Nuisance Values

An Address Delivered by

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NUISANCE VALUES.

The scope of this title is so wide and various, aside from any significance it may have in the profession of patent or trade mark law, as to perhaps principally involve a field quite remote from such specific interest. Even so, in its larger aspect, it may perhaps be helpful to view that field in perspective in any general search for a measuring rod of even approximate dimensions.

Concentration of the term in any particular instance is necessarily dependent on the facts and circumstances involved in some instant case. This seems to be true, whether it be a remedial one, or sufficiently important to be noticed, or just an every day affliction to be endured, throughout the whole environment of every human life, whether bounded by domestic, business, professional, or other relationship.

A nuisance may, perhaps, be either positive or negative, dependent on its relations to other factors. As Mr. Justice Holmes said in *Towne v. Eisner,* 245 U. S. 418:

> "A word is not a crystal transparent and unchanged; it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."

As to the word, Webster's New International Dictionary defines Nuisance as:

> Hurt; harm; injury; annoyance; as, to do a thing with *nuisance* to others.
>
> Also, "That which annoys or gives trouble and vexation; that which is offensive or noxious; an

offensive, annoying, unpleasant, or obnoxious thing, practice, or person; a cause or source of annoyance. When anything works legal damage it becomes a legal nuisance, which is defined by Sir Frederick Pollock as: 'the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or, in some cases, in the exercise of a common right.' A nuisance affecting the public or a community in general is a *public nuisance;* one affecting some particular person or persons, a *private nuisance;* one both affecting the public and doing special individual damage, a *mixed nuisance,"*

In the famous Commentaries on the Laws of England, by Sir William Blackstone, he defines Nuisance as: "anything that worketh hurt, inconvenience, or damage". Chapter XIII, "Of Nuisance" happens to be between Chapter XII, "Of Trespass", and Chapter XIV, "Of Waste".

Of the first subject, he says:

"The second species, therefore, of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of trespass. Trespass, in its largest and most extensive sense, signifies any transgression or offense against the laws of nature, of society, or of the country in which we live, whether it relates to a man's person or his property."

Of the second subject, conveniently intervening between the first and third, he says:

"A third species of real injuries to a man's lands and tenements, is by nuisance. Nuisance, or annoyance, signifies anything that worketh hurt, inconvenience, or damage",

and he says, they are of two kinds, the public or common nuisances, and private nuisances.

Of the third subject, "Waste", he says:

"It is a spoil and destruction of the estate, either in houses, woods, or lands; by demolishing not the temporary profits only, but the very substance of the thing."

In discussing private wrongs under the general heading of nuisances, as may affect a man's corporeal hereditaments, the familiar illustration is used of building a house so close that the roof overhangs the roof of a neighbor,—"this is a nuisance, for which an action will lie." Another instance illustrates by the statement:

"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 benefits of his house."

And further:

"As to incorporeal hereditaments, the law carries itself with the same equity."

This is illustrated by the familiar instance of obstruction of a right of way, "for preventing enjoyments of such right of way, either at all, or 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,"

with the pertinent suggestion as to priority, it is necessary:

"That my market or fair be the elder, otherwise the nuisance lies at my own door."

And Blackstone also says: "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."

As an alternative, in the failure of such gospel rule, Blackstone says further, suggesting the 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 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."

Thus the remedies are two-fold: preventive, as by abatement and therefore compensatory, and punitive, as by indictment and therefore by infliction of punishment.

The compensatory remedy is an action at law for damages. If the injury complained of cannot be adequately compensated in damages, the remedy is by injunction. But the solution as by the first and second alternatives, proposes either the alluring haven of peaceful settlement, suggested by the term "compensatory", or the litigious, expensive, and unfriendly alternative, under the nomination "punitive".

As to Indictment: The nuisance should be described with certainty, according to the circumstances, and with the detail and fullness usual in indictments. *State v. Matthews,* 42 Vermont 542.

As to Time: It is not necessary that the exact date of committing the offense should be given; it is sufficient if it is alleged as of "about" a certain date, before the finding and within the statutory period of limitation: *State v. Schilling,* 14 Iowa 455.

