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Liability For Injury Caused By The Emission Of Noxious Gases

Wright v. Masonite Corporation

In an action to recover damages for the loss of grocery stock which had been contaminated by the infiltration of formaldehyde gas from defendant's manufacturing plant, which was located approximately 200 feet from the plaintiff's store, the Court of Appeals for the Fourth Circuit held that the defendant was not liable in nuisance since the invasion was neither intentional nor negligent. The majority of the court stated that under North Carolina law the doctrine of Rylands v. Fletcher was inapplicable to non-ultrahazardous activities and that the rules of the Restatement of Torts governing liability for nuisance would be applied.

Restatement § 822 provides that a defendant is liable in nuisance for a non-trespassory invasion of another's interest in land only if the invasion had been both intentional and unreasonable, or unintentional and otherwise actionable under the rules governing negligent, reckless, or ultrahazardous conduct. Restatement § 825 explains:

An invasion of another's interest in the use and enjoyment of land is intentional when the actor

(a) acts for the purpose of causing it; or

(b) knows that it is resulting or is substantially certain to result from his conduct.

1. 368 F.2d 661 (4th Cir. 1966).

2. 3 H. & C. 774, 159 Eng. Rep. 737 (Ex. 1865), rev'd, L.R. 1 Ex. 265 (1866), aff'd L.R. 3 H.L. 300 (1868). The defendants constructed on their land a reservoir which broke, causing water to flood the plaintiff's coal mine. Unable to hold the defendants liable under the then existing law of trespass, nuisance, or negligence, the Court of Exchequer, nevertheless held for the plaintiffs stating, “We think that the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable for all damage, which is the natural consequence of its escape.” L.R. 1 Ex. 265, 279-80. The House of Lords affirmed, but Lord Cairns narrowed the above principle to apply to only “non-natural” uses of their land by the defendants. L.R. 3 H.L. 330, 339.

3. Restatement of Torts § 822 (1939): 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 or 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 ultra-hazardous conduct.

4. Restatement of Torts § 825 (1939).
In applying these sections, the majority interpreted an intentional invasion to require that the defendant acted for the purpose of causing the harm or knew that the harm was resulting or substantially certain to result from his conduct. It would appear that the court was interpreting the word "invasion" in Restatement § 822 and § 825 to be synonymous with "invasion of another's interest in the private use and enjoyment of land" and to have required that the defendant intended every element of the nuisance, not just a physical invasion. Since no negligence had been proven, and it was found that the invasion was unintentional within this interpretation of § 825, the majority affirmed the district court's dismissal of the action.

In a vigorous dissent, Judge Bryan registered his dismay at this result, the consequence of which, in his judgment, was that when an invasion by noxious gases emanates from a source undiscovered for a long period of time, no liability would be imposed even though extensive damage would be likely. He found that although the North Carolina cases cited in the majority opinion had stated that the Restatement rules were being applied, none had ever held that recovery in a nuisance action was predicated upon proof of scienter on the part of the offender. His conclusion was that North Carolina law did not require the majority's result and that "intentional" referred to whether the acts causing the injury were involuntary, not to whether the injury was intentional; in his view, "[t]he only question in respect to the injury is whether it was substantial and unreasonable."

The statement of the court in the principal case that North Carolina does not apply the doctrine of Rylands v. Fletcher to non-ultrahazardous activities should not have been determinative of the court's approach. North Carolina is not the only state which professes to have

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5. This construction is certainly valid as a pure question of semantics; however, the correctness of this interpretation would seem to be questionable merely from the structure of Restatement § 822. The result of requiring the nuisance to be unreasonable when it is intentionally inflicted, but removing this requirement when it is negligently created would seem to be to allow a defense to such an action where the defendant has the more culpable state of mind, but not for the lesser.

6. See Wright v. Masonite Corp., 237 F. Supp. 129 (M.D.N.C. 1965), Finding of Fact #28, at 135: "Plaintiff did not initially associate the odor in his store with any activity of the defendant in the operation of his plant. He did not notify the defendant of his difficulty until February 1, 1963, three days before he closed his store. . . . The defendant knew for a number of years that it was discharging the fumes from its finishing plant, including fumes . . . containing urea-formaldehyde, into the atmosphere. . . . There was nothing to indicate to the defendant the possibility of creating a nuisance of the type described by the plaintiff."

7. This interpretation would probably not be significant in most nuisance cases, especially those involving an invasion by gases, since the harm caused is usually such an obvious result of the invasion that knowledge of one necessarily implies knowledge of the other. The Wright case is unusual in that the lower court's findings clearly indicate that the physical invasion was "intentional" but the resultant harm was not. See note 5 supra.

8. E.g., Watts v. Pama Mfg. Co., 256 N.C. 611, 124 S.E.2d 809 (1962) (alleged nuisance consisting of noise and vibration from machinery in defendant's plant); Morgan v. High Penn Oil Co., 283 N.C. 185, 77 S.E.2d 682 (1953) (action for damages and injunction of a nuisance consisting of noxious gases from defendant's refinery). The majority and dissent in the principal case agree that in both of these cases, the defendants had knowledge of the injury being caused and therefore their actions must be construed as being "intentional" within the definition of Restatement of Torts § 825 (1939).

