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against the grain of anti-trust legislation, the purpose of which is to promote and protect competition. Whatever the reason it is certain that the narrow application of Robinson-Patman remains and it is clear that any extension of coverage beyond tangible personal property and into the area of privileges, services, and interests in real property will have to come from Congress.

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AIR POLLUTION AS A PRIVATE NUISANCE

The problem of air pollution, though immediate in our minds, has been recognized since 1306, when the burning of sea coal was forbidden in England under the penalty of death.[1] Monetary compensation for damage from air pollution is recoverable under the nebulous tort concept of private nuisance,[2] on the theory that a right in the use and enjoyment of land has been invaded.[3]

Wright v. Masonite Corp.[4] involved a private nuisance action for damages caused by noxious gases. The plaintiff owned a small grocery store located approximately 200 feet from the defendant's masonite board factory. One phase of the defendant's production process involved spraying some of the boards with a lacquer or varnish containing a urea-formaldehyde resin.[5] Fumes created during this spraying process were emitted from the factory by two large exhaust fans. Prior to December 1962 there was no odor of any consequence in the vicinity of the plaintiff's grocery. Toward the end of December, a noxious odor became apparent in and around the grocery, and by January 1963 customers were complaining that the

[1]Kennedy & Porter, *Air Pollution: Its Control and Abatement,* 8 VAND. L. REV. 854 (1955).

[2]Seavey, *Nuisance: Contributory Negligence and Other Mysteries,* 65 HARV. L. REV. 984 (1952); PROSSER, TORTS § 87 (3d ed. 1964).

[3]Blessington v. McCrory Stores Corp., 198 Misc. 291, 95 N.Y.S.2d 414, 422 (Sup. Ct. 1950); Beckman v. Marshall, 85 So. 2d 552, 554 (Fla. 1956); RESTATEMENT OF TORTS ch. 40, at 217 (1939).

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

[5]A urea-formaldehyde resin is produced by combining urea and formaldehyde. This combination is then mixed with other chemicals and compounds in various quantities and proportions to produce what is known in the trade as a synthetic lacquer or a synthetic varnish. In the manufacturing process, the urea and formaldehyde do not always result in a perfect combination of the two chemicals, and the result in the finished product in such case is a very small percentage of "free" formaldehyde. Appendix to petition for writ of certiorari, p. 6, Wright v. Masonite Corp., 368 F.2d 661 (4th Cir. 1966).

groceries had a bad taste. At the end of January 1963, the odor had premeated almost every item in the store, and early in February the plaintiff was forced to close his business. During this time, state health officials failed to locate the source of the odor, and it was not until February 1963 that a professor of chemistry was able to determine that the odor in and around the plaintiff's store was formaldehyde gas.

The plaintiff brought a diversity action for nuisance in the United States District Court which resulted in a dismissal with prejudice. This court found that the defendant company was the source of the harm and damages were fixed at $12,000. However, the court also found that the plaintiff had failed to prove a cause of action for damages under the law of North Carolina because the invasion was not intentional.[6] On appeal, the decision of the lower court was affirmed by the United States Court of Appeals for the Fourth Circuit, which held that for an invasion to be intentional the actor must act "for the purpose of causing the harm or... [know] that it is resulting or is substantially certain to result from his conduct."[7]

A nuisance arising from the emission of noxious gases involves "a more or less continuous interference with the use and enjoyment of property by causing or permitting the escape of deleterious substances or things such as smoke, odors,... etc."[8] Within this category two distinct rules have been used by courts to determine whether the defendant is liable for damages: (1) the Absolute Nuisance Rule and (2) the *Restatement of Torts* Rule. The often cited *Rylands v. Fletcher* case,[9] a possible third rule, is in reality a form of the Absolute Nuisance Rule,[10] and its actual use in the field of air pollution has been limited,[11]

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[6]368 F.2d 661, 665 (4th Cir. 1966). The court relies chiefly on Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953), as the basis for following the *Restatement* view. This case deals with the erection of an oil refinery approximately 100 feet from plaintiff's home and the emission of fumes into the air.

[7]368 F.2d at 663.

[8]1 HARPER & JAMES, TORTS § 1.23, at 64 (1956).

[9]Fletcher v. Rylands, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), reversed in Fletcher v. Rylands [1866] L.R. 1 Ex. 265, affirmed in Rylands v. Fletcher, L.R. 3 H.L. 300 (1868). This famous English case deals with the flooding of plaintiff's coal mine by the sudden release of water from a reservoir on the defendant's land. The Court of Exchequer stated:

> We think the true rule of law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape.

L. R. 1 Ex. 265, 279-80 (1866).

[10]Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 426 (1942).

[11]The following two cases have specifically relied on *Rylands* in the area of

serving only to confuse further an already confused area of law.