These conditions were in the mind of Mr. Justice Holmes, when he wrote the above quotation from *Towne v. Eisner.*

In *Enos v. Hamilton,* 27 Wis. 256, the nuisance complained of shut off access to plaintiff's mill, and deprived him of the use thereof, and prevented him from seasonably stocking it for future work.

It was held also, as in *Lawson v. Price,* 45 Md. 123, that loss of profits resulting from interference with a lawful business, or loss of crops, may be an element of damage arising from a nuisance.

The law of nuisances extends and is pertinent to the realm of the Patent Law. Familiar instances occur, as in False Marking, against which, as you know, there exists statutory relief.

By fitting up a factory to make infringing articles, as in *Goodyear v. Mullee,* 5 Blatch. 429, or combining to aid others to infringe, as in *Bate Refrigerator Co. v. Gillette,* 30 Fed. 683, or partially making the device and sending it to others to be finished, as in *Knowles v. Peck,* 42 Conn. 386.

Another instance of actionable nuisance is in neglect by a defendant to notify his agents of an injunction, as in *Mundy v. Ridgewood Mfg. Co.,* 34 Fed. 541.

Or deception in a purpose of making the public believe that the article is covered by a patent, discussed in *Tomkins v. Butterfield,* 33 O. G. 758.

To the contrary, in a false marking charge, putting on a hose supporter the date of a patent for grain ties, was held in another case, not to constitute evidence of intent to deceive, the device not being clearly outside the patent.

But putting on a structure the word patented *with the date of the patent,* after the patent has expired, was

held to negative the idea of fraud, together with definite limitations as to right to use the original name, as established in the well known Supreme Court decision in *Wilson v. Singer Mfg. Co.,* 11 Biss. 298.

So it boiled down, often and oftener, even in Blackstone's time, to the wisdom, or convenience, or expediency, of offering or accepting a challenge, or living to fight another day. Between the two alternatives are, as right at the present time, the solutions of issues of vast importance relating to metes and bounds, in a world at war, or any comparatively minor or trivial dispute;—a vast ocean of unsolved problems whose name is legion. Milton put in the mouth of Satan, the words: "My sentense is for open war. Of wiles more inexpert I boast not"; *but* we must not forget the character of the speaker.

Even the patent system itself has been attacked as a utilized nuisance. Page Mr., now Justice, Thurman Arnold.

That one time nemesis of alleged violators of statutory prohibitions by use of the cartel system, under the shield of some patent protection, in a recent article in The Reader's Digest, has said:

> "What is the reason for the restrictive policies to which labor unions have become committed? A certain percentage is graft and corruption, but a larger percentage is the result of the age-old struggle for economic power by men who love power. Whenever a small group of individuals, uncurbed by legal authority, is permitted to dominate any important part of the production or distribution of the necessities of life, these results will inevitably follow:
>
> They seek to consolidate their power by destroying existing independent enterprise.

They prevent new enterprise from entering the field.

They restrict production and raise prices.

They stop the introduction of more efficient methods of production in order to maintain obsolete ways in which they have a vested interest.

They set up an arbitrary and despotic control over the industry and exploit members of their own group.

They enter into politics, using money and economic coercion to maintain themselves in power.

Labor acquired its present extensive power as a result of a series of Supreme Court decisions which suddenly and completely reversed the Department of Justice's interpretation of the antitrust law: that unions were subject to penalty when they used their power coercively for an illegitimate labor objective.

Effective prosecutions had been instituted under this interpretation, and though unions made loud public protest many labor leaders confidentially admitted that such curbs were necessary. The Supreme Court decisions completely changed the picture because they compelled the abandonment of prosecutions against any form of labor coercion. No responsible government agency now has authority to act, and the responsibility for uncovering instances of indefensible labor coercion has been delegated to newspaper columnists and newspaper reporters."

The field of nuisances, both generally and specifically, is as wide as the universe, and nature itself is not exempt from the charge. For instance, consider the mosquito.

It toils not, neither does it spin, but Cleopatra in all her glory, was perforce required to expose her beauty only as surrounded by a group of peacock feather fans in the hands of her retinue of slave girls.