9. 368 F.2d at 666-67.
rejected this doctrine. However, it has been pointed out by numerous commentators that courts often disavow the case by name while accepting its doctrine under some other guise. The essential factor in the doctrine of Rylands v. Fletcher is the requirement that the activity involved be "non-natural." This has been recognized to mean that the activity must be extraordinary or abnormal, and as Prosser points out, "[T]he 'rule' of Rylands v. Fletcher is that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." Accordingly, Prosser also observes in discussing the law of nuisance in Texas, a jurisdiction which also claims to disavow Rylands v. Fletcher, "[L]iability for what is called 'nuisance' very often rests upon a basis of strict liability, without proof of wrongful intent or negligence, and is not to be distinguished in any respect from the doctrine of Rylands v. Fletcher." Further, he criticizes the Restatement, which accepts the rule as applying only to "ultrahazardous activity" as not reflecting either the English or American cases, which stress the place where the activity is done. He concludes that there is little difference between the "unreasonable use" required in nuisance and the "non-natural use" of Rylands v. Fletcher and states that:

There is in fact probably no case applying Rylands v. Fletcher which is not duplicated in all essential respects by some American decision which proceeds on the theory of nuisance; and it is quite evident that under that name the principle is in reality universally accepted.

Significantly, liability under Rylands v. Fletcher is strict liability; it is not necessary that the defendant have intended that the substances would escape or that any harm would result. If any mental element is required, it is only in the voluntary carrying on of some activity on one's own land.

The law of private nuisance has been a source of great difficulty for courts, legal writers, and students alike. Numerous problems have resulted from the failure of many to recognize that private nuisance is a tort-liability concept characterized by the interest protected - the use and enjoyment of land. Several types of tortious conduct, most

10. See W. Prosser, Torts § 77, at 524-25 (3d ed. 1964) (for a listing of those American jurisdictions which have accepted and rejected the doctrine by name).
12. See note 2 supra.
15. Restatement of Torts §§ 519, 520 (1939).
17. Id. at 529.
notably trespass, negligence, and "strict liability" are related to the law of private nuisance. Thus, many courts approach the law of nuisance as Justice Stewart approaches pornography — despite an inability to articulate an adequate workable definition, they feel that they can recognize a nuisance when they see it. Another and possibly the most typical approach of the courts in this area is for the issue of nuisance to be ignored if any other ground for decision exists.

A private nuisance, as indicated above, has usually been defined as an interference with the use and enjoyment of land. It has long been recognized that an emission of noxious odors or fumes which invades an adjacent landowner's property may constitute an actionable nuisance. It is easily seen that an invasion of the plaintiff's land by smoke or fumes differs little from the traditional concept of a trespass to land. Although the interest protected in a trespass action is said to be the exclusive possession of land it is obvious that the terms "use and enjoyment of land" and "exclusive possession of land" are not mutually exclusive. However, it is not surprising that there has been much difficulty in distinguishing between them. Generally, courts considering the question have considered invasion by gases or similar substances to be non-trespassory. The principal case could possibly

20. The field of public nuisance is a completely distinct area, dealing with offenses against the public which, though generally punishable as crimes, may also give rise to civil liability to one who has incurred special damage. See W. PROSSER, TORTS §§ 605-11 (3d ed. 1964); 1 F. HARPER & F. JAMES, TORTS §§ 64-65 (1956). See also Smith, Private Action for Obstruction to Public Rights of Passage, 15 COLUM. L. REV. 141 (1915).


22. Compare City of Barberton v. Miksch, 128 Ohio St. 169, 190 N.E. 387 (1934), where the percolation of water from a sewer system onto the plaintiff's land is called a trespass, with Healy v. Citizens' Gas & Elec. Co., 199 Iowa 82, 210 N.W. 118 (1924), where, on almost identical facts, the court treats the interference as a nuisance. The Restatement attempts to avoid some of the difficulty by not using the term "nuisance" at all. See RESTATEMENT OF TORTS §§ 822-40 (1939).

23. See note 19 supra and accompanying text.


26. See notes 11 & 22 supra; Lamm v. Chicago, St. P. M. & O. Ry., 45 Minn. 71, 47 N.W. 455 (1890) (recovery allowed for a "trespass" to plaintiff's easement for access, light and air in the public street where defendant's trains emitted ashes, smoke and cinders); Donahue v. Keystone Gas Co., 181 N.Y. 313, 73 N.E. 1108 (1905) (action for damages done to plaintiff's shade trees by gas negligently allowed to escape from defendant's pipes, where court states that defendant was a "trespasser" and that one who injured his neighbor by smoke would be a "semi-trespasser"); Igmeundson v. Midland Continental R.R., 42 N.D. 455, 173 N.W. 752 (1919) (action for damages from smoke, noxious vapors, oil, steam, cinders and noise emitted from defendant's trains in which it was held that the creation of such nuisance supported a cause of action in trespass); Digiriomo v. Philadelphia Gun Club, 371 Pa. 40, 89 A.2d 357 (1952) (action to enjoin gun club from shooting over and onto plaintiff's land, where court speaks in terms of both trespass and nuisance).

