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## THE DEVELOPMENT OF NUISANCE IN THE EARLY COMMON LAW

WILLIAM A. McRAE, JR.

*At a time when fashion puts law reporting on about the same basis as news reporting, and when the last word spoken and distributed by loose leaf services is often regarded as the wisest, it is well to recall Mr. Justice Holmes' observation that in order to know what the law is we must know what it has been. Continuing, he said, "While, on the one hand, there are a great many rules which are quite sufficiently accounted for by their manifest good sense, on the other, there are some which can only be understood by reference to the infancy of procedure among the German tribes, or to the social condition of Rome under the Decemvirs."<sup>1</sup>*

### I. THE POSSESSORY ASSIZES AND OTHER EARLY FORMS OF ACTION

From the Norman Conquest to the reign of Henry II writs were issued in response to the needs of complainants, and without any studious respect for precedent.<sup>2</sup> Only in the course of time did they become *brevia de cursu*, writs of course. Undoubtedly rights which later were protected by the Assize of Nuisance were in this period protected, though by writs which were still uncrystallized.

Glanvill gives an example of a writ of *quod permittat* used to protect an easement, which was one of the first of its kind:<sup>3</sup> "The King to the Sheriff, Greeting. I command you, that without delay, you command R. that, justly and without delay, he permit H. to have his Easements in the Wood and in the Pasture of such a Vill, which he ought to have, as he says; as he ought to have them and usually has had them; and that

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<sup>1</sup>HOLMES, *THE COMMON LAW* 1, 2 (1881).

<sup>2</sup>MAITLAND, *EQUITY, Also THE FORMS OF ACTION* 315 (1932).

<sup>3</sup>GLANVILL, xii. c. 14.

you permit not the aforesaid R. or any other to molest or injure him.”<sup>4</sup> It is to be expected that actions of this kind in the early law were more commonly brought either in the communal courts, or the feudal courts,<sup>5</sup> than in the king’s court; for the king’s court heard cases, except those affecting the crown or in which the litigants were tenants *in capite*, only by way of special favor.

The reforms of Henry II, in the latter part of the twelfth century, greatly changed the course of English law. In this period, English law was centralized and unified by the institution of a permanent court of professional judges, by the holding of court in various places throughout the land, by the inauguration of “inquests” or “recognitions” and the original writ as normal parts of the machinery of justice.<sup>6</sup> In the land law the encroachments of the king’s court were rapid. Since the violation of a man’s seisin, or possession, might easily lead to a breach of the peace, the king’s court soon became the only forum for determining “who was last seised of this free tenement?” In the procedure by original writ (that is, by royal writ) and inquest of the neighbors,<sup>7</sup> no question of right was determined; this was at first left to the lord’s courts. But the transition to the grand assize, which determined the question of right, *mainus jus*, was inevitable, and it happened indeed sometime during Henry’s reign.<sup>8</sup> It became axiomatic that “when a person claims any freehold tenement, or a service . . . he cannot draw the person holding it into a suit without the King’s writ, or that of his Justices.”<sup>9</sup>

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<sup>4</sup>*Rex vicecomiti salutem. Praecipio tibi quod sine dilatione praecipias R. quod iuste et sine dilatione permittat habere H. aisiamenta sua in bosco et in pastura de villa illa quae habere debet ut dicit, sicut ea habere debet et habere solet: et non permittas quod praefatus R. vel alius ei inde molestiam vel iniuriam faciat. Ne amplius etc. Teste. etc.* YALE HISTORICAL PUBLICATIONS. (Edited by G. E. Woodbine).

<sup>5</sup>By Glanvill’s time writs of *tolt* and *pone* by demandant and *accedas ad curiam* or *recordari facias* by the tenant were available to transfer the case to the king’s court. GLANVILL, vi. c. 7.

<sup>6</sup>1 HOLDSWORTH, HISTORY OF ENGLISH LAW 327 (5th ed. 1931); 1 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 138 (2d ed. 1911).

<sup>7</sup>MAITLAND, *op. cit. supra* note 2, at 314 *et seq.*

<sup>8</sup>1 HOLDSWORTH, *op. cit. supra* note 6, at 327.

<sup>9</sup>GLANVILL, xii. 2. 25.

II. RELATION BETWEEN THE ASSIZE OF NOVEL DISSEISIN  
AND THE ASSIZE OF NUISANCE

*The Assize of Novel Disseisin*

The great possessory action, Assize of Novel Disseisin, resembling the *actio spoli* of canon law and the interdict *unde vi* of Roman law,<sup>10</sup> was probably instituted by Henry in 1166 at the council held at Clarendon.<sup>11</sup> It lay "when any one unjustly and without a judgment has disseised another of the freehold."<sup>12</sup> The writ was addressed to the sheriff and bade him, after taking securities from the complainant that he would prosecute the claim, seize the tenement and cause the complainant to be resealed if his claim was just. In the meantime the sheriff was commanded to summon twelve free and lawful men of the neighborhood to view the land and then to appear before the king or his justices prepared to recognize, *recognoscere*, who was last seised.<sup>13</sup>

It is clear from the earliest mention of the Assize of Novel Disseisin by Glanvill that it was limited to a suit by the disseisee against the disseisor.<sup>14</sup> There could obviously be no disseisin unless the plaintiff was in the first place seised. This much is implicit in the very name of the assize. But the early understanding of seisin, as being roughly equivalent to possession,<sup>15</sup> makes it necessary to add another qualification which is not implicit in the name. Plaintiff must have been seised of a *free tenement*. Indeed no possessory assize could be successful unless the injury was to a free tenement. The word 'tenement', *tenementum*, was

<sup>10</sup>2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 48; BIGELOW, *PLACITA*, 128, 130.