Ordinarily, the nuisance value of mosquitos, flies, and other insects is nil, and has been since a time when

little Moses, who lived to become the greatest lawgiver of sacred or profane history, was rescued from the bull-rushes by Pharoah's daughter. The compensating consideration came, when late in the last century, scientific research and experiment in blood transfusion exposed the vital danger existing in the station-to-station perigrinations of these despised pests. See the National Geographic Magazine for February.

In this line of devoted investigation, certain young American doctors sacrificed their lives in courageous self experimentation, to discover the source of yellow fever.

So, after all, there seems to have been a certain degree of Divine justice involved, and with a very real and lasting nuisance value.

And was it not David Harum who said:
"Fleas on a dog is a good thing. They make him forgit about bein' a dog."

Even the great King David, the boy wonder who with his sling and a white stone from the brook, slew the mighty Goliath, later discovered a nuisance value in one of his best soldiers.

Walking on his housetop in the cool of the morning, and observing at her bathing Bath-Sheba, the beautiful wife of Uriah the Hittite, he experienced an unholy and covetous desire. He promptly wrote a letter, and even sent it by the hand of Uriah to his captain Joab, stating: "Set ye Uriah in the fore front of the hottest battle, and retire ye from him that he may be smitten and die."

And that was not the last time that sacrifice of one third of a domestic triangle measured its nuisance value to the other third.

Again, is there not a nuisance value of a sort in a plugged nickel or a counterfeit $5 note, provided the victimized receiver is able, and his conscience permits him, to keep it in circulation? Or, if he considers the case purely in its academic status, and says to himself, as did the poet Kipling, in the Conundrum of the Workshops: "By the grace of God we may scurry through, as our Father Adam did."

Perhaps one of the justices of the Supreme Court, in a recent decision, was not so far wrong in advocating the exercise of morals and equity. Perhaps, in fact, the old fashioned Golden Rule might be invoked, either long or shortly before submitting many an action to the crucible of judicial decision.

One instance of the outgrowth of a general public benefit in reminding of the risks of under caution, or the saving grace and compensation of preparedness against mishap, is the story of the man who had invented a sure cure for snakebites. After trying it on himself many times successfully, he went for a walk in the woods, forgetting to take the cure along, was bitten by a rattler, and perished miserably.

Those who have not read the novel Elsie Venner, by Dr. Oliver Wendell Holmes, might do so profitably, with the same idea in view.

And bad as it was, Pearl Harbor had its partial recompense of unearned increment, in urging the sufficiency of the pregnant words—"lest we forget."

Harriet Beecher Stowe discovered a great nuisance value in the subject of Slavery, that inspired her to write "Uncle Tom's Cabin", and the sacrifice of Union blood in the Civil War was well worth its cost.

There is a notorious custom sometimes practiced by deliberately effecting destruction of fruits, vegetables, or other monopolized products, to maintain the market price. Or, as in recent political history, by the ploughing under of productive crops, or killing of the juveniles of the swine family, to reduce the normal production and supply of food.

Either of such practices may involve the Blackstone prohibition against "trespass" and "waste", and is a public as well as a private nuisance, whose value or profit is definitely negative, except to an unpopular profiteering class.

Compensating nuisance values exist in the slate strata of a coal mine and its supporting columns; or thought to be by Cain in his elimination of his brother Abel; or in the mantel of Julius Caesar through which the dagger of the envious Casca pierced; or in the arras behind which Polonius hid himself from Hamlet.

Remember also the celebrated Tea Party in Boston Bay, in the 18th century, and the following cost and resulting value to the Colonies, in opposing that obnoxious taxation nuisance, and its resulting benefits.

Entirely out of proportion, of course, to the cost and agony of the present World War and its character as a tremendously encompassing nuisance, is the slight partial recompense incident to the privilege open to United States citizens of adoption of a mass of German patents, now in the custody of the Alien Property Custodian.

