## NUISANCE—LIABILITY FOR DEPREDATIONS OF ANIMALS *Ferae Naturae* PURPOSELY ATTRACTED TO THE LAND

*Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955)*

Defendant constructed a pond upon his farm near plaintiffs' adjoining lands. Later, defendant, knowing the habits of wild geese and for the purpose of attracting them, placed decoys, food, and bait on the pond. In the following three-year period the number of geese attracted to the pond increased from 200 to 3,000. During this time the geese preyed upon plaintiffs' grain fields, which theretofore had never been damaged by wild geese, and caused $1,500 damage. After repeated warnings to defendant, plaintiffs brought an action for nuisance seeking damages and a restraining order. The lower court sustained defendant's demurrer on the ground[1] that he did not own the geese and was not liable for the intrusions of animals *ferae naturae* which had not been reduced to possession. On appeal the Supreme Court of North Carolina reversed, holding that the complaint stated a cause of action.[2]

An action for private nuisance lies against one who has caused an unreasonable and substantial interference with the use or enjoyment of land.[3] While this interference may be negligent or result from ultrahazardous conduct,[4] most nuisances, as in the principal case, are intentional in the sense that the actor creates or continues to maintain a condition with knowledge that it will result, or is substantially certain to result, in harm to the interests of another.[5] Whether an in-

1 The defendant also demurred on the ground that the complaint did not allege negligence either in the construction or maintenance of the pond. The appellate court properly rejected this argument. See note 7 *infra*.

2. Andrews v. Andrews, 242 N.C. 382, 88 S.E.2d 88 (1955). On remand, the case was tried in October 1955. The jury found for the plaintiff and awarded damages for the crops destroyed by the geese. Letter from M. C. McLeod, attorney for appellant, to the *Washington University Law Quarterly*, Oct. 15, 1955.

3. PROSSER, TORTS 389-401 (2d ed. 1955). Nuisance may consist of an interference with the physical condition of the land, or with the comfort and health of the occupant, or with the occupant's peace of mind. See RESTATEMENT, TORTS § 822 (1939), where the general rule for liability in an action of nuisance is stated as follows:

> The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,
> (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
> (b) the invasion is substantial; and
> (c) the actor's conduct is a legal cause of the invasion; and
> (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.

For a historical background of nuisance, see also RESTATEMENT, TORTS, Scope and Introductory Note to c. 40 at 214-25 (1939); McRae, *The Development of Nuisance in the Early Common Law*, 1 U. FLA. L. REV. 27 (1948).

4. See RESTATEMENT, TORTS § 822, comment *m* (1939); PROSSER, TORTS 392-93 (2d ed. 1955).

5. RESTATEMENT, TORTS § 825 (1939); PROSSER, TORTS 392 (2d ed. 1955).

tentional interference is unreasonable is determined by weighing, in the light of all the surrounding circumstances, the utility of the actor's conduct against the resulting harm.[6] Nevertheless, while it is true that the actor's conduct is important in determining the reasonableness of the interference, it is important to note that in referring to the use and enjoyment of land, the action of nuisance refers primarily to the interest invaded rather than to the type of conduct causing the interference.[7] The action, therefore, may be maintained only by those having property rights or privileges in the land.[8]

The demurrer in the principal case did not attack the complaint on the ground that any of the basic elements of nuisance outlined above were missing, but rather on the ground that one is not liable for the depredations of animals which he does not own.[9] Thus, the issue presented by the instant case is whether a defendant against whom an action for nuisance is brought must have a property interest in the agency causing the invasion of the use or enjoyment of the land of another.

A careful search has failed to reveal an American case with a similar factual situation,[10] and what little English law there is on the subject is unsettled. The first English case on this point appears to have been *Boulston's Case*[11] in which the court held that defendant was not liable

6. Meyer v. Kemper Ice Co., 180 La. 1037, 158 So. 378 (1934); Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 Atl. 280 (1931); PROSSER, TORTS 398, 410-16 (2d ed. 1955). See also RESTATEMENT, TORTS §§ 826-28 (1939), for the general rules in determining "reasonableness," and specific applications of these rules in §§ 829-31.

7. RESTATEMENT, TORTS, Scope and Introductory Note to c. 40 at 220-21 (1939), where it is stated:

> Failure to recognize that private nuisance has reference to the interest invaded and not to the type of conduct which subjects the actor to liability has been a fertile cause of confusion. Thus, in respect to an interference with the use and enjoyment of land, attempts are made to distinguish between private nuisance and negligence, overlooking the fact that private nuisance has reference to the interest invaded and negligence to the conduct that subjects the actor to liability for the invasion.

See also 33 MARQ. L. REV. 240 (1950).

8. RESTATEMENT, TORTS § 823 (1939).

9. Since the geese in the principal case were migratory wild fowl, neither the defendant nor the sovereign had a property right in them. Sickman v. United States, 184 F.2d 616, 618 (7th Cir. 1950).

10. Although the factual situation in Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), was very similar, the court held that it did not have jurisdiction to decide the question. The plaintiffs sued for damages to their crops caused by geese concentrating on a United States game preserve. In dictum the court stated that one is not liable for the trespasses of animals *ferae naturae* which have not been reduced to possession. The language of the opinion, however, seems to indicate that the court was possibly speaking in terms of the liability imposed upon a *keeper* of animals rather than in terms of liability for nuisance. As to the liability of keepers of animals *ferae naturae*, see Manger v. Shipman, 30 Neb. 352, 46 N.W. 527 (1890) (wolf); Stevens v. Hulse, 263 N.Y. 421, 189 N.E. 478 (1934) (bear); Olmsted v. Rich, 53 Hun 638, 6 N.Y. Supp. 826 (N.Y. Sup. Ct., Gen. T. 1889) (bees); Taylor v. Granger, 19 R.I. 410, 37 Atl. 13 (1896) (pigeons). See also PROSSER, TORTS 319-26 (2d ed. 1955), for a discussion of the liability for interferences of one's own animals.