<sup>11</sup>1 HOLDSWORTH, *op. cit. supra* note 6, at 275-276, 329; 1 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 124-127, 145.

<sup>12</sup>GLANVILL, xiii. c. 32.

<sup>13</sup>GLANVILL, xiii. c. 33; BRACON, f. 179; BOOTH, *NATURE OF REAL ACTIONS* 210; POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 146.

<sup>14</sup>GLANVILL, xiii. c. 32 *et seq.* It was from the first supplemented by the Assize of Mort d'Ancestor.

<sup>15</sup>The idea of linking seisin with the conception of an estate of freehold, and thus making it a feudal concept, would indeed have been almost as strange to Coke as it would have been to Bracton writing more than three hundred years earlier. It is clear beyond doubt that throughout the mediaeval period one could be seized of chattels, personal or real, just as truly as one could be seized of a freehold estate in land. *cf.* 1 MAITLAND, *COLLECTED PAPERS* 329 *et seq.* (1911).

defined broadly to include “any incorporeal thing which can be holden by one man of another.”<sup>16</sup> A chattel personal could never be so held, and the Assize of Novel Disseisin was never used to recover a chattel of which one had been disseised.<sup>17</sup>

For the purposes of the assize, the meaning of disseisin was liberally construed, and the writs were widely varied “according to the diversity of the tenements in which disseisins are committed.” If, for example, a man dug or reaped on complainant’s land, contending that the tenement was his own, or if he impeded a person justly possessing a thing from using it in peace and quiet, by entering into an unjust dispute with him, he disseised the rightful possessor.<sup>18</sup> In these cases, curiously enough, the complainant might never have been out of possession. The use and enjoyment of his free tenement was disturbed by the defendant, and complainant might treat this as a disseisin.<sup>19</sup> It was similar to disseisin at election of later law; and the complainant elected to treat it as a disseisin because an action in the King’s Court for trespass did not become common until the reign of Henry III.<sup>20</sup> By the time of Bracton, trespass alone lay if defendant made no claim of right.<sup>21</sup> But in both of these cases, novel disseisin and later trespass, there was some kind of invasion of complainant’s free tenement by the defendant,<sup>22</sup> either directly, as for example by digging on complainant’s land, or indirectly, as for example by droving sheep on to complainant’s land but not himself entering. The source of the injury was in every case on complainant’s land.

#### *The Assize of Nuisance*

If the troubling of complainant’s possession was caused by “things

<sup>16</sup>2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 148.

<sup>17</sup>AMES, LECTURES ON LEGAL HISTORY 172 *et seq.* (1930). If plaintiff wished to recover the specific chattel, recaption was his only possible course: and even then he must act *flagrante delicto*, which was one day in Britton’s time. 1 NICH. BRITT. 57, 116; *cf.* Maitland, *The Beatitude of Seizin*, 4 L. Q. REV. 29 (1888); Pike, *Livery of Incorporeal Things*, 5 L. Q. REV. 35 (1889).

<sup>18</sup>GLANVILL, xii. c. 35.

<sup>19</sup>BRACTON, f. 161b; FLETA 213.

<sup>20</sup>2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 53.

<sup>21</sup>*Si autem nihil clamaverit in tenemento aliud erit, quia tunc erit transgressio, et non disseysina de libero tenemento.* BRACTON, f. 161b.

<sup>22</sup>Defendant is properly called “tenant” only if he is in possession and complainant is not.

erected, made or done" not on complainant's land but on defendant's, the Assize of Nuisance was, in theory, the proper remedy apparently from the very earliest times.<sup>23</sup> Glanvill gives an example of the writ: "The King to the Sheriff, Greeting. N. complains to me that R. unjustly and without judgment has raised a certain dyke in such a Vill or thrown it down to the nuisance of his freehold in the same Vill since my last voyage into Normandy."<sup>24</sup>

The clearest expression of the theoretical difference in the scope of the two assizes is the example of the pond given by Bracton.<sup>25</sup> Where a pond was raised or lowered wholly on defendant's land to damage of complainant's land, the Assize of Nuisance was exclusively available; where it was raised or lowered wholly on complainant's land, the Assize of Novel Disseisin was exclusively available.

*Overlapping and Confusion of the Assize of Novel Disseisin  
and the Assize of Nuisance*

In the pond case, it may properly be asked, what action lay if it was raised or lowered partly on complainant's and partly on defendant's land? Bracton answers that Assize of Nuisance was the proper remedy. The reason given is that it would be onerous to be required to prosecute both assizes and that in the Assize of Nuisance it is adjudged that the nuisance be removed and that the thing be brought back to its normal state. This reason appears adequate. His suggestion, as a further reason, that the Assize of Nuisance included the Assize of Novel Disseisin is unnecessary, and is inconsistent with his previous statement that "*assiza nove disseysine sub se cotinet nocumentu*."<sup>26</sup> This was a common sense solution of a case in which the theory of each of the two Assizes could not have been mistaken. But, at least during the reign of Henry II, when a mere

<sup>23</sup>"When the complainant has no tenement to which a nuisance can be caused, his complaint will not be valid, or he concerning whom the complaint is made has no tenement which can cause a nuisance." BRACTON, f. 234. If the nuisance was not created by the person in possession, whether he was heir or successor, a distinction was drawn; the defendant (possessor) was not liable to a penalty, although he was liable to make restitution of the state of the premises. Thus if a man raised a foss or a pond to the nuisance of complainant's free tenement, and died leaving an heir, the heir was bound to abate the nuisance. *cf.* 1 NICH. BRITT. 408.