27. See, e.g., Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954), where in an action by dairy farmers for injuries to cattle and farms caused by fluoride discharged from defendant's plant, the court called the action one of trespass on the case rather than trespass quare clausum fregit because the injury was consequential and not direct; Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435
have been decided for the plaintiff had the court wished to call the invasion a trespass. Although this would have been a rather unorthodox basis for decision, a recent Oregon case, *Martin v. Reynolds Metals Company*, held that a similar invasion was a trespass, thus avoiding the shorter statute of limitations applicable to actions for nuisance. Designating an invasion by fluoride gases a trespass, the court in *Martin* defined a trespass as "any intrusion which invades the possessor's protected interest in exclusive possession, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist."

While the authority of the *Martin* case may be minimal since the issue before the court was only whether to bar the plaintiff by the nuisance statute of limitations, the result of the decision approaches that advocated by Judge Bryan in the principal case. The only difference would seem to be that Judge Bryan would find a nuisance only where the invasion is "substantial and unreasonable," while the *Martin* court presumably would find a trespass on the basis of such an invasion regardless of its substantiality or unreasonableness. As a matter of logic, there appears to be little reason for making the rights of the parties turn on the size of the particles which invade the plaintiff's property. Actions for trespass have been allowed where the invasion was by small particles of lead, shotgun pellets passing over and landing on plaintiff's property, a spray of water, smoke, steam, and
cinders,\textsuperscript{33} and water from a polluted stream.\textsuperscript{34} To hold that an invasion is not a trespass merely because the particles are smaller than a shotgun pellet would seem to be no more than an outdated remnant of an earlier state of science when the nature of gases and fumes was not yet understood.

The only other possible basis for holding that an invasion by gases was non-trespassory might be the distinction between direct and indirect consequences.\textsuperscript{35} Thus, the distinction could be drawn between particles which are thrown directly on the plaintiff's land and those which are diffused into the atmosphere and are later cast upon the plaintiff's land. The artificiality of this distinction is obvious,\textsuperscript{36} and, in fact, this type of analysis is no longer considered valid.\textsuperscript{37}

If the determination of whether an invasion by gases is actionable as a trespass or as a nuisance depends upon the size of the particles, then there would appear to be no logical basis for deciding the outer limits of a trespass. Certainly, an odor is distinguishable from the invasions in \textit{Martin} and \textit{Wright} only by the size and number of the particles, and if the dicta in \textit{Martin} is to be followed, then a trespass may consist of an invasion by light or noise also. This approach would result in the whole concept of nuisance being virtually swallowed up by the law of trespass. Such a result would, however, create greater difficulties. While the nuisance requirement of unreasonableness would be extinguished, the question of scienter or intent on the part of the defendant would still be left open. While at common law a trespass had only to be voluntary,\textsuperscript{38} the more recent trend is to find a trespass only when the invasion is intentional, negligent, or the result of extrahazardous activity.\textsuperscript{39} But even if this view were to be accepted, the position of the majority in the principal case, applying the test of intention in § 825, would still be untenable — the requirement

\begin{itemize}
  \item \textsuperscript{34} West Kentucky Coal Co. v. Rudd, 328 S.W.2d 156 (Ky. 1959). "Injury of the character here involved has many times been held to constitute a continuing trespass, for which damages or an injunction may be obtained..." \textit{Id. at} 160.
  \item \textsuperscript{35} Historically, trespass existed only for injuries which were direct and immediate, although not necessarily intentionally caused, while an action on the case was for injuries which were intentional, though indirect. \textit{See} W. Prosser, \textit{The Law of Torts} § 7 (1964).
  \item \textsuperscript{36} Cf. Smith, \textit{Liability for Substantial Physical Damage to Land by Blasting}, 33 Harv. L. Rev. 542 (1920) (denouncing the distinction which allowed recovery for damages where there was a trespass but not when the damage was done by concussion).
  \item \textsuperscript{37} \textit{Restatement (Second) of Torts} § 158, comment on clause (a) (1965): In order that there may be a trespass under the rule stated in this Section, it is not necessary that the foreign matter should be thrown directly and immediately upon the other's land. It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter.
  \item \textsuperscript{38} \textit{See, e.g.,} W. Prosser, \textit{Torts} § 13 (3d ed. 1964); \textit{Restatement (Second) of Torts} § 166, comment b (1965).
  \item \textsuperscript{39} \textit{See, e.g.,} W. Prosser, \textit{Torts} § 13 (3d ed. 1964). \textit{Restatement (Second) of Torts} § 166 (1965) provides: Except where the actor is engaged in an abnormally dangerous activity, an unintentional and non-negligent entry on land in the possession of another, or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor, even though the entry causes harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest.
\end{itemize}
of scienter under the modern view of trespass applies only to the invasion, not to the harm. The substitution of trespass for nuisance does not appear to be a satisfactory alternative, as it is universally agreed that the essence of the action in nuisance is an unreasonable interference. The Martin case is then acceptable only insofar as it points out that there is no difference in the mental element required in trespass and nuisance. However, if Judge Bryan's view in the dissenting opinion in the principal case were to be followed, then nuisance would be taken back to the old common law trespass in that the harm need only be the result of a voluntary act, but not necessarily the result of intent to invade or harm.

