A TREND TOWARD COALESCENCE OF TRESPASS AND NUISANCE: REMEDY FOR INVASION OF PARTICULATES

I. HISTORICAL BACKGROUND

The possessor of land has always enjoyed a favored legal position against those whose encroachments threatened his possessory interests.[1] All unprivileged physical intrusions of a direct nature constituted trespass[2] and have been remedied without a showing of actual harm[3]—indeed even though the entry was designed to benefit the possessor.[4] On the other hand, if the entry could be more properly termed "indirect," either an intentional or negligent entry had to be proved along with actual damages.[5] Although force was said to be a necessary ingredient,[6] it was always implied in trespass actions in the absence of actual violence.[7] In those situations in which the entry did not meet the requirements of directness, the appropriate remedy was trespass on the case.[8]

The interest of the possessor in the use and enjoyment of his land has also been protected—though less fully—by an action on the case, this time for nuisance.[9] This latter action bears some resemblance to trespass in that it was available without a showing of negligence or intentional misconduct[10] as that term is usually understood:[11] but it resembles the strict action of trespass on the case since it required a

---

1. 1 Harper & James, Torts § 1.1 (1956) [hereinafter cited as Harper & James].

2. Dougherty v. Stepp, 18 N.C. 370 (1835); 1 Harper & James § 1.5, at 16; Prosser, Torts § 13, at 56 (2d ed. 1955) [hereinafter cited as Prosser].

3. 1 Harper & James § 1.3, at 11; Prosser § 13, at 56.

4. Case of the Tithes, Y.B. 21 Hen.VII 27, pl. 5 (1507); See also 1 Harper & James § 1.5, at 16, § 1.8, at 25.

5. Reynolds v. Clarke, 1 Str. 634, 93 Eng. Rep. 747 (K.B. 1725); Prosser § 13, at 56.

6. 1 Harper & James § 1.3, at 9; Prosser § 7, at 26.

7. 1 Harper & James § 1.3, at 9 & n.13; Prosser § 13, at 56; Shipman, Common-Law Pleading § 35 (3d ed. 1923).

8. Reynolds v. Clarke, 1 Str. 634, 93 Eng. Rep. 747 (K.B. 1725); 1 Harper & James § 1.3, at 9.

9. This statement is based primarily on the analysis given in 1 Street, Foundations of Legal Liability ch. 15 (1906). See also 1 Harper & James § 1.1, § 1.24, at 67; 2 Harper & James § 12.3, at 749; Prosser § 70, at 390.

10. 1 Harper & James § 1.24, at 68-69; Prosser § 70, at 392.

11. Prosser § 8, at 29; Restatement, Torts § 13, Comment e (1934). See Miller, A Primer of Absolute Liability, 1957 Wash. U.L.Q. 99.

showing of actual damages.[12] In their developmental stages, the actions designed to protect the physical integrity of the land—trespass and trespass on the case—on the one hand, and the action designed to protect the possessor's interest in the use and enjoyment of the land on the other, were theoretically mutually exclusive.[13]

More recent authorities suggest that substantial changes have taken place in these actions,[14] particularly in the recognition that there can be no liability in any of them unless the defendant's conduct was either intentional, negligent, or ultrahazardous.[15] Early cases and authorities indicate that nuisance constituted a basis for liability in tort independent of intentionality, negligence or ultrahazardousness;[16] but modern authorities disclose the fallacy in this assertion—nuisance is *not* a type of conduct, but only an effect, an unreasonable interference with the use and enjoyment of land.[17]

Recognizing that considerable disagreement remains concerning the precise scope of trespass and nuisance,[18] the *Restatement of Torts'* definitions are presented to facilitate analysis and comparison.