<sup>24</sup>GLANVILL, xiii. c. 35.

<sup>25</sup>BRACTON, f. 234b; *cf.* BRITTON, ii. c. xxxl.

<sup>26</sup>BRACTON, f. 232.

disturbance of complainant's possession, without claim being made to the tenement, might be a disseisin, border line cases can easily be imagined. If a man removed his fences and allowed his sheep to go into his neighbor's meadow this might support either Assize of Novel Disseisin or Assize of Nuisance.<sup>27</sup> The neighbor might, on the other hand, even before injury, force enclosure by the writ of *curia claudendo*, which could be used as a kind of medieval *quia timet* injunction.<sup>28</sup>

That the scope of the two actions was not clearly defined in the thirteenth century may be understood by examining the following passage from Bracton: "If a man should obstruct a road \* \* \* by which a person is accustomed to enter a pasture ground, by a foss, a wall, a hedge or a palisade, such a nuisance does not much differ from a disseisin and therefore ought to be removed by an Assize of Novel Disseisin."<sup>29</sup> The gist of the action here is that complainant has been prevented from enjoying his right of common; but the very act complained of is the interference with the right of way which is ordinarily the typical case for the Assize of Nuisance.<sup>30</sup> In the early law the distinction was not of great importance. The procedure in Assize of Novel Disseisin and Assize of Nuisance was practically the same. The importance of the theoretical difference underlying the two does not clearly emerge until the appearance of the action of trespass, followed, after the Statute of Westminster II,<sup>31</sup> by the development of the action on the case.

### III. OTHER COMMON LAW REMEDIES FOR PRIVATE NUISANCE

It has been noted that the Assize of Nuisance made its appearance almost simultaneously with the Assize of Novel Disseisin, and that it was in theory a supplemental, possessory writ. But it was not the only remedy available to redress a nuisance.

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<sup>27</sup>By Henry III's reign it would probably have been trespass. But see BRACTON, f. 207b.

<sup>28</sup>Prior of Lewes v. Anon., Y. B. 13 Rich. II (R. S.) vii, p. 78 (1390).

<sup>29</sup>BRACTON, f. 232. Bracton speaks here of "appurtenances of appurtenances." The right of cleansing, for example, was appurtenant to the right of drawing water. In the developed law of easements these rights became known simply as incidences of easements.

<sup>30</sup>*cf.* 1 NICH. BRITT. 278.

<sup>31</sup>Statute of Westminster, 1285, 13 Edw. I, c. 24.

The injured party might abate the nuisance which interfered with his easement. "If Adam put a hedge where his neighbour has a right of way to his common of pasture, and the neighbour freshly on the placing thereof do abate it in the daytime, he commits no tort; but it will be a tort if he abate it by night although it was wrongfully placed."<sup>32</sup>

The right of self help was, however, greatly restricted.<sup>33</sup> To permit it was to invite violence. A nuisance could be abated by act of the party injured only if he acted immediately.<sup>34</sup> Judicial definition of 'immediately' is hard to find. The four days allowed by Bracton for the recovery of a free tenement from a disseisor, a day for the disseisee to ride north, a day south, a day east and a day west in order to gather his friends<sup>35</sup> was probably not applied to one who was disseised of his easement.<sup>36</sup> It is doubtful to what extent an injured person, in the medieval law, could abate a nuisance from fumes, noises and the like;<sup>37</sup> abatement cases are concerned almost wholly with nuisance for interference with easements.<sup>38</sup>

Complainant might employ the writ of justices<sup>39</sup> addressed to the sheriff.<sup>40</sup> This was a summary procedure, available *pur commun profit*, or in other words where a considerable part of the public were prejudicially affected.<sup>41</sup>

From the time of Henry III, the action of trespass might be brought

<sup>32</sup>Y. B. 21 Edw. I (R. S.) 462 (1293); cf. *Wigford v. Gill*, Cro. Eliz. 269, 78 Eng. Rep. 524 (1592).

<sup>33</sup>Maitland, *The Beatitude of Seisin*, 4 L. Q. REV. 29, 36 (1888).

<sup>34</sup>AMES, *op. cit. supra* note 17, at 178 n.9; BRACON, f. 233; 1 NICH. BRITT. 403.

<sup>35</sup>Branston, *The Forcible Recaption of Chattels*, 28 L. Q. REV. 262, 265 n.6.

<sup>36</sup>By Edward III's day it was probably not even the rule in the case of disseisin of a free tenement.