Thus, while the crux of a nuisance is unreasonableness, a distinction is often made between nuisances which are per se or absolute and those which are per accidens. Except for those activities specifically proscribed by statute, there are very few, if any, activities which may be correctly categorized as "absolute" nuisances. The more realistic approach is to determine that a nuisance exists only after determining its reasonableness by looking at the location and surroundings.

This approach is illustrated by the fact that courts have been forced to retreat from their earlier determinations that a particular activity was a nuisance per se when the same activity was being carried on under different circumstances. But if nuisances are to be treated as trespasses, then the result would be that all nuisances would be per se.

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40. See, e.g., Wood v. United Airlines, 32 Misc. 2d 955, 223 N.Y.S.2d 692, aff'd 16 App. Div. 2d 659, 226 N.Y.S.2d 1022 (1962), where recovery on the basis of trespass was denied where a plane crashed, after a mid-air collision, into the plaintiff's apartment building. The court stated that for recovery in trespass the defendant must have "intend[ed] the act which amounts to or produces the unlawful invasion," 223 N.Y.S.2d at 695, and indicated that recovery might have been allowed if the pilot had had some control over the plane or had been attempting to crash-land.

41. Normally, one who intentionally trespasses will be liable regardless of whether he has caused any harm. Restatement (Second) of Torts § 163 (1965).

42. See notes 8 & 9 supra and accompanying text.

43. Reasonableness would not be a defense to an absolute nuisance, and it is often stated that an absolute nuisance may not arise out of negligent conduct. The principal reason for distinguishing nuisances as per se and per accidens is that contributory negligence is said to be a defense to a nuisance per accidens but not to a nuisance per se. See McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928) (opinion of Cardozo, J.).

44. An otherwise lawful act which becomes a nuisance only by reason of surroundings or special circumstances. See, e.g., United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931); DeLahunta v. City of Waterbury, 134 Conn. 630, 59 A.2d 800 (1948); Beckwith v. Town of Stratford, 129 Conn. 506, 29 A.2d 775 (1942) (where a nuisance is said to be absolute if created intentionally, but is not if created negligently); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908); Bormemouth Realty Co. v. Gulf Soap Corp., 212 La. 57, 31 So. 2d 488 (1947); Adams v. Commissioners of Town of Trappe, 204 Md. 165, 102 A.2d 830 (1954); Metzger v. Pennsylvania O. & D. R. Co., 146 Ohio St. 406, 66 N.E.2d 203 (1946); Meacham v. Mount, 379 Pa. 441, 110 A.2d 310 (1954); City of Milwaukee v. Milbrew, Inc., 240 Wis. 527, 3 N.W.2d 386 (1952). See generally W. Prosser, Torts § 88, at 603-05 (3d ed. 1964).


46. W. Prosser, Torts § 88 (3d ed. 1964): "[T]he prevailing view is that such property rights and privileges are not absolute, but relative, that there is no nuisance if the defendant has made a reasonable use of his property, and that any use which is unreasonable under the circumstances may be a nuisance." Id. at 604.

47. See W. Prosser, Torts § 88 (3d ed. 1964).
Although many nuisances are created by negligent conduct and would be actionable on a negligence theory, it is the resultant condition, not any fault in the causative conduct, which most basically characterizes an action in nuisance. It has been stated that “[n]uisance is a condition, and not an act or failure to act on the part of the person responsible for the condition. If the wrongful condition exists, and the person charged therewith is responsible for its existence, he is liable for the resulting damages to others, although he may have used the highest degree of care....” As Justice Cardozo stated, “One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions.”

Thus, at least theoretically the existence of a nuisance is dependent, not upon the reasonableness of the actor’s conduct in terms of foreseeability of harm, but upon the reasonableness of the resultant invasion in light of all the surrounding circumstances and facts. Normally, this determination is made by balancing the gravity of the harm caused against the utility of the causative conduct. Consequently, many of the factors relevant to a determination of negligence will have some bearing on the question of nuisance, since the utility of the conduct is influenced by factors such as the suitability of the conduct to its locality and the impracticability of preventing or avoiding the invasion.

It is submitted that Restatement § 825 requires only that the actor must have acted for the purpose of causing the invasion or have known that the invasion would or was substantially certain to occur. Thus, if one who emits gases knows that they are entering or are substantially certain to enter the land of another, then the invasion is intentional within the meaning of Restatement § 825. Accordingly, if the expulsion of fumes onto the land of a neighbor is a necessary and regular consequence of an industrial operation, the actor cannot deny that the invasion is intentional. If, in addition, the invasion is unreasonable, Restatement § 822 imposes liability which the actor may not avoid by claiming ignorance of the actual harm caused. It is sufficient that the conditions causing the harm were intentionally created, and the result need only be unreasonable, not intentional.