The Absolute Nuisance Rule[12] is an American version of strict liability in the field of nuisance.[13]

> [A]bsolute nuisance may be defined as a distinct civil wrong, arising or resulting from the invasion of a legally protected interest, and consisting of an unreasonable interference with the use and enjoyment of the property of another; the doing of anything, or the permitting of anything under one's control or direction to be done without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights . . . .[14]

The Absolute Nuisance Rule eliminates negligence[15] as a requirement

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air pollution: Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900 (1890); Frost v. Berkeley Phosphate Co., 42 S.C. 402, 20 S.E. 280 (1894). A recent English case applied the *Rylands* Rule and was commented on in CAMB. L.J. 168 (1961). The comment dealt with the case of Halsey v. Esso Petroleum Co. (1961) 1 Weekly L.R. 683 which applied Rylands v. Fletcher in granting recovery for damage to the plaintiff's laundry hanging on the line and the paint on his car caused by the emission of acidic fumes from the defendant's premises.

The following cases have used the doctrine of Rylands v. Fletcher but not in the field of air pollution: Norfolk & W. Ry. v. Amicon Fruit Co., 269 Fed. 559 (4th Cir. 1920); Central Ind. Coal Co. v. Goodman, 111 Ind. App. 480, 39 N.E.2d 484 (1942); Helms v. Eastern Kansas Oil Co., 102 Kan. 164, 169 Pac. 208 (1917); Bridgemann-Russell Co. v. City of Duluth, 158 Minn. 509, 197 N.W. 971 (1924); Central Exploration Co. v. Gray, 219 Miss. 757, 70 So. 2d 33 (1954); Thigpen v. Skousen & Hise, 64 N.M. 290, 327 P.2d 802 (1958); Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co., 60 Ohio St. 560, 54 N.E. 528 (1899); Brown v. Gessler, 191 Ore. 503, 230 P.2d 541 (1951); Weaver Mercantile Co. v. Thurmond, 68 W. Va. 530, 70 S.E. 126 (1911).

The following cases have specifically rejected the doctrine of Rylands v. Fletcher: Fritz v. E.I. Dupont DeNemours & Co., 45 Del. 427, 75 A.2d 256 (1950) (air pollution); United Fuel Gas Co. v. Sawyers, 259 S.W.2d 466 (Ky. 1953); Reynolds v. W. H. Hinman Co., 145 Me. 343, 75 A.2d 802 (1950); Kelley v. National Lead Co., 210 S.W.2d 728 (Mo. 1948) (air pollution); DeGray v. Murray, 69 N.J.L. 458, 55 Atl. 237 (1903); Sinclair Prairie Oil Co. v. Stell, 190 Okla. 344, 124 P.2d 255 (1942); Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954) (air pollution); Rose v. Socony-Vacuum Corp., 54 R.I. 411, 173 Atl. 627 (1934); Turner v. Big Lake Oil Co., 128 Tex. 155, 96 S.W.2d 221 (1936); Jacoby v. Town of City of Gillette, 62 Wyo. 487, 174 P.2d 505 (1946). See Pollock, *Duties of Insuring Safety*, 2 L.Q. REV. 52, 55 (1886).

[12]King v. Columbian Carbon Co., 152 F.2d 636 (5th Cir. 1945); United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 Pac. 262 (1931); Boston Ferrule Co. v. Hills, 159 Mass. 147, 34 N.E. 85 (1893); Bohan v. Port Jervis Gas-Light Co., 122 N.Y. 18, 25 N.E. 246 (1890); Ducktown Sulphur, Copper & Iron Co. v. Barnes, 60 S.W. 593 (Tenn. 1900); G. L. Webster Co. v. Steelman, 172 Va. 342, 1 S.E.2d 305 (1939); Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306 (1924).

[13]Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457-58 (1959).

[14]Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724, 730 (1944). This rule is also followed in Beckwith v. Town of Stratford, 129 Conn. 506, 29 A.2d 775, 777 (1942).

[15]G. L. Webster Co. v. Steelman, 172 Va. 342, 1 S.E.2d 305, 311 (1939); McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928).

for imposing liability. *United Verde Extension Mining Co. v. Ralston*[16] applied this rule. Here the court said that the operation of a smelter, in itself lawful, became a nuisance if it discharged poisonous gas and smoke which was carried by wind currents onto and caused injury to the land of another. The location of the smelter, sixteen miles from the plaintiff's premises, was deemed immaterial[17] in determining liability.

The rule looks to the defendant's intention to bring about certain conditions which are in fact found to be a nuisance,[18] without regard to whether his actions were reasonable[19] or the invasion itself intended. For example, emitting gas into the atmosphere indicates an intention to create such a condition.