<sup>37</sup>It was said in *Rex v. Rosewell*, 2 Salk. 459, 91 Eng. Rep. 397 (1699): "If H builds a house so near mine that it stops my lights or shoots the water upon my house, or is in any other way a nuisance to me, I may enter upon the owner's soil and pull it down." cf. *Baten's Case*, 9 Co. 53b, 77 Eng. Rep. 810 (1610); 3 BLACKSTONE, COMMENTARIES \*5-\*6.

<sup>38</sup>FITZHERBERT, NAT. BREV. 411; BROOK'S ABR. 103. 33; cf. GALE, EASEMENTS 505 *et seq.* (10th ed. 1925).

<sup>39</sup>BRACON, f. 233b; 1 NICH. BRITT. 402.

<sup>40</sup>It is probable that the writ of justices could have been employed at times other than the formal *tour* which was made twice a year; otherwise its value as a summary procedure would have been greatly reduced.

<sup>41</sup>This was not an action for damages but an action to abate.



for nuisance.<sup>42</sup> But it is very unlikely that the technical action of trespass ever gained a very secure foothold. And in a case in Henry IV's reign trespass was not allowed for an obstruction to a right of way. It was held that Assize of Nuisance alone lay.<sup>43</sup>

Bracton, in a passage which is almost a paraphrase of Justinian,<sup>44</sup> states that "An action of interdict concerning a right of footway or private carriage-way is allowed against those who unjustly prevent a person from using his servitude."<sup>45</sup> No more is heard of this remedy by interdict. Here, as in many other cases, English law was impervious to Roman influence.

Complainant might also have used the writ of right,<sup>46</sup> or he might have used the writ *quod permittat*, which could be "in the nature of a writ of right or of a writ of entry."<sup>47</sup> Ames speaks of the *quod permittat* as being simply "analogous to a writ of right."<sup>48</sup> It was broader than the Assize of Nuisance or the Assize of Novel Disseisin. It could be brought by the heir or alienee of the disseisee and lay to protect easements or other incorporeal rights against the disseisor, his heir or alienee.<sup>49</sup> "In some cases the question whether it or a *praecipe quod reddat* was the appropriate writ gave rise to controversy;<sup>50</sup> and in other cases it was coextensive with the Assize of Novel Disseisin as extended by the Statute of Westminster II. Its scope was extended to remedy many various nuisances to incorporeal hereditaments by the provision of c. 24 of the same statute which permitted the making of writs in *consimili casu*."<sup>51</sup>

The writ *quo jure clamat communam* seems to have lain only

<sup>42</sup>Y. B. 6, 7 Edw. II. (R. S.) p. 12 (1314); Y. B. 30 Edw. I. (R. S.) p. 22 (1302).

<sup>43</sup>FITZHERBERT'S ABR., *Action sur le Cas* pl. 24; cf. Y. B. 19 Hy. VI. Mich. pl. 49 (1440); see Y. B. 20 Hy. VII. Mich. pl. 18 (1504).

<sup>44</sup>INSTITUTES OF JUSTINIAN 4.15.6; CODE OF JUSTINIAN 8.1; DIGEST OF JUSTINIAN 48.22.

<sup>45</sup>BRACTON, f. 104.

<sup>46</sup>GLANVILL, xii. c. 14. This writ was previously described as a *quod permittat*; *quære*, whether it is not in the nature of a writ of right.

<sup>47</sup>3 HOLDSWORTH, *op. cit. supra* note 6, at 20.

<sup>48</sup>AMES, *op. cit. supra* note 17, at 231.

<sup>49</sup>cf. Y. B. 6 Edw. II (R. S.) xxvii, p. 313 (1313).

<sup>50</sup>The Eyre of Kent, ii, 131, 132, 133.

<sup>51</sup>3 HOLDSWORTH, *op. cit. supra* note 6, at 20. But see Professor Winfield, *Nuisance as a Tort*, 4 C.A.M.B. L. J. 189, 191 (1931). He suggests that the writ *quod permittat prosternere* did not arise until about 250 years after the Statute of Westminster II.

“for a tenant seised in fee simple against one who claimed common over his land;”<sup>52</sup> it was thus designed not to protect complainant’s incorporeal right, but to rid his tenement of a particular kind of incorporeal right claimed by defendant, *i.e.*, a right of common.

There was, finally, the writ *curia claudendo* by which “when one landowner neglects to enclose his land, thus causing a nuisance to neighbour, notably through straying cattle, the neighbour may compel enclosure.”<sup>53</sup>

#### IV. EARLY REMEDIES FOR PUBLIC NUISANCES

In redressing public nuisances in the time of Henry II enquiries were made either in the King’s Chief Court, or before Justices sent into different parts of the kingdom for the purpose of making inquisitions, by a jury of the place or vicinage.<sup>54</sup> By the time of Edward I minor offences were dealt with in the Court Leet or at the Sheriff’s Tourn.<sup>55</sup> The Statute of 12 Rich. II, c. 13 (1389), the first known statute dealing with public nuisances, enacted that “If anyone cast dung etc. into Ditches, Water etc. which are next to any City, Borough or Town, he who will may sue forth a writ directed unto the Mayor or Sheriff or Bayliff of such Town etc.” The development of the presenting jury and the use of the presentment and indictment for common nuisances are not different from the same procedure in other crimes. It is significant, however, that criminal liability for common nuisances appeared ever to be reaching into new fields. The explanation is twofold: first, the method of English law being not *a priori* but inductive, it is difficult at any time to tell what the limits of a doctrine are, and thus whether a given case is an extension; and secondly, the scope of liability here, as in private nuisance, was gradually becoming wider.