The case law both prior and subsequent to publication of the Restatement supports this position. Thus, in McFarlane v. City of...
Niagara Falls,\textsuperscript{54} in an action for the creation of the nuisance of a piece of sidewalk projecting upward so that the plaintiff was caused to fall, it was held that the "nuisance" was created only because of the defendant's negligence and that therefore the contributory negligence of the plaintiff would be a defense. But, in a similar case, where the alleged nuisance was a depression in a steeply inclined sidewalk, it was held that the nuisance was an intentional one to which contributory negligence would not be a defense.\textsuperscript{55} It was stated then that, "[a] second [class of nuisances] includes nuisances which are intentional, using that word as meaning not that a wrong or the existence of a nuisance was intended but that the creator of them intended to bring about the conditions which are in fact found to be a nuisance."\textsuperscript{56} The court then distinguished the McFarlane case as involving a condition caused by negligent construction, while the nuisance in the case before the court was caused by a condition existing exactly as intended by the defendants.\textsuperscript{57}

Similarly, in an action for damages caused by the escape of fumes from a tank car which the defendant left on its railroad siding overnight, the court stated that the case should have been submitted to the jury on the theories of \textit{res ipsa loquitur} and negligently-created nuisance, but not on the separate ground of an intentionally-created nuisance.\textsuperscript{58} Here again, the invasion was caused by a mishap, negligence being the cause of the invasion; however, the defendant never intended to cause an invasion or knew or reasonably should have known that an invasion would occur. In Waschak v. Moffat,\textsuperscript{59} in an action for damages caused by the emission of hydrogen sulphide gas from a pile of burning coal waste kept by the defendants on their land, it was held that the plaintiffs could not recover for damage done to their home. This result is reconcilable with the construction being urged here since the fumes were emitted as a result of a fire which started through no fault of the defendants and the court specifically found that the "[D]efendants did not know and had no reason to anticipate the invasion of this gas and the results which might follow."\textsuperscript{60}

\textsuperscript{54} 247 N.Y. 340, 160 N.E. 391, 392 (1928). Justice Cardozo stated: "[W]e hold that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrong-doer the label of a nuisance."

\textsuperscript{55} Beckwith v. Town of Stratford, 129 Conn. 506, 29 A.2d 775 (1942).

\textsuperscript{56} Id. at 777.

\textsuperscript{57} Id. at 778-79.

\textsuperscript{58} McKenna v. Allied Chem. & Dye Corp., 8 App. Div. 2d 463, 188 N.Y.S.2d 919 (Sup. Ct. 1959) (citing \textit{Restatement of Torts} § 822 (1939)).


\textsuperscript{60} 379 Pa. 441, 109 A.2d at 312. Accord, Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954) (where the fire causing the noxious gases and odors was started by spontaneous combustion in the defendant's "gob pile"). Cf. Dunsbach v. Hollister, 2 N.Y.S. 94 (Sup. Ct. 1888), aff'd, 132 N.Y. 602, 30 N.E. 1152 (1892), where recovery in damages was allowed for a nuisance caused by the wind blowing sand from a large pile kept by the defendant, but the court stated that it was
The problem of what mental element is required is complicated by the fact that normally an invasion by gases or similar substances is visible and obvious; in such cases, the defendant will probably know that the substances he is emitting are invading the plaintiff's property and also that such invasions are causing harm.

Thus, in King v. Columbian Carbon Co., the court allowed recovery for damage caused by the non-negligent discharge of soot, carbon black, and other by-products of an industrial operation onto the plaintiff's land. In doing so, it stated:

According to the allegations in the complaint, which must be accepted as true, the Defendant is continuously casting carbon, soot, and greasy distillate upon the Plaintiffs' lands, as it knew it would do when it constructed its plant. It knew then, as it knows now, that so long as it would continue its operations the soot and the grease, etc., would continue to fall. . . .

In finding that the due care of the defendant was no defense, the court distinguished a number of Texas cases which required proof of negligence for recovery in nuisance on the basis that the substances which escaped in those cases did so contrary to the purposes and intent of the defendants to keep them where they had been put, while in the case before the court the defendants knew from the inception of the operation that oil and soot would be discharged from the smokestacks and would necessarily fall on the property of others. Thus, while under the doctrine of Rylands v. Fletcher, which was not accepted in Texas, recovery could be had if the defendant had only brought the necessary to prove negligence for the plaintiffs to recover. But see dissenting opinion by Musmanno, J., who argues that the defendants were at least "substantially certain" that they were causing an invasion of the plaintiff's interests. Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310, 323 (1954).

61. 152 F.2d 636 (5th Cir. 1945).
62. Id. at 640.
63. Cosden Oil Co. v. Sides, 35 S.W.2d 815 (Tex. Civ. App. 1931) (oil and waste overflowing from defendant's land). See, e.g., Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936) (escape of waste materials from earthen ponds or pools); Warren v. Premier Oil Ref. Co., 173 S.W.2d 287 (Tex. Civ. App. 1945) (oil leaking from defendant's pipeline). Texas disavows the doctrine of Rylands v. Fletcher and consistent with the analysis in Prosser, Nuisance Without Fault, 20 Texas L. Rev. 399 (1942), these cases may be explained either as involving conduct which did not create an unreasonable risk of harm, or as not involving unnatural uses of land in that locale, or because the invasion was unintentional.
64. King v. Columbian Carbon Co., 152 F.2d 636, 640 (5th Cir. 1945). The court cites as authority another Texas case, Marvel Wells, Inc. v. Seeleg, 115 S.W.2d 1011 (Tex. Civ. App. 1938), which while reversing on a question of damages, allowed recovery for damages caused by ashes, dust and cinders emitted from the defendant's smokestack, without any allegation of negligence. Cf. Kelly v. Nat'l Lead Co., 240 Mo. App. 47, 110 S.W.2d 728 (1948), which reversed a judgment for the plaintiff who had sustained damage by reason of the invasion of fumes, gases and chemical particles from defendant's plant, on the basis that no negligence was proved, but the court said that plaintiff was trying to make the facts fit an improper theory of recovery (negligence) and remanded the case with leave to the plaintiff to bring the action on the theory of nuisance; Giardina v. Garnerville Holding Corp., 265 App. Div. 1004, 38 N.Y.S.2d 913 (Sup. Ct. 1943), aff'd, 291 N.Y. 619, 50 N.E.2d 1015 (1943) (allowing recovery against a factory owner who maintained a nuisance consisting of a large cloud of steam and smoke emanating from his factory so as to cover an adjoining private road causing plaintiff's truck to collide with another truck).
invading substances upon his own land, the defendant must have intended that there would be an invasion in order for liability in nuisance to be imposed.