Still another instance of nuisance value growing out of patented inventions, is the ease and audacity exercised by some manufacturers already vested with an

established line of standard constructions. Rather than adopt an improvement of merit, especially if better and cheaper, one type of business economy frequently prevails in favor of purchasing the device and then submerging it in the freezing brine of forgotten things, for the rest of its natural life.

Prior to the Statute of Monopolies in 1624, in the reign of James I, which ended the grievances of creating artificial business barriers, the nuisance of being fenced off from otherwise natural and legal rights was extremely onerous. The value of it was in the compensation provided by the statute itself, of great and increasing value to the tradesmen, merchants and importers of Great Britain.

Possibly as pertinent a case as any in the books, of a cleverly planned and executed effort to monopolize a new and growing business, is found in *Columbia Motor Car Co. et al. v. C. A. Duerr & Co. et al.,* 184 Fed. 893, over the famous Selden patent No. 549160, of 1895.

In that case, George B. Selden, himself a patent lawyer, had a great conception and a long range vision of the undeveloped art of motor vehicles. He had the conception of a constantly running motor, driving wheels for road traction, and an intervening clutch. He had an engine, but made the mistake of using the Brayton, or constant pressure type, instead of the Otto, or constant volume explosion type.

As the opinion of the Circuit Court of Appeals, Second Circuit, rendered in 1911, states:

> "For over 16 years the application lay in the Patent Office and the applicant took full advantage of the periods of inactivity permitted by the rules and statutes."

After the grant in 1895 numerous licenses were issued to prominent motor car companies, all ambitious for the new and promising business, returning to Selden and his associates a rich harvest in royalties, up to nearly the end of the patent term.

The defendants, including one Henry Ford, declined to be passive under the threats of suit, and the tribute demanded, and broke the patent on the rock of Brayton instead of the safer selection of Otto, as held by the Court. The inference is obvious.

In a series of essays, written during the first World War by a distinguished American philosopher, the prefatory note reads:

> "This is not a war book. It is a book about democracy and peace, about America's ideals, her duties and her dangers."

In a chapter entitled "The Idealism of War", he compares the views of the German General, von Bernhardi, with those of the American General, Homer Lea. From Bernhardi he quotes:

> "All petty and personal interests force their way to the front during a long period of peace. Selfishness and intrigue run riot, and luxury obliterates ideals. Money acquires an excessive and unjustifiable power, and character does not obtain due respect."

Quoting from General Lea, he says:

> "When a country makes industrialism the end, it becomes a glutton among nations, vulgar, swinish, arrogant. Commercialism is only a protoplasmic gormandizing and retching that vanishes utterly when the element that sustains it is no more."

However true or false, both somewhat extravagant views have in them the germ of a red light warning, and

a pause for the change to green. Industrialism, commercialism, and invention, have been important factors in making America great.

Of the latter, we all know that a definite percentage are covered, or attempted to be, by Letters Patent of limited scope or perhaps doubtful validity, compared to others. Both are dependent on the familiar limiting elements available, in advising either side of any proposed controversy.

Just here is where honesty, frankness, absence of self interest, and perfect fairness, enter the equation in coming to a decision, either moral or equitable, or both.

Remembering that the law, as a general rule, favors fair settlement, the Courts and the statutes, like the prisons and poor houses of Charles Dickens' time, are still in good running order.

Saving of expense, time and trouble, expediency, or mutual benefit, may recommend or favor agreement and settlement, even on the "nuisance value" theory. Otherwise, and on the real merits, patent litigation still continues to hold its absorbing interest for counsel, and the Court as well.

And so, whether any of the sheep folds of the exploiters of patented property rights happen to hold within their environment some goats along with the lambs, let us not forget that it is sometimes the lambs themselves who need our professional care the most, along with the ninety and nine who need no protection from the wolves.

This is perhaps the lesson that may be learned from the teaching of Mr. Arnold, and equally as well from

Handel's greatest oratorio, the Messiah. To paraphrase the famous baritone solo of that grand work, shall we not sometimes better pause and listen for the voice, as of one crying in the wilderness, begging for the answer that never comes, to such a similar question, as:

Why do the lawyers so furiously rage together, and why do inventors imagine a vain thing?

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