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<sup>52</sup>3 HOLDSWORTH, *op. cit. supra* note 6, at 20; 2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 142; BOOTH, *op. cit. supra* note 13, at 237; 1 NICH. BRITT. 388; BRACTON, f. 229b; FLETA 263.

<sup>53</sup>Y. B. 13 Rich. II. (R. S.) vii, p. 78 (1390).

<sup>54</sup>GLANVILL, ix. c. 11.

<sup>55</sup>FLETA 269; Co. Litt. \*56a; 1 Rol. 541.

V. INDIVIDUAL'S RIGHT TO SUE FOR DAMAGES  
FROM PUBLIC NUISANCE

"It was recognised, certainly by the beginning of the sixteenth century, that a nuisance might be public and remediable by indictment, or private and remediable by action on the case at the suit of the person damaged thereby."<sup>56</sup> This statement is undoubtedly correct, but it cannot mean that the distinction between public and private nuisance was not made until the beginning of the sixteenth century. The remedies for the two have already been examined, and the examples are numerous. The distinction was made certainly by the twelfth century, and probably earlier. Public nuisances were then known as *purprestures*. Glanvill says of them, "Whenever a nuisance is committed affecting the King's highway, or a city, the suit concerning it belongs to the King's Crown."<sup>57</sup> If the defendant was found guilty of creating a *purpresture* he was subject to *amercement*, and his lands might even be forfeited. An individual who suffered special damages from a public nuisance was, at that time, unable to sue, and indeed there is no mention in Bracton of the possibility of such a suit.<sup>58</sup> The earliest case in which it is suggested that an individual may sue is apparently Y. B. 12 Hy. IV. p. 43 (1411). Fitzherbert cites a case of 1535<sup>59</sup> which he asserts holds that "obstructing the public highway is a common nuisance and if plaintiff is injured he has his action (on the case) for any damage." Though this view eventually prevailed, it was not accepted without dissent, the dissent being that a public offence should not give rise to a private right.<sup>60</sup> The action of nuisance by an individual who suffered special damages from a public nuisance then arose wholly within the growing action of trespass on the case.<sup>61</sup>

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<sup>56</sup>8 HOLDSWORTH, *op. cit. supra* note 6, at 424.

<sup>57</sup>GLANVILL, ix. c. 11.

<sup>58</sup>*cf.* BRACTON, f. 234.

<sup>59</sup>Y. B. 27 Hy. VIII. 26, 27 (1535). But Fitzherbert questions whether an individual may sue for special damages to himself coming from a public nuisance under 12 Rich. II c. 13. FITZHERBERT, NAT. BREV. 393 (1389); see also William's Case, 5 Co. 72b, 73a, 77 Eng. Rep. 163, 164-165 (1592) and cases cited.

<sup>60</sup>See 1 BACON'S ABR. 137 G. 1 (7th ed. 1831); 1 COMYN'S DIC. 421.

<sup>61</sup>No case of this kind has been found prior to the Statute of Westminster II, and no case of this kind has been found since then which was not trespass on the case.

## THE DEVELOPMENT OF NUISANCE

37

## VI. EXAMPLES FROM THE MEDIEVAL LAW

It is commonly accepted that actionable nuisance may be, first, physical injury to premises occupied by plaintiff, or to the property situated on such premises; or, secondly, an interference with the use of such premises or property by plaintiff. Cases of the first type in medieval law are numerous: for example, diverting water;<sup>62</sup> raising a weir;<sup>63</sup> heightening or lowering a pond;<sup>64</sup> building a house higher than complainant's and so near that the rain from defendant's house flows onto complainant's house;<sup>65</sup> removing lateral support.<sup>66</sup> Cases of the second type are less numerous; the common law was always quicker to redress a physical injury than it was to recognize or enforce a mere right. It was, however, early recognized that a man might raise a market to the nuisance of complainant's market. The nuisance, which could be redressed by assize, lay in taking away complainant's customers.<sup>67</sup> Similarly defendant might be liable for starting a ferry in competition with complainant's ferry and thus taking away complainant's customers, or for starting a fair or mill in competition with complainant's fair or mill and reducing complainant's profits.<sup>68</sup> In each of these cases in which defendant was held liable it was declared that complainant's claim rested on whether or not he had a franchise by prescription or by specialty from the King. In the absence of restriction by common law or statute, competition was free. Examples of nuisance popularly so called, such as noise or odors, are numerous in the early law.<sup>69</sup>

## VII. NECESSITY OF PROVING DAMAGES

It was emphatically laid down that to found the Assize of Nuisance,

<sup>62</sup>Y. B. 30 Edw. I. (R. S.) p. 40 (1302); Y. B. 31 Edw. I. (R. S.) p. 404 (1303); Y. B. 12 Edw. III. (R. S.) p. 464 (1338).

<sup>63</sup>Y. B. 12 Edw. III. 467 (1338).

<sup>64</sup>BRACON, f. 233.

<sup>65</sup>Y. B. 18 Edw. III. (R. S.) xviii, p. 210 (1344).

<sup>66</sup>1 COMYN'S DIG. 420.