Recovery without proof of intentional harm has also been allowed in similar cases where the defendant maintained a nuisance consisting of smells, odors and air pollution from naphtha tanks, smoke, sawdust and embers from a burner at a sawmill, smoke and poisonous fumes from a smelter, or coal dust from a coal yard. Since these substances were easily traceable, several of the courts indicated that the harm may have been foreseeable. However, the cases do not give any indication that proof was required that the defendants knew or had reason to know that they were causing harm; they knew only that the substances were being discharged as a result of their operation, and liability was imposed.

Difficult to reconcile along these lines is Powell v. Superior Portland Cement, Inc., which denied recovery in nuisance for the emission

65. Bohan v. Port Jervis Gas-Light Co., 122 N.Y. 18, 25 N.E. 246 (1890) : "But where the damage is the necessary consequence of just what the defendant is doing, or is incident to the business itself, or the manner in which it is conducted, the law of negligence has no application, and the law of nuisance applies." Id. at 247.
67. Sterrett v. Northport Mining & Smelting Co., 30 Wash. 164, 700 P. 266 (1902) (where the court states that there was no negligence, but implies that the damage was foreseeable).

The ownership of land carries with it the rightful use of the atmosphere while passing over it... But air is movable, and constantly flowing from the premises of one to those of another, and hence, when it becomes thickly impregnated with putrid substances, it necessarily flows onto the adjacent premises in one direction or another. This being so, it follows that any business which necessarily and constantly impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter, may become a nuisance to those occupying adjacent property, in case it is so near, and the atmosphere is contaminated to such an extent, as to substantially impair the comfort or enjoyment of such adjacent occupants. Id. at 99.


69. There are numerous nuisance cases in which damages were allowed or a complaint was held to state a cause of action, and while the courts did not specifically deal with the issue, due care was not allowed as a defense in any of these cases nor did any contain evidence or allegations that the defendants intended harm or knew that they were causing harm. E.g., Baltimore & P.R.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883) (noise, smoke and odors emitted from defendant's trains); E. Rauh & Sons Fertilizer Co. v. Shreffer, 139 F.2d 38 (6th Cir. 1943) (sulfur dioxide fumes from defendant's plant damaged plaintiff's gladiola plants); United Verde Copper Co. v. Ralston, 46 F.2d 1 (9th Cir. 1931) (sulfur dioxide fumes caused injury to crops and depreciation in value of plaintiff's land); United Verde Copper Co. v. Jordan, 14 F.2d 299 (9th Cir. 1926); Dixie Ice Cream Co. v. Blackwell, 217 Ala. 330, 116 So. 348 (1928) (emission of smoke, soot and cinders from defendant's smokestack); Bigbee Fertilizer Co. v. Scott, 3 Ala. App. 333, 56 So. 834 (1911) (fluorine gas discharged from plant); Ponder v. Quitman Ginnery, 122 Ga. 29, 49 S.E. 746 (1905) (dust and sand from cotton ginning machinery); Iverson v. Vint, 243 Iowa 949, 54 N.W.2d 494 (1952); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 169 P. 208 (1907) (oil and poisonous substances discharged into water and fumes); Frey v. Queen City Paper Co., 79 Ohio App. 64, 66 N.E.2d 252 (1946) (fly-ash and coal particles from defendant's furnace and heating plant); Jones v. Rumford, 64 Wash. 2d 559, 392 P.2d 808 (1964) (odors from chicken breeding plant).
70. 115 Wash. 12, 129 P.2d 536 (1942) (denying recovery for damage done by dust emitted from defendant's plant). Contra, California Orange Co. v. Riverside
of dust from defendant’s operation onto the plaintiff’s property. However, this case may possibly be distinguished on the basis that the court may have felt that the plaintiff did not suffer “material injury,” but only slight discomfort and annoyance.\(^{71}\)

If intentional harm is to be a required element for the imposition of liability on one maintaining a non-negligent nuisance, then unless the actor knew that the harm was resulting or was substantially certain to result, it would be required that one suing for damages notify the defendant that he was causing the harm. But obviously, where substantial damage has already occurred prior to discovery of the source of the harm, such procedure would amount to closing the gate after the cows had escaped. No case until \(Wright\) has indicated such a requirement or has required proof that the defendant was aware of the damage that he was causing. However, there are cases which have required that one must give notice that a nuisance is being maintained to one who is the alienee or transferee of the creator of the nuisance.\(^{72}\) In these cases, the “intentional” requirement refers to the causative conditions, not the resulting harm, and the reason for making such a distinction cannot be because the alienee did not know of the harm as the alienor did, but because the alienor was the party who intentionally caused the invasion which resulted in a nuisance.

