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Torts--Nuisance--Reasonable Use

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> He is a bright boy and being such he cannot recover from the company because his mind is not shown to be a child under fourteen.[21]

The capacity of the boy is further indicated by the fact that he knew the meaning of the danger sign upon the enclosure and when questioned whether he believed that the electricity was off because the gate was ajar, he replied, "Yes, I did. *What child wouldn't?*"[22] In summary, the court selected the least flexible approach to reach its result.

Age can be no more than an indication of ability to appreciate a given risk. A conclusive presumption does not alter the minor's misjudgment or his immaturity. Either the rebuttable presumption of no benefit at age fourteen or the *Restatement* view, if applied after age fourteen, would permit the child to present his case. Mentally subnormal children, because of their deficiencies, have a particular need of at least introducing evidence of their failure to comprehend a risk. The *Bentley* rule prevents the jury's inquiry into the negligence of the land possessor, the nature of the condition on the land or any other facts upon which reasonable men might differ. In a society increasingly more industrialized and mechanized such an inquiry would seem critical in many factual situations. The likelihood that negligent acts by land possessors today would not be appreciated even by normal children over age fourteen increases with the complexity of conditions continually being added to land areas.

Howard Downing

TORTS—NUISANCE—REASONABLE USE—Plaintiff brought an action for damages for diminution of the market value of her home as the result of an alleged nuisance created by the defendant, an oil refining company. Since 1928, defendant had been in operation at this location, which was zoned for heavy industrial use. Technilogical developments in the industry dictated the defendant's installation of a "platformer-unifying" unit in 1957. No evidence was produced that the placement and use of the unit were not accomplished with ordinary prudence and discretion; however, the unit necessarily produced a composite noise. Plaintiff's home, in which she had lived since 1950, was in a residential district across the street from defendant's plant; it was separated by a distance of 420 feet from the "platformer-unifying" unit. The trial court entered judgment on a verdict for the plaintiff. *Held:* Reversed and a

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[21] Brief for Appellee, p. 6, Bentley v. South-East Coal Co., 334 S.W.2d 349 (Ky. 1960).

[22] 334 S.W.2d 349 (Ky. 1960). (Emphasis added.) It appears that this phrase by the child is awkward and unnatural.

new trial granted. Instructions given by the trial court[1] necessarily assumed as a matter of law either that the use of the refinery property was unreasonable or that, if reasonable, recovery was nevertheless allowable if the annoyance to the plaintiff was sufficient to offend a person of ordinary sensibilities. This instruction did not permit the jury to weigh the relative circumstances of the parties. In determining whether such annoyance, if any, was unreasonable, the jury should have been instructed to take into consideration all of the circumstances of the case as shown by the evidence, including "the lawful nature and location of the Company's business; the manner of its operation; the importance of its business and it's influence on the growth and prosperity of the community . . . ; the kind, volume, time and duration of the noise; the respective situations of the parties; and the character and development of the neighborhood or locality in which their properties are situated."[2] *Louisville Ref. Co. v. Mudd,* 339 S.W.2d 181 (Ky. 1960).

The purpose of this comment will be to show how the Kentucky court has approached the problem of weighing interests when an annoyance has been created by the reasonable use[3] of property.

"Nuisance, which means literally annoyance, may be described as a wrong done to one by disturbing him in the enjoyment of his property or in the exercise of a common right. But the term eludes exact definition. . . ."[4] "Today liability for nuisance may rest upon an intentional invasion of the plaintiff's interests, or a negligent one, or conduct which is abnormal and out of place in its surroundings, and so falls fairly within the principle of strict liability."[5]

This type of litigation brings into conflict two generally accepted principles: (1) one must not use his property to the detriment of another; and (2) one is entitled to a reasonable use of his property. Of course, when two generally accepted principles come into conflict the determination should be made by weighing the interests involved, including those of the community as a whole. The decision must be made in the light of the deterring or prohibiting effect it may have upon an industry which is vital to the community, and equal consideration must be given to the burden which may be imposed upon a property owner's use and enjoyment of his land. If, after weighing all

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[1] The instructions referred to are not set forth in the court's opinion.

[2] Louisville Ref. Co. v. Mudd, 399 S.W.2d 181, 187 (Ky. 1960).

[3] "Reasonable use," as employed in this comment, means a use which is substantially the same as those practices of others engaged in like endeavors and where reasonable precautions have been taken to avoid the creation of an annoyance.

[4] Lloyd, *Noise as a Nuisance,* 82 U. Pa. L. Rev. 567, 568 (1934).

[5] Prosser, Torts § 70, at 392 (2d ed. 1955).

of the interests involved, it is determined that the defendant's reasonable use produces an unreasonable effect upon the plaintiff, then the annoyance should constitute an actionable nuisance.