<sup>67</sup>Y. B. 2 Edw. II. (R. S.) xix, p. 72 (1309); Y. B. 13 Edw. III. (R. S.) p. 208 (1339).

<sup>68</sup>Y. B. 4 Edw. II. (R. S.) xxvi, p. 93 (1311); Y. B. 7 Edw. II. (R. S.) xxxix, p. 187 (1314).

<sup>69</sup>Aldred's Case, 9 Co. 576, 77 Eng. Rep. 817 (1610), and cases cited.

or any other action growing out of the complainant that defendant's act was a nuisance, damages must be proved.<sup>70</sup> This is perhaps the meaning of the case in Y. B. 7 Edw. III. Mich. pl. 27 (1332). The broad maxim *sic utere tuo ut alienum non laedas* was restricted by the recognition that some damages were *absque injuria*. Thus if a man erected a mill upon his land and so subtracted customers from his neighbor's mill, his neighbor suffered *damnum* but there might be no *injuria*.<sup>71</sup> In 1410 in the *Gloucester Grammar School Case*,<sup>72</sup> (which was called an action of trespass), complainants as masters of an ancient grammar school, alleged that whereas formerly they were wont to get ten shillings per quarter for tutoring each scholar, now they got only two shillings, because defendants had erected a rival school. It was held that no action lay. Hankford said, Thirning agreeing, "*damnum puit estre absque injuria*." This was true both in the Assize of Nuisance, and in action on the case for nuisance. No attempt was made to answer the question when an act is, and when it is not *absque injuria*; the problem was recognized but was not satisfactorily dealt with until a much later day.<sup>73</sup>

#### VIII. EFFECTS OF THE STATUTE OF WESTMINSTER II

Although actions on the case (*in consimili casu*, in the language of the Statute) were granted more freely from the time of the Statute of Westminster II, their early growth, in actions of nuisance, was slow.<sup>74</sup> The Assize of Nuisance was better known, and, though more cumbersome, continued for many years to be the procedure chosen. Trespass on the case gradually spread and gathered momentum; in it the scope of liability was extended and the elements of the tort of nuisance became more clearly defined.

As the action on the case superseded the Assize of Nuisance, rules were periodically laid down defining the scope of each. The rules of any period are of more than antiquarian interest because they reflect the

<sup>70</sup>BRACON, f. 221; FLETA 252.

<sup>71</sup>2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 534; BRACON, f. 221, 24b, 45b, 92b.

<sup>72</sup>Y. B. 11 Hy. IV. Mich. pl. 21 (14Q9).

<sup>73</sup>2 POLLOCK AND MAITLAND, *op. cit. supra* note 6, at 534. The nature of the problem makes a rule of thumb impossible.

<sup>74</sup>Action on the case probably existed before the Statute of Westminster II.

growing principles upon which the action on the case rested. Theoretically, trespass on the case lay only when adequate relief was not afforded by any of the other original writs. "A man shall never have an action upon the case where he may have any other remedy by any writ founded in the registry."<sup>75</sup> Disapproval of overlapping remedies is found throughout the early development of English law. Thus successive generations of judges continued to lay down the exclusive province of trespass on the case of nuisance on the one hand, and Assize of Nuisance on the other.<sup>76</sup> The Assize continued to lie in those cases where it lay before the Statute. It could be brought by a freeholder against a freeholder, and it lay only for acts of misfeasance.<sup>77</sup> It was said that if the tenant of land on which X has a common of pasture do anything to destroy X's pasture, he shall have the Assize of Nuisance, and not the action on the case;<sup>78</sup> and if Y has a way leading up to Blackacre and a man obstruct it assize lies but not case.<sup>79</sup> Other acts founding the Assize of Nuisance and not case were: where one made a ditch across plaintiff's right of way<sup>80</sup> or across a stream, causing his land to be flooded.<sup>81</sup> The one common factor in all of these cases is that defendant's act was in each case a misfeasance, a misfeasance of a type which would not sustain trespass,<sup>82</sup> and which was *damnum* and *injuria*. Examples of trespass on the case, are, conversely, examples of nonfeasance. If, it was said, a man ought to clean a ditch and fails to do so, and as a result plaintiff's land is surrounded, case alone lies.<sup>83</sup>

The function of the Assize was to abate the nuisance; action on the case lay only for damages.

As early as the reign of Henry IV, it was said by Screne, that "If a market be raised to the nuisance of my market, I shall have Assize of

<sup>75</sup>See *Beswick v. Cunden*, Cro. Eliz. 520, 78 Eng. Rep. 768 (1598).

<sup>76</sup>Y. B. 11 Hy. IV. 83 (1409); Y. B. 11 Hy. IV. 11, 26 (1409); *AMES*, *op. cit. supra* note 17, at 332 n.1.

<sup>77</sup>Y. B. 11 Hy. IV. 83 (1409).

<sup>78</sup>*Ibid.*

<sup>79</sup>Y. B. 2 Hy. IV. 11b (1401).

<sup>80</sup>Y. B. 2 Hy. IV. 11 (1401); Y. B. 11 Hy. IV. 26, 83 (1409).

<sup>81</sup>Y. B. 11 Hy. IV. 83 (1409).

<sup>82</sup>BOOK OF ASSIZES 2. *Contra*: Y. B. 13 Hy. VII. 26 (1498), which can only be regarded as anomalous.

