apply to the two some of the same substantive rules of law. A private nuisance is narrowly restricted to the invasion of interests in the use or enjoyment of land. It is only a tort, and the remedy for it lies exclusively with the individual whose rights have been disturbed. A public nuisance is a species of catch-all low-grade criminal offense, consisting of an interference with the rights of the community at large, which may include anything from the blocking of a highway to a gaming-house or indecent exposure. Although as in the case of other crimes, the normal remedy is in the hands of the state, a public nuisance may also be a private one, when it interferes with private land.[13] The seeds of confusion were sown when courts began to hold that a tort action would lie even for a purely public nuisance if the plaintiff had suffered "particular damage."

Public Nuisance

Public nuisance was a common-law crime, and as such it passed over into the early American law. When crimes became a matter of statute only, all of the states enacted broad criminal statutes covering such nuisances. These statutes either did not attempt to define nuisance, or at most defined it in a very general and rather meaningless fashion. Such statutes have quite uniformly been construed to include anything that would have been a public nuisance at common law.[14] In addition

10 Stephen, A General View of the Criminal Law of England 105 (2d ed. 1890).

11 Unless the case can be fitted into one category or the other, there is simply no nuisance at all. A good example of this is Mandell v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct. 1956), where plaintiff was injured by running into a defectively installed awning on defendant's building. It was held that no private nuisance was pleaded, because there was no allegation of any interference with rights in land; and no public nuisance, because there was no allegation that the awning interfered with the public highway, or with plaintiff's rights as a member of the general public.

12 "Public and private nuisances are not in reality two species of the same genus at all. There is no generic conception which includes the crime of keeping a common gaming-house and the tort of allowing one's trees to overhang the land of a neighbour." Salmond, Torts 229 (9th ed. 1936).

13 See notes 163-80 *infra* and accompanying text.

14 See, *e.g.*, People v. Lim, 18 Cal. 2d 872, 118 P.2d 472 (1941); Engle v. Clark, 53 Ariz. 458, 90 P.2d 988 (1939); People v. Clark, 268 Ill. 156, 108 N.E. 994 (1915); First Ave. Coal & Lumber Co. v. Johnston, 171 Ala. 470, 54 So. 598 (1911).

there are in every state a multitude of specific provisions declaring that certain things, such as bawdy houses, black currant plants, buildings where narcotics are sold, mosquito breeding waters, or unhealthy multiple dwellings, are public nuisances.

Apart from such specific designation, the crime comprehends a very miscellaneous and diversified group of petty offenses,[15] all based on some interference with the interests of the community, or disruption of the comfort or convenience of the general public. It may be interference with the public health, as in the case of a hogpen,[16] the keeping of diseased animals,[17] a malarial pond,[18] or carrying a child with smallpox along the highway;[19] or with the public safety, as in the case of the storage of explosives,[20] shooting fireworks in the streets,[21] or the practice of medicine by one not qualified;[22] or with the public morals, as in the case of houses of prostitution,[23] illegal liquor establishments,[24] gaming houses,[25] indecent exhibitions,[26] bullfights,[27] unlicensed prize fights,[28] or public profanity.[29] It may be based upon disruption of the public peace, as by loud and disturbing noises,[30] or an opera performance that threatens to cause a riot;[31] or upon interference with the public comfort, as in the case of bad odors, smoke, dust and vibration;[32] or upon interference with public convenience,

The writer must confess to an impish desire to see someone prosecuted for being a common scold. He is even prepared to offer nominations. The last case reported appears to be Commonwealth v. Mohn, 52 Pa. 243 (1866). See also United States v. Royall, 27 Fed. Cas. 906 (No. 16201) (C.C.D.C. 1829); James v. Commonwealth, 12 S. & R. 220 (Pa. 1825).

15 A good number of cases are collected in PROSSER, TORTS § 89, at 605-06 (3d ed. 1964).

16 Seigle v. Bromley, 22 Colo. App. 189, 124 Pac. 191 (1912).

17 Fevold v. Board of Supervisors, 202 Iowa 1019, 1031, 210 N.W. 139, 144 (1926).

18 Mills v. Hall & Richards, 9 Wend. 315 (N.Y. Sup. Ct. 1832).

19 King v. Vantandillo, 4 Maul. & Sel. 73, 105 Eng. Rep. 762 (K.B. 1815).

20 State *ex rel.* Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254, 169 S.W. 587 (1914).

21 Landau v. City of New York, 180 N.Y. 48, 72 N.E. 631 (1904).

22 State *ex rel.* Collet v. Scopel, 316 S.W.2d 515 (Mo. 1958).

23 Black v. Circuit Court, 78 S.D. 302, 101 N.W.2d 520 (1960).

24 Brown v. Perkins, 78 Mass. (12 Gray) 89 (1858).

25 State *ex rel.* Williams v. Karston, 208 Ark. 703, 187 S.W.2d 327 (1945).

26 Weis v. Superior Court, 30 Cal. App. 730, 159 Pac. 464 (Dist. Ct. App. 1916).

27 State v. Canty, 207 Mo. 439, 105 S.W. 1078 (1907).

28 Commonwealth v. McGovern, 116 Ky. 212, 75 S.W. 261 (1903).

29 Wilson v. Parent, 228 Ore. 354, 365 P.2d 72 (1961).

30 People v. Rubenfeld, 254 N.Y. 245, 172 N.E. 485 (1930).

31 Star Opera Co. v. Hylan, 109 Misc. 132, 178 N.Y. Supp. 179 (Sup. Ct. 1919).

32 Transcontinental Gas Pipe Line Corp. v. Gault, 198 F.2d 196 (4th Cir. 1952) (injunction to abate a nuisance).

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the nuisance will interfere

33 James v. Hayward, Cro. Car. 1

34 David M. Swain & Son v. Chic

35 Lamereaux v. Tula, 312 Mass.

36 Town of Mount Pleasant v. V
1957), *aff'd*, 6 App. Div. 2d 880, 177

37 Shamhart v. Morrison Cafeteri

38 State v. Pennington, 40 Tenn.

39 State v. Hooker, 87 N.W.2d 33

40 Pennsylvania Coal Co. v. Ma
Phoenix v. Johnson, 51 Ariz. 115, 1
with residence); *cf.* Attorney Gene
Co., 34 Mich. 461 (1876) (obstructic
(cursing particular household); Stat
singing school).

41 Higgins v. Connecticut Light
ple v. Brooklyn & Queens Transit
1939), *aff'd*, 283 N.Y. 484, 28 N.E.2
200, 170 Eng. Rep. 691 (N.P. 1802).
There are, however, statutes in t
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public right as such need be involv
People v. Rubenfeld, 254 N.Y. 24
Saline, 276 S.W.2d 874 (Tex. Civ. A

42 Smith v. City of Sedalia, 152
America v. Reynolds, 178 F.2d 503 (
5 F.2d 374 (D.C. Cir. 1925) (workh
269, 86 N.W.2d 475 (1957) (quarry)
95 (1866) (iron works, noise, vibrat
1950) (outdoor public address syste
1867) (locomotives).

43 State *ex rel.* Wear v. Springfie