11. Cro. Eliz. 547, 77 Eng. Rep. 216 (1597).

for damages to his neighbor's farm caused by rabbits which defendant had introduced on his own land. The court's holding was based on the grounds that defendant had no property right in animals *ferae naturae* and that the plaintiff could have protected himself by killing the rabbits when they came on his land. The reasoning of *Boulston's Case*, however, was seriously weakened in *Farrer v. Nelson*.[12] In granting recovery Judge Pollock stated that an action could be brought by one whose land had been damaged by animals originally introduced upon the land of another. Moreover, although plaintiff in this case had no right to kill the animals, it was stated in dictum that an action would lie even though the animals were *ferae naturae* and might lawfully be killed by the person whose land they had invaded. While expressing no doubt that a landowner could maintain any amount of game that might reasonably be kept in the ordinary use of his land, he felt that this right ceased where the use became extraordinary and unnatural.[13] The right to recovery was said to depend upon the broad maxim *Sic utere tuo ut alienum non laedas, i.e.*, "enjoy your property in such a manner as not to injure that of another person."[14] Though *Boulston's Case* was followed in *Brady v. Warren*[15] and *Stearn v. Prentice*,[16] the latter cases are distinguishable from the *Farrer* case in that the defendant in these cases did not purposely accumulate the animals. Consequently, the rule in *Boulston's Case*, denying recovery because of a lack of property rights in the animals, is probably no longer the law in England.[17]

In other areas of the law of nuisance, recovery is allowed for odors,[18] noise,[19] or smoke[20] which unreasonably interfere with the use and enjoyment of another's land. In determining the reasonableness

12. [1885] 15 Q.B. 258.
13. *Id.* at 260.
14. BROOM, LEGAL MAXIMS 244 (9th ed. 1924). See also Tennessee Coal, Iron & R. Co. v. Hartline, 244 Ala. 116, 11 So. 2d 833 (1943).
15. [1900] 2 Ir. R. 632 (action for depredations of rabbits which had been introduced on the land by defendant's grantor).
16. [1919] 1 K.B. 394 (1918), 18 MICH. L. REV. 70 (1919) (rats attracted by large bone pile on defendant's land). The court distinguished *Farrer v. Nelson* (see text supported by note 12 *supra*) on the ground that plaintiff in that case had been deprived of his right to kill the pheasants, whereas plaintiff in this case could have used this method of self-help. This argument, the validity of which is certainly questionable, see 19 COLUM. L. REV. 251 (1919), would not have been available in the principal case, since migratory birds are given sanctuary under the treaties and laws of the United States which make it unlawful to kill such birds except as permitted by regulation. Migratory Bird Treaty Act, 49 STAT. 1556 (1936), as amended, 16 U.S.C. §§ 703-11 (1952). See 50 C.F.R. § 6.9 (Supp. 1955) (Permits may be obtained to kill migratory birds injurious to agriculture and other interests.).
17. See SALMOND, TORTS 671 (11th ed. Heuston 1953).
18. Salt River Valley Water Users' Ass'n v. Arthur, 51 Ariz. 101, 74 P.2d 582 (1937).
19. Kosich v. Poultrymen's Serv. Corp., 127 N.J. Eq. 434, 13 A.2d 825 (Ch. 1940).
20. Marvel Wells, Inc. v. Seelig, 115 S.W.2d 1011 (Tex. Civ. App. 1938).

of the interference, the courts in such cases look to the maintenance of the condition which is responsible for the agency causing the injury rather than to any property right of the defendant in that agency. Obviously the defendant has no property right in the particles constituting the odor or smoke. Nor do the courts speak of any requirement of a property right in the agency causing injury in those cases where relief is granted against the maintenance of conditions which allow the accumulation of insects or rodents that interfere with the use or enjoyment of the land of another.[21]

It appears that the lower court in the principal case misconceived the basis of an action for nuisance. By emphasizing the lack of any property interest in the geese, it ignored the fact that the essence of the action is an unreasonable invasion of the plaintiff's property interests, and that the court should look to the causation of the interference only to determine the reasonableness of the invasion.[22] It is true the defendant will not be liable in the great majority of cases which might arise involving the invasions of animals *ferae naturae.* Probably simply because the animals *are ferae naturae,* the defendant usually will have done nothing to purposely attract them or to cause their depredations. However, where one has created conditions *for the very purpose* of attracting animals and which cause unreasonable interferences with the use of his neighbor's land, there would seem to be no reason to refuse to impose liability. Thus, in the principal case, by weighing the utility of the use of defendant's land with the gravity of the harm caused to the land of the plaintiffs, the court was merely applying long established principles of the law of nuisance to a novel factual situation.

21. Yaffe v. Fort Smith, 178 Ark. 406, 10 S.W.2d 886 (1928) (mosquitoes); Coole v. Haskins, 57 Cal. App. 2d 737, 135 P.2d 176 (1943) (rats). See also Maynard v. Carey Const. Co., 302 Mass. 530, 19 N.E.2d 304 (1939) (cockroaches).

22. See text supported by notes 6 & 7 *supra.*