<sup>83</sup>Y. B. 11 Hy. IV. 83 (1409); 1 Rol. Abr. 104. 16.

Nuisance, and in a common case if the purchasers at my market be disturbed or beaten and as a result I lose my toll, I shall have a good action of trespass on my case.”<sup>84</sup> The reason for the distinction is evident: defendant must be seised of a free tenement or the Assize of Nuisance fails. But the act complained of in the second of the two examples is a misfeasance. The transition from these facts to a case where defendant was both seised of a free tenement and was guilty of misfeasance, was not difficult, considering that the court of the King’s Bench looked with favor on the extension of the action on the case. Counsel frequently suggested that case should lie, but the old distinction was for a while repeated with the old reason.<sup>85</sup> It is indeed not until the reign of Elizabeth that a case is found in which the two actions were allowed to be alternative.<sup>86</sup> In *Leverett v. Townsend*<sup>87</sup> defendant disturbed plaintiff’s right of common by plowing, and action on the case was allowed instead of Assize of Nuisance.<sup>88</sup> Coke was counsel for the plaintiff. The court allowed action on the case in this period, that is, at the end of the sixteenth century, for flooding,<sup>89</sup> stopping of a way,<sup>90</sup> diverting of water,<sup>91</sup> and in many other cases which formerly were within the exclusive province of the Assize of Nuisance.<sup>92</sup> The extension thus made, which amounted practically to a supersession of the Assize of Nuisance by the action of trespass on the case, is perhaps the most important single extension made in the expansion of that action.

The extension of the action on the case to include the Assize of Nuisance did not necessarily mean an extension of the scope of liability in nuisance. It was simply the substitution of one remedy for another. But through the action on the case the scope of liability was in fact

<sup>84</sup>Y. B. 11 Hy. IV. 47 (1409).

<sup>85</sup>As for example by Pigot in Y. B. 21, Hy. VII. 30a (1506). Similarly, case lay for misfeasance by a freeholder which caused a nuisance to a termor. This, too, undoubtedly contributed to the growing idea that case would lie for a misfeasance although both plaintiff and defendant were freeholders.

<sup>86</sup>Sly and Mordant’s Case, 1 Leon. 247, 74 Eng. Rep. 225 (1596).

<sup>87</sup>Cro. Eliz. 199, 78 Eng. Rep. 454 (1588).

<sup>88</sup>An earlier case *contra*: Y. B. 2 Hy. IV. 11 (1401).

<sup>89</sup>Sly and Mordant’s Case, *supra*, note 86; *Beswick v. Cunden*, Cro. Eliz. 402, 78 Eng. Rep. 646 (1593).

<sup>90</sup>*Alston v. Pamphyn*, Cro. Eliz. \*466, 78 Eng. Rep. 719 (1596).

<sup>91</sup>1 Rol. Abr. 104. (L.) Sec. 9.

<sup>92</sup>*Ibid.*

rapidly expanding.

If the interference was not by a freeholder, Assize of Nuisance never lay.<sup>93</sup> This was at first required in actions on the case, but it was finally settled that if "a man erect a house or mill to the nuisance of another; every occupier afterwards is subject to an action [*i.e.*, on the case] for nuisance."<sup>94</sup> In *Lady Brown's Case*<sup>95</sup> a husband diverted water by a pipe and cock to his house; it was held that an action lay against the wife after the death of the husband if she lived in the house and used the water. "For every turning of the cock is a new nuisance." The doubtful case of *Ryppon v. Bowles*<sup>96</sup> questions mere occupancy as a basis of defendant's liability. Defendant, lessee of a freeholder who had obstructed plaintiff's lights, was sued in an action on the case for nuisance. It was held that defendant was not liable, for if he abated the nuisance he would be liable to his lessor in an action of waste. *Lady Brown's Case* was distinguished on the ground that the nuisance complained of in her case was the turning of the cock. Only three years after *Ryppon v. Bowles*, in the case of *Brent v. Haddon*,<sup>97</sup> the court rejected the argument that defendant was merely the lessee in occupation and consequently could not be sued for nuisance. This was undoubtedly the prevailing opinion,<sup>98</sup> even at the time of the unsatisfactory case of *Ryppon v. Bowles*.<sup>99</sup> Not only was the occupier liable for nuisance in an action on the case, but also the creator of the nuisance who might be out of possession. Thus, in *Rosewell v. Prior*<sup>100</sup> a tenant for years created a nuisance. The question was whether, after a recovery against the tenant for years for the creation, an action would lie against him for the continuance after he had made an underlease. It was held that plaintiff might have his action on the case against either the lessee who created the nuisance, although he was out of possession,

<sup>93</sup>AMES, *op. cit. supra* note 17, at 232 n.6; *cf.* *Beswick v. Cunden*, Cro. Eliz. 520, 78 Eng. Rep. 768 (1597).

<sup>94</sup>1 COMM'N'S DIG. 420; *cf.* Y. B. 22 Hy. VI. 15, 23 (1444); *cf.* Y. B. 33 Hy. VI. 26. 10 (1455).

<sup>95</sup>3 Dyer 319b, 73 Eng. Rep. 723 (1571).

<sup>96</sup>Cro. Jac. 373, 79 Eng. Rep. 319 (1617).

<sup>97</sup>Cro. Jac. 555, 79 Eng. Rep. 476 (1620).