One possible source of confusion is that in many nuisance cases, the action is brought for an injunction. Because an injunction is an extraordinary remedy, granted only at the discretion of the court, it must appear not only that the harm be substantial and unreasonable, but also that the plaintiff has no adequate remedy at law. Therefore, when the defendant has terminated the nuisance there is no reason for an injunction to be granted. Consequently, when such an action is brought, the defendant will necessarily have notice that he is causing both an invasion and harm, and his continued maintenance of the causative conditions will constitute an intentional invasion and an intentional

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\(^{71}\) See Comment, \(Recovery of Damages For Private Nuisance, 18 WASH. L. REV. 31\) (1943), which suggest this rationale, but is extremely critical of the result. \(See also\) Harless v. Wakman, 145 W. Va. 266, 114 S.W.2d 548, 555 (1930), which affirmed a denial of recovery for injuries caused by the emission of coal dust from the defendant’s coal mining operations. While the court stated that the trial court did not err in submitting the case to the jury on the basis of negligence, and not nuisance, the case may be reconciled if one were to interpret the jury’s decision, in light of the trial court’s instructions, as finding that the defendant did not intentionally invade the plaintiff’s premises and that the injury suffered was trifling and not substantial.

\(^{72}\) Clarke v. Boysen, 39 F.2d 800 (10th Cir.), cert. denied, 282 U.S. 869 (1930): “Such notice and request to abate is usually necessary as a prerequisite to impose liability against a person who merely passively continues a private nuisance created by his predecessor in title or possession.” \(Id. at 809\); Tennessee Coal, Iron & R.R. Co. v. Hartline, 244 Ala. 16, 11 So. 2d 833 (1943): “It is the one who creates a nuisance or who knowingly continues it if created by another, that is answerable for consequences. The bare fact of occupancy or of ownership imposes no responsibility.” \(Id. at 837\); Reinhard v. Lawrence Warehouse Co., 41 Cal. App. 2d 741, 107 P.2d 50 (1941): “[O]ne who was not the creator of a nuisance must have notice or knowledge of it before he can be held.” \(Id. at 504\); Georgia Power Co. v. Moore, 47 Ga. App. 411, 170 S.E. 520 (1933); Dunsbach v. Hollister, 2 N.Y.S. 94 (Sup. Ct. 1888), \(aff’d, 132 N.Y. 602, 30 N.E. 1152\) (1892).
In dealing with such situations, a court will normally weigh the comparative values of the utility of the causative conduct and the gravity of the resultant harm. When the latter factor is found to be of greater weight, then the infringing conduct will be enjoined, but even if the conduct is so useful as to preclude the issuance of an injunction, damages would still be awarded for the injury already done. While it has been said that in order for a nuisance to exist the harm must be continuous or recurring, the better view is that such a requirement is only one factor to be considered in determining the substantiality of the invasion. Significantly, this factor is best suited to showing that there is no adequate remedy in damages in a suit for injunction, and it should have limited application in a suit for damages.

The law in Maryland is generally opposed to the position taken by the principal case although no Maryland case has been squarely faced with the issue. The leading case is *Susquehanna Fertilizer Co. v. Malone,* an action for damages caused by the discharge of noxious gases escaping from the defendant's plant. The court held for the plaintiff, despite the fact that the defendant had used the best and most approved equipment available, and stated:

No one has a right to erect works which are a nuisance to a neighboring owner, and then say he has expended large sums of money

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73. See Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435, 439 (1942): "[C]ontinued conduct resulting in continuing or recurrent invasions, after the actor knows the invasions are resulting, is always intentional."

74. See, e.g., Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907), enforced, 237 U.S. 474 (1915), modified, 240 U.S. 650 (1916) (injury from sulphur fumes); Mountain Copper Co. v. United States, 142 F. 625 (9th Cir. 1906); Bliss v. Washoe Copper Co., 186 F. 789 (9th Cir. 1909); Bliss v. Anaconda Copper Mining Co., 167 F. 342 (C.C.D. Mont. 1909); Downing v. Elliott, 182 Mass. 28, 64 N.E. 201 (1902); Matthews v. Stillwater Gas & Elec. Co., 63 Minn. 493, 65 N.W. 947 (1896); Elliott Nursery Co. v. Duquesne Light Co., 281 Pa. 166, 126 A. 345 (1924); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 835 S.W. 658 (1904); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 P. 306 (1924) (weighing process used for injunction, but not for damages). See generally Restatement of Torts §§ 826-31 (1939); 19 Ind. L.J. 167 (1944). A distinction is sometimes made between temporary and permanent nuisance, but it would appear that this is relevant only as one factor to be considered in the weighing process, or in determining whether there is an adequate remedy at law.