The rule of absolute nuisance should not be confused with a nuisance per se, which is a nuisance at all times and under any circumstances, regardless of location or surroundings.[20] It is generally agreed that a lawful business can never be a nuisance per se.[21] Under the absolute rule, the existence of a nuisance, actionable in damages, does not necessarily give rise to injunctive relief, since the need for the activity may outweigh the damage produced and injunctive relief becomes another question.[22]

It has been suggested that certain property rights have been given greater protection from interference than other rights and that nonpolluted air may fall into that category.[23]

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[16]37 Ariz. 554, 296 Pac. 262, 264-65 (1931).

[17]37 Ariz. 554, 296 Pac. 262, 265 (1931). See also Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306, 308 (1924). Here the court notes the material harm done and disregards the locality of the business and the methods used.

[18]Beckwith v. Town of Stratford, 129 Conn. 506, 29 A.2d 775 (1942); Seavey, *Nuisance: Contributory Negligence and Other Mysteries,* 65 HARV. L. REV. 984, 992 (1952); Wright v. Masonite Corp., 368 F.2d 661, 666 (4th Cir. 1966). (A. Bryan, J. dissenting). The dissent makes this point by giving the RESTATEMENT view of "intention" a broader interpretation than the majority of the court does. "It is not whether the *injury* was intentional; but whether the *causative acts* were intentionally done."

[19]Courts attempting to determine the reasonableness of the defendant's actions look at locality, nature of the trade, manner of using property, extent of the injury, and the effect on life, health and property. Fox v. Ewers, 195 Md. 650, 75 A.2d 357 (1950); Reber v. Illinois Cent. R.R., 161 Miss. 885, 138 So. 574 (1932).

[20]Ozark Bi-Products v. Bohannon, 224 Ark. 17, 271 S.W.2d 354, 356 (1954).

[21]Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 Pac. 581, 583 (1910); McPherson v. First Presbyterian Church, 120 Okla. 40, 248 Pac. 561, 565 (1926); Town of Colton v. South Dakota Cent. Land Co., 25 S.D. 309, 126 N.W. 507, 509 (1910).

[22]Anderson v. American Smelting & Ref. Co., 265 Fed. 928 (D.C. Utah 1919); Poultryland, Inc. v. Anderson, 200 Ga. 549, 37 S.E.2d 785 (1946).

[23]Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48, 51 (1954); Union Cemetery Co. v. Harrison, 20 Ala. App. 291, 101 So. 517, 519 (1924); PROSSER, TORTS § 88, at 603 (3d ed. 1964).

The second approach, as set out in the *Restatement of Torts*,[24] is an attempt to classify the various forms of liability that constitute actionable nuisance.

> The actor is liable in an action for damages for a non-trespassory[25] invasion of another's interest in the private use and enjoyment of land if,
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> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
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> (b) the invasion is substantial; and
>
> (c) the actor's conduct is a legal cause of the invasion; and
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> (d) the invasion is either
>
> (i) intentional and unreasonable; or
>
> (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.[26]

The *Restatement* definition of an intentional invasion requires that the defendant either specifically act for the purpose of causing the invasion or be substantially certain that the invasion will result from his actions.[27] *Waschak v. Moffat*[28] illustrates the *Restatement*

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[24]The following cases which adopt the RESTATEMENT view deal with the emission of noxious gases and odors: E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38 (6th Cir. 1943); Chapman Chem. Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949); Luthringer v. Moore, 31 Cal. 2d 489, 190 P.2d 1 (1948); Koseris v. J. R. Simplot Co., 82 Idaho 263, 352 P.2d 235 (1960); Patterson v. Peabody Coal Co., 3 Ill. App. 2d 311, 122 N.E.2d 48 (1954); Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 82 N.W.2d 151 (1957); Fuchs v. Curran Carbonizing & Eng'r Co., 279 S.W.2d 211 (Mo. Ct. App. 1955); McKenna v. Allied Chem. & Dye Corp., 8 App. Div. 2d 463, 188 N.Y.S.2d 919 (Sup. Ct. 1959); Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953); Soukoup v. Republic Steel Corp., 78 Ohio App. 87, 66 N.E.2d 334 (1946). Courts have adopted this rule hoping to "obviate the difficulty and confusion in attempting to reconcile or distinguish the great mass of cases." Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310, 314 (1954).

[25]Trespass is an invasion of the plaintiff's interest in exclusive possession of land, while nuisance is an interference with one's use and enjoyment of it. RESTATEMENT OF TORTS ch. 40, at 224 (1939). *But see,* Note, 39 TEX. L. REV. 243 (1960) which discusses and criticizes a case dealing with the election of remedy of trespass or nuisance for emission of flouride gas.

[26]RESTATEMENT OF TORTS § 822 (1939).

[27]RESTATEMENT OF TORTS § 825 (1939) says: "An invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct." Comment (a) says: "It is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing such an invasion. He must either act for the purpose of causing it or know that it is resulting or is substantially certain to result from his conduct." *Id.* at 238.

[28]379 Pa. 441, 109 A.2d 310 (1954).