<sup>98</sup>*Rosewell v. Prior*, 2 Salk. 460, 12 Mod. 635, 88 Eng. Rep. 1570 (1702).

<sup>99</sup>This case was questioned by Holt, C. J., in *Rosewell v. Prior*, 2 Salk. 460, 12 Mod. 635, 640, 88 Eng. Rep. 1570 (1702).

<sup>100</sup>Note 99, *supra*.



or against the under lessee in possession. It was argued by the defendant in this case that before c. 24 of the Statute of Westminster II the Assize of Nuisance did not lie against the erector of the nuisance after granting over the freehold; and the only remedy was by *quod permittat* and that lay only against the alienee; that liability of the creator should not be extended by an action on the case for this would “punish one for what he cannot redress; for he cannot justify abating this nuisance.”<sup>101</sup> It was argued with force that the continuance of the nuisance “is the sole foundation of the action, and the only material question is, by whom it is continued?” The court admitted that an action lay against the occupier for the continuance of a nuisance,<sup>102</sup> but rejected the argument that the creator of the nuisance, who is not in possession, should not be liable. “And surely this action is well brought against the erector for before his assignment over he was liable for all consequential damages; and it shall not be in his power to discharge himself by granting over; . . . And it is a fundamental principle in law and reason, that he that does the first wrong shall answer for all consequential damages.”<sup>103</sup> This extension of the action on the case is a break with the theory of nuisance reflected in the Assize.

It has been noted that in the early law plaintiff could bring neither the Assize of Nuisance nor action on the case for nuisance unless he was seised of a freehold. This rule was indeed construed so strictly that “if the owner of the freehold to which the nuisance was done conveyed it to another, that other, not being the freeholder at the time of the nuisance committed, had no cause of action.”<sup>104</sup> Similarly, there are no early examples of nuisance by a termor. “No allusion to termor’s right to have case occurs earlier than Y. B. 9 Edw. IV. 35b pl. 10 (1469). But of course termor could abate the nuisance.”<sup>105</sup> By the end of the sixteenth century, however, it was settled that plaintiff could bring an action on the case for nuisance although he was not a freeholder. In an

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<sup>101</sup>Rosewell v. Prior, note 99, *supra*, 88 Eng. Rep. 1570, 1571-2.

<sup>102</sup>*cf.* Some v. Barwish, Cro. Jac. 231, 79 Eng. Rep. 200 (1608).

<sup>103</sup>In a much later period, Parke, B., in *Thompson v. Gibson*, 7 M. & W. 456, 151 Eng. Rep. 845 (1841) approved the reasoning of *Rosewell v. Prior*, saying that a man may not avoid liability for a wrong by showing that subsequent events make it impossible for him to stem the damages flowing from that wrong.

<sup>104</sup>HOLDSWORTH, *op. cit. supra* note 6, at 330.

<sup>105</sup>AMES, *op. cit. supra* note 17, at 232 n.4.

anonymous case in the common pleas it was stated, obiter, that "if the plaintiff or defendant had but an estate for years, then an action upon the case would lye."<sup>106</sup> The case of *Westbourne v. Mordant*<sup>107</sup> affirms this view.

The action on the case was a better remedy than the assize, and in 1601 it was finally settled by the Exchequer Chamber in *Cantrel v. Church*<sup>108</sup> that action on the case lay wherever formerly Assize of Nuisance lay. The court said:

"But after divers motions and considerations . . . they resolved that the action on the case [for stopping *totaliter* plaintiff's way to his common] was well brought; for he hath election to bring either the one, or the other: For although there had a difference been taken where the way is so stopped up, that he loseth the use thereof altogether, and thereby his common; there an assize shall lie; but where it is estopped but in part, and not totally, that there an action upon the case lies and not an assize; they conceived it not to be any difference, for he hath election to have either the one or the other action. . . ."

It followed naturally that trespass on the case became the usual and established remedy for nuisance. The foundations were thus soundly laid for the development and the continued growth of an extensive and important body of the Anglo-American common law.

<sup>106</sup>Anon., 3 Leon. 13, 74 Eng. Rep. 509 (1565). The case of *Leeds v. Shakerly*, Cro. Eliz. 751, 78 Eng. Rep. 983 (1600), in which it is said that plaintiff had to prove his seisin of the mill at the time of the nuisance in order to recover cannot be regarded as a correct expression of the law at that time unless "seisin" is construed to have its earlier meaning of "possession."

<sup>107</sup>Cro. Eliz. 191, 78 Eng. Rep. 447 (1589). In *VINER'S ABRIDGMENT* (Nuisance K. 2.) plaintiff is described as lessee for years; he is not so described in the report. Cf. *Penruddock's Case*, 5 Co. 100b, 2 Rol. 142, 77 Eng. Rep. 210 (1598). There was no doubt that for a nuisance created in the life of the testator and continued afterwards the devisee might have an action on the case. *Some v. Barwish*, Cro. Jac. 231, 79 Eng. Rep. 200 (1608). Similarly the heir could bring an action on the case. *Gresill v. Hoddesden*, Yelv. 143, 80 Eng. Rep. 96 (1609).

<sup>108</sup>Cro. Eliz. 845, 78 Eng. Rep. 1072 (1601), citing *Yevance v. Holcomb*, 2 Dyer 250b (73 Eng. Rep. 553) (1566).