75. See W. Prosser, Torts 601 (3d ed. 1964): It is sometimes said by court and writers that a nuisance must involve the idea of continuance or recurrence over a considerable period of time. What is meant by this is not altogether clear. In many cases, of course, continuance or recurrence . . . is necessary to cause any substantial harm. . . . If the harm was not foreseeable in the first instance, some continuance of the defendant's conduct may be required to establish his intent and his liability; and the duration or frequency of the invasion may certainly bear upon the reasonableness of what he has done. But in cases where the harm to the plaintiff has been instantaneous, although substantial, it may be held that the plaintiff may maintain an action for damages for a nuisance; and likewise where the defendant has acted only briefly. . . . See also Prosser, Nuisance Without Fault, 20 Texas L. Rev. 399, 402 n.8 (1942): "The proper statement would seem to be that for nuisance the interference must be a substantial one, and that the duration . . . is merely one factor, and not necessarily a conclusive one, in determining whether the damage is sufficiently substantial."

76. Baltimore & P.R.R. v. Fifth Baptist Church, 108 U.S. 317, 329 (1883): "For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongdoer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance."

77. 73 Md. 268, 20 A. 900 (1890).
in the erection of his works, while the neighboring property is comparatively of little value. The neighboring owner is entitled to the reasonable and comfortable enjoyment of his property, and if his rights in this respect are invaded, he is entitled to the protection of the law. . . . 78

Recovery has also been allowed for damages from smoke, soot, and gases emitted from factories in several cases,79 none of which required more than a showing of an invasion of the plaintiff's property resulting in substantial harm.

There are also a number of cases in Maryland which deal with the requirement of notice to one who was the transferee of the original creator of a nuisance. In Walter v. County Commissioners80 and Pickett v. Condon,81 it was held that notice was required to one who was not the creator of the nuisance, and in Guest v. Commissioners of Church Hill,82 the rule was stated to be:

If a person, who has not constructed a work which is a nuisance or causes damage, comes into possession of it, he is entitled to knowledge or notice of its injurious character and an opportunity to abate it before he can be held liable, but the original wrong-doer is not entitled to any notice before being sued for the injury caused by his own act.83

Similarly, in Harms v. Kuchta84 and Lion v. Baltimore City Passenger Ry.,85 it was held that no notice need be given to the original creator of a nuisance in an action for damages.86

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78. Id. at 282, 20 A. at 902.
79. See North American Cement Corp. v. Price, 164 Md. 234, 237, 164 A. 545, 546 (1933), where it was said:
   As stated in Susquehanna Fertilizer Co. v. Malone: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. . . ."
   Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 A. 270 (1898) (holding that defendant's due care was irrelevant). Cf. Jackson v. Shawinigan Electro Products Co., 132 Md. 128, 103 A. 453 (1918) (sustained declaration which did not allege intent or knowledge of harm). See also 1 J. Poe, PLEADING AND PRACTICE 158 (Tiffany 5th ed. 1925): "[I]f he conducts any lawful trade and business which infects or taints the surrounding air with noxious gases or offensive smells, so as to be injurious to the health of the occupants of neighboring houses he is responsible in damages."
80. 35 Md. 385 (1872) (obstruction by public highway which caused water to back up onto the plaintiff's land).
81. 18 Md. 413 (1862) (obstruction of a stream causing overflow).
82. 90 Md. 689, 45 A. 882 (1900) (city, which regraded streets so as to divert drainage onto plaintiff's land, held not entitled to notice).
83. Id. at 695, 45 A. at 884.
84. 141 Md. 610, 119 A. 454 (1922) (nuisance consisting of shed causing rainwater to run onto plaintiff's property).
85. 90 Md. 266, 44 A. 1045 (1899) (negligently constructed drains and vault carried surface water into the plaintiff's basement).
86. See 1 J. Poe, PLEADING AND PRACTICE 162 (Tiffany 5th ed. 1925). Cf. Metropolitan Sav. Bank v. Manion, 87 Md. 68, 79, 39 A. 90, 91 (1898) where, in holding that the defendant property owner was not liable for a nuisance consisting of a stable maintained by his tenant, it was stated, "It could make no possible difference whether the appellee was notified or not; by giving the notice, the appellee's liability was neither fixed nor enlarged."
The court in the principal case has apparently interpreted the word *invasion* in Restatement § 825 to be synonymous with the word *harm* and seems to be requiring that the actor know, or at least should have known, that a harm would result from his actions. This reading of the Restatement is tenable, but is not in accord with the general law which has not required such a degree of "fault" for liability in nuisance.

The dissent, however, has stated that knowledge on the part of the actor is irrelevant and that a nuisance should be found if the defendant has acted "voluntarily" and the resultant injury was substantial and unreasonable. This approach represents, in effect, an adoption of strict liability for nuisance in that it dispenses entirely with the concept of fault. While this position is also tenable, it is submitted that it is not the one advocated by the Restatement or the majority of case law. It closely approaches the doctrine of *Rylands v. Fletcher*, which holds that an actor will be liable for the purely accidental escape of certain substances from his land, where he has been neither negligent nor intended that there should be any escape or harm. The better reading of the requirement of Restatement § 825 is that the actor must have intended an *invasion*, *i.e.*, known that his actions were resulting in or substantially certain to result in some substance or energy being transmitted onto or over the land of a neighbor. It is not necessary that he know either that harm would result or that the invasion would be substantial or unreasonable. When put in the context of an invasion by gases, it is sufficient that the actor knew that he was discharging gases which were substantially certain to enter the land of his neighbor.