Commentaries on the Laws of England in Four Books, vol. 2,
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CHAPTER XIII. OF NUISANCE.

A third species of real injuries to a man's lands and tenements, is by *nuisance.* Nuisance, *nocumentum,* or annoyance, signifies any thing that worketh hurt, inconvenience, or damage. And nuisances are of two kinds:

- *public* or *common* nuisances, which affect the public, and are annoyance to *all* the king's subjects: for which reason we must refer them to the class of public wrongs, or crimes and misdemeanours: and

- *private* nuisances, which are the objects of our present consideration, and may be defined, any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

We will therefore, first, mark out the several kinds of nuisances, and then their respective remedies.

I. In discussing the several kinds of nuisances, we will consider, first, such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

> 1. First, as to *corporeal* inheritances. If a man builds a house so close to mine that his roof overhangs my roof and throws the water off his roof upon mine, this is a nuisance, for which an action will lie. Likewise to erect a house or other building so near to mine that it obstructs my antient [sic] lights and windows, is a nuisance of a similar nature. But in this latter case it is necessary that the windows be *antient,* that is, have subsisted there a long time without interruption; otherwise there is no injury done. For he hath as much right to build a new edifice upon his ground as I have upon mine; since every man may erect what he pleases upon the upright or perpendicular of his own soil, so as not to prejudice what has long been enjoyed by another; and it was my folly to build so near another's ground. Also if a person keeps his hogs, or other noisome animals, so near the house of another that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is, if one's neighbour sets up and exercises an offensive trade; as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places; for the rule is, "*sic utere tuo, ut alienum non lædas:*" this therefore is an actionable nuisance. So that the nuisances which affect a man's *dwelling* may be reduced to these three:
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> > 1. Overhanging it; which is also a species of trespass, for *cujus est solum, ejus est usque ad cælum:*
> > 2. Stopping antient lights: and,
> > 3. Corrupting the air with noisome smells: for light and air are two indispensable requisites to every dwelling.

But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like: this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.

As to nuisance to one's *lands:* if one erects a smelting-house for lead so near the land of another, that the vapour and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows, that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance: for it is incumbent on him to find some other place to do that act, where it will be less offensive. So also if my neighbour ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance. With regard to *other* corporeal hereditaments: it is a nuisance to stop or divert water that uses to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; or, in short, to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel morality, of "doing to others as we would they should do unto ourselves."

2. As to *incorporeal* hereditaments, the law carries itself with the same equity. If I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance: for in the first case I cannot enjoy my right at all, and in the latter I cannot enjoy it so commodiously as I ought. Also, if I am entitled to hold a fair or market, and another person sets up a fair or market so near mine that he does me a prejudice, it is a nuisance to the freehold which I have in my market or fair. But, in order to make this out to be a nuisance, it is necessary,

1. That my market or fair be the elder, otherwise the nuisance lies at my own door.
2. That the market be erected within the third part of twenty miles from mine.

For Sir Matthew Hale construes the *dieta,* or reasonable day's journey, mentioned by Bracton, to be twenty miles; as indeed it is usually understood, not only in our own law, but also in the civil, from which we probably borrowed it. So that if the new market be not within seven miles of the old one, it is no nuisance: for it is held reasonable that every man should have a market within one-third of a day's journey from his own home; that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there. If such market or fair be on the same day with mine, it is *prima facie* a nuisance to mine, and there needs no proof of it, but the law will intend it to be so; but if it be on any other day, it *may* be a nuisance: though whether it *is* so or not, cannot be intended or presumed, but I must make proof of it to the jury. If a ferry is erected on a river, so near another antient ferry as to draw away its custom, it is a nuisance to the owner of the old one.