The Kentucky court has encountered difficulty in reconciling these conflicting principles. Emphasizing that one must not use his property to the detriment of another, one line of cases has apparently made an erroneous application of the doctrine of strict liability by defining nuisance in terms of the "effect" which the annoyance has upon the plaintiff. In an early decision,[6] the court relied exclusively on the "effect" definition and granted relief for noise and vibrations in the absence of any allegation as to the nature of the defendant's operations. Relying mainly on the same basis, the court has granted an injunction prohibiting the maintenance of a hog pen that caused offensive odors,[7] and in a later case indicated that damages could have been awarded against a city for an annoyance resulting from the location of its pest house[8] after explicitly recognizing its necessity and its location in close proximity to someone's property.

In a few later cases the court stated that reasonable use was not a defense if an annoyance existed. In abating night operations of a factory,[9] the court stressed that freedom to use property as the owner sees fit is limited by the effect the operation has on others. In *Rogers v. Gibson*,[10] the court, emphasizing that reasonable use was no defense to an annoyance, stated:

> 'If a particular use of property causes a nuisance this fact is sufficient to entitle a person injured thereby to relief. If a nuisance exists, the fact that due care was exercised and due precautions were taken against the annoyance or injury complained of, is no excuse. The fact that the defendant has used the ordinary means to avoid the nuisance complained of which are used in general by others engaged in the same business is no defense. A nuisance may be created or maintained with the best or highest degree of care.'[11]

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[6] Wiedman v. Line, 13 Ky. L. Rep. 590 (1892).

[7] Philips v. Elizabethtown Butter and Cheese Factory, 15 Ky. L. Rep. 574 (1894).

[8] City of Paducah v. Allen, 20 Ky. L. Rep. 3142, 49 S.W. 343 (1899). Plaintiff could be allowed damages even though the city had made no palpable abuse of discretion in locating a pest house in close proximity to plaintiff's property.

[9] Wheat Culvert Co. v. Jenkins, 246 Ky. 319, 320, 55 S.W.2d 4 (1932):

> Liberty of action or of using one's own property as he pleases implies only freedom from arbitrary restraint, and not immunity from reasonable regulations and prohibitions imposed in the interest of the community. Every citizen has the right to enjoy the ordinary comforts of human existence, and is entitled to a remedy or redress when those comforts are disturbed by a nuisance. That is to be determined or measured by the effect which the act or condition has upon persons of ordinary health, of normal or average sensibilities, and of ordinary tastes and habits and mode of living.

[10] 267 Ky. 32, 101 S.W.2d 200 (1937).

[11] *Id.* at 35, 101 S.W.2d at 201.

In a later case the court reiterated this principle[12] by explicitly stating that even a lawful business prudently operated may constitute a nuisance for which relief will be granted.

The court in these later cases was correct in stating that reasonable use in itself is not a defense to the creation of a nuisance. They failed, however, to recognize that it should be a factor to be taken into consideration. In essence, their determination was based upon the "effect" the nuisance had upon the plaintiff, and they applied what amounted to strict liability by *disregarding the nature of the defendant's use and the other interests involved.*

As previously stated, relief from a nuisance can be established upon the doctrine of strict liability; however, the Kentucky court may have failed to properly recognize the situations in which it should be applied.

Strict liability as applied to nuisance originated in *Rylands v. Fletcher,*[13] an English decision. The defendant built a reservoir upon his land in which large quantities of water accumulated. A defect in the reservoir allowed the water to escape, causing *sudden* and *unexpected* damage to the plaintiff's property. Even though the defendant was not negligent, the court imposed liability for the injury resulting from the escape of a substance, *dangerous to others if it escaped,* which had been brought upon the land of the defendant.

This case is distinguishable from the generally accepted concept of nuisance on two grounds: (1) The defendant *did not intend* the consequences of his act; he intended to have the reservoir, but he did not intend to have the defect which caused the plaintiff's injury. In the ordinary nuisance case the defendant intends the consequences of his act.[14] (2) The damage was *sudden* and *unexpected.* A nuisance is commonly thought of as continuing for a substantial period of time.

However, even though these distinctions exist, the courts in this country have applied the doctrine of strict liability to nuisances arising out of dangerous substances upon the land of the defendant.[15] The courts have made a further and unjustifiable extension of the doctrine

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[12] Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941), in which the court stated:

> There can be no doubt but that commercial and industrial activities which are lawful in themselves may become nuisances if they are so offensive to the senses that they render the enjoyment of life and property uncomfortable. It is no defense that skill and care have been exercised and the most improved methods and appliances employed to prevent such result.

[13] [1868] 3 H.L. 330.

[14] For example, if the defendant's operation produces a noise, he knows or should know it is substantially certain that the plaintiff can hear it, thus by operating he intends to produce the consequence that the plaintiff can hear the noise.

[15] 2 Harper & James, Torts § 14.1 (1956).

to nuisances growing out of the operation of a rock crusher[16] and smoke,[17] carbon,[18] soot,[19] and noxious gases[20] from industrial enterprises. The consequences in these cases did not involve sudden and unexpected damage, nor were they caused by inherently dangerous substances. How can they be reconciled with the *Rylands* rationale?

Apparently the Kentucky court has also erroneously extended the doctrine of strict liability. In the Kentucky cases previously discussed, none of which factually resemble the *Rylands* case, the court found liability without considering either negligence or intention, which are the only other bases of liability for a nuisance.

In direct conflict with this handling of the problem, another line of decisions in Kentucky has emphasized the principle that one is entitled to a reasonable use of his property. In an early decision[21] the court refused to allow recovery when the plaintiff failed to show that the noise complained of was other than the usual and ordinary sound incident to a careful operation. In *Indian Ref. Co. v. Berry*,[22] the court held that a lawful business prudently conducted must be endured and its operation will not constitute a nuisance, even though it may depreciate the value of property or cause annoyance to others. The court applied the same principle in refusing to grant relief in an action against a blacksmith shop,[23] an undertaking establishment,[24] a drive-in theatre,[25] and a blasting operation.[26] In a 1953 decision[27] the court stated that Kentucky law is in accord with the "American Rule," i.e., the doing of a lawful thing in a careful and prudent manner will not constitute a nuisance.[28]

In this line of decisions the court was apparently attempting to escape the harshness of the strict liability doctrine. In *Rogers v. Bond Bros.*,[29] the court stated that the doctrine of *Rylands v. Fletcher* had been expressly rejected in Kentucky. These decisions, rejecting the doctrine, allowed the pendulum to swing too far and succeeded only in shifting the hardship from the defendant to the plaintiff.

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[16] Gilbert v. Davidson Constr. Co., 110 Kan. 298, 203 Pac. 1113 (1922).
[17] Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924).
[18] Columbian Carbon Co. v. Tholen, 199 S.W.2d 825 (Tex. Civ. App. 1947).
[19] King v. Columbia Carbon Co., 152 F.2d 636 (5th Cir. 1945).
[20] Bohan v. Port Jervis Gas Light Co., 122 N.Y. 18, 25 N.E. 246 (1890).
[21] Hughes v. General Elec. Light and Power Co., 107 Ky. 485, 54 S.W. 723 (1900).
[22] 266 Ky. 123, 10 S.W.2d 630 (1928).
[23] Morris v. Roberson, 137 Ky. 841, 127 S.W. 481 (1910).
[24] L. D. Pearson & Son v. Bonnie, 209 Ky. 396, 272 S.W. 375 (1925).
[25] City of Somerset v. Sears, 313 Ky. 784, 233 S.W.2d 530 (1950).
[26] Williams v. Codell Constr. Co., 253 Ky. 166, 69 S.W.2d 20 (1934).
[27] United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. 1953).
[28] *Id.* at 468.
[29] 279 Ky. 239, 130 S.W.2d 22 (1939).

Unjustifiable decisions might be made by an application of either of these principles established in Kentucky. This possibility is illustrated by the principal case. If the decision had been based upon the plaintiff's contention that the "effect" upon him should be the sole determining factor, then the court would have disregarded the fact that the defendant was prudently conducting a lawful business in a locality zoned exclusively for his type of business. The consequences to the defendant and to the community that might result from such a decision would also have been disregarded. On the other hand, if the decision had been made by accepting the defendant's contention that a reasonable use of the property should be an absolute defense in an action of nuisance, then any degree of damage to the plaintiff would be irrelevant.[30]

These untenable positions of the Kentucky court in the past have apparently arisen as a result of its attempt to segregate the defendant's acts from the effect they have upon the plaintiff. In an action of nuisance it should be determined in light of all the circumstances whether the defendant's reasonable use was not, in fact, unreasonable in view of the effect it has upon the plaintiff.

The court in the present case has taken a wise step in refusing to say, as a matter of law, who shall bear the burden when an annoyance is created by the reasonable use of property. By taking into consideration the reasonableness of the defendant's act and the effect which it has upon the plaintiff with all other existing circumstances of the particular litigation, society itself will determine the just disposition of the burden.

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[30] California has attempted to solve the problem by statute. Cal. Code Civ. Proc. § 731a (Deering 1959) provides:

> Whenever any city, city and county, or county shall have established zones or districts under authority of law wherein certain manufacturing or commercial or airport uses are expressly permitted, except in an action to abate a public nuisance brought in the name of the people of the State of California, no person or persons, firm or corporation shall be enjoined or restrained by the injunctive process from the reasonable and necessary operation in any such industrial or commercial zone or airport of any use expressly permitted therein, nor shall such use be deemed a nuisance without evidence of the employment of unnecessary and injurious methods of operation. Nothing in this act shall be deemed to apply to the regulation and working hours of canniers, fertilizing plants, refineries, and other similar establishments whose operation produce offensive odors.

Is this a more desirable way of handling the problem? Can a statute successfully handle a concept which is so dependent upon the needs of an expanding society?