For where there is a ferry by prescription, the owner is bound to keep it always in repair and readiness, for the ease of all the king's subjects; otherwise he may be grievously amerced: it would be therefore extremely hard if a new ferry were suffered to share his profits which does not also share his burden. But where the reason ceases, the law also ceases with it: therefore it is no nuisance to erect a mill so near mine as to draw away the custom, unless the miller also intercepts the water. Neither is it a nuisance to set up any trade, or a school, in a neighbourhood or rivalship with another: for by such

emulation the public are like to be gainers; and, if the new mill or school occasion a damage to the old one, it is *damnum absque injuria.*

II. Let us next attend to the remedies which the law has given for this injury of nuisance. And here I must premise that the law gives no *private* remedy for any thing but a *private* wrong. Therefore no *action* lies for a public or common nuisance, but an *indictment* only: because, the damage being common to all the king's subjects, no *one* can assign his particular proportion of it; or, if he could, it would be extremely hard if every subject in the kingdom were allowed to harass the offender with separate actions. For this reason, no person, natural or corporate, can have an action for a public nuisance, or punish it; but only the king in his public capacity of supreme governor and *pater-familias* of the kingdom. Yet this rule admits of one exception, where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action. As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein; there, for this particular damage, which is not common to others, the party shall have his action. Also, if a man hath abated or removed a nuisance which offended him, (as we may remember it was stated in the first chapter of this book that the party injured hath a right to do,) in this case he is entitled to no action. For he had choice of two remedies: either without suit, by abating it himself by his own mere act and authority, or by suit, in which he may both recover damages and remove it by the aid of the law; but, having made his election of one remedy, he is totally precluded from the other.

The remedies by suit are:

1. By action *on the case* for damages, in which the party injured shall only recover a satisfaction for the injury sustained, but cannot thereby remove the nuisance. Indeed, every continuance of a nuisance is held to be a fresh one; and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it. Yet the founders of the law of England did not rely upon probabilities merely, in order to give relief to the injured. They have therefore provided two other actions: the *assize of nuisance,* and the writ of *quod permittat prosternere;* which not only give the plaintiff satisfaction for his injury past, but also strike at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold; so that a lessee for years is confined to his action upon the case.

2. An *assize of nuisance* is a writ, wherein it is stated that the party injured complains of some particular fact done, *ad nocumentum liberi tenementi sui,* and therefore commanding the sheriff to summon an assize, that is, a jury, and view the premises, and have them at the next commission of assizes, that justice may be done therein: and if the assize is found for the plaintiff, he shall have judgment of two things:

1. To have the nuisance abated; and,
2. To recover damages.

Formerly an assize of nuisance only lay against the very wrongdoer himself who levied or did the nuisance, and did not lie against any person to whom he had alienated the tenements whereon the nuisance was situated. This was the immediate reason for making that equitable provision in statute Westm. 2, 13 Edw. I. c. 24, for granting a similar writ *in casu consimili, w*here no former precedent was to be found. The statute enacts that "*de cetero non recedant querentes a curia domini regis, pro eo quod*

tenementum transfertur de uno in alium;" and then gives the form of a new writ in this case; which only differs from the old one in this, that where the assize is brought against the very person only who levied the nuisance, it is said "*quod A.* the [wrong-doer] *injuste levavit tale nocumentum;*" but, where the lands are aliened to another person, the complaint is against both, "*quod A.* [the wrongdoer] *et B.* [the alienee] *levaverunt.*" For every continuation, as was before said, is a fresh nuisance, and therefore the complaint is as well grounded against the alienee who continues it as against the alienor who first levied it.

3. Before this statute, the party injured, upon any alienation of the land wherein the nuisance was set up, was driven to his *quod permittat prosternere,* which is in the nature of a writ of right, and therefore subject to greater delays. This is a writ commanding the defendant to permit the plaintiff to abate, *quod permittat prosternere,* the nuisance complained of; * and, unless he so permits, to summon him to appear in court, and show cause why he will not. And this writ lies as well *for* the alienee of the party first injured, as *against* the alienee of the party first injuring; as hath been determined by all the judges. And the plaintiff shall have judgment herein to abate the nuisance, and to recover damages against the defendant. Both these actions of *assize of nuisance,* and of *quod permittat prosternere,* are now out of use, and have given way to the action on the case; in which, as was before observed, no judgment can be had to abate the nuisance, but only to recover damages.

Yet, as therein it is not necessary that the freehold should be in the plaintiff and defendant respectively, as it must be in these real actions, but it is maintainable by one that hath possession only, against another that hath like possession, the process is therefore easier, and the effect will be much the same, unless a man has a very obstinate as well as an ill-natured neighbour; who had rather continue to pay damages than remove his nuisance. For in such a case recourse must at last be had to the old and sure remedies, which will effectually conquer the defendant's perverseness, by sending the sheriff with his *posse comitatus,* or power of the county, to level it.