---

12. Thompson v. Crocker, 26 Mass. (9 Pick.) 59 (1829); 1 Harper & James § 1.23, at 67.

13. In general, it is said that trespass on the one hand, and the case actions on the other, were in origin theoretically mutually exclusive. See Keigwin, Cases in Common Law Actions § 62, at 163 (2d ed. 1938). See also Prosser § 13, at 56, § 72, at 409. The extension stated in the text necessarily follows from Street's further division of case actions into those which were closely allied to trespass on the one hand and the less clearly related case for nuisance on the other. See note 9 supra.

14. McFarlane v. City of Niagara Falls, 247 N.Y. 340, 160 N.E. 391 (1928). Judge Cardozo, speaking for the court, said:

> There has been forgetfulness at times that the forms of action have been abolished, and that liability is dependent upon the facts and not upon the name. . . . [W]e hold that whenever a nuisance has its origin in negligence, one may not avert the consequences of his own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance. Very often the sufferer is at liberty to give to his complaint either one label or the other. It would be intolerable if the choice of a name were to condition liability.

Id. at 344, 160 N.E. at 392. See generally Prosser § 56; Ames, Law and Morals, 22 Harv. L. Rev. 97 (1908); Smith, Tort and Absolute Liability—Suggested Changes in Classification, 30 Harv. L. Rev. 241 (1917).

15. Restatement, Torts §§ 158, 165 (1934); Restatement, Torts § 822 (1939).

16. Sutton v. Clarke, 6 Taun. 29, 128 Eng. Rep. 943 (C.P. 1815); Prosser § 70, at 392; Note, 5 Detroit L. Rev. 84 (1935); Comment, 33 Marq. L. Rev. 240 (1950).

17. Cumberland Pipe Line Co. v. Commonwealth, 214 Ky. 698, 283 S.W. 1039 (1926); Schindler v. Standard Oil Co., 207 Mo. App. 190, 232 S.W. 735 (1921); Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E.2d 724 (1944); Prosser § 70, at 391.

18. 1 Harper & James § 1.23; Prosser § 72, at 409.

Under the *Restatement*, one intentionally entering land in another's possession or causing some person or thing to enter thereon, is liable as a trespasser even in the absence of harm,[19] while one entering recklessly, negligently or as a result of ultrahazardous activity is liable only if harm results.[20] Nuisance liability obtains if there is a substantial and unreasonable invasion which is intentional, negligent, reckless, or ultrahazardous.[21]

Several basic distinctions immediately become apparent in the case of intentional invasions. For trespass there need be only an unprivileged trespassory entry whereas an actionable nuisance requires a substantial and unreasonable interference of a *non*-trespassory nature. For this reason the phrase *de minimis non curat lex* is often applied to nuisance,[22] and various policy considerations are invoked to avoid liability where the utility of defendant's conduct outweighs plaintiff's interest in use and enjoyment.[23] "[T]he injurious activity must advance the social interests of the community more than such interests

---

19. Restatement, Torts § 158 (1934):

> One who intentionally and without a consensual or other privilege
> (a) enters land in possession of another or any part thereof or causes a thing or third person so to do, or
> (b) remains thereon, or
> (c) permits to remain thereon a thing which the actor or his precedessor in legal interest brought thereon . . .
> is liable as a trespasser to the other irrespective of whether harm is thereby caused to any of his legally protected interests.

20. Id. at § 165:

> One who recklessly or negligently, or as a result of an extra hazardous activity, enters land in the possession of another or causes a thing or third person so to enter is subject to liability to the possessor if, but only if, his presence or the presence of the thing or the third person upon the land causes harm to the land, to the possessor thereof or to a thing or a third person in whose security the possessor has a legally protected interest.

21. Restatement, Torts § 822 (1939):

> 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.

22. Prosser § 70, at 395.

23. Dixon v. New York Trap Rock Corp., 293 N.Y. 509, 50 N.E.2d 517 (1944); Booth v. Rome, W. & O.T. Ry., 140 N.Y. 267, 35 N.E. 592 (1893); Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Restatement, Torts § 826 (1939).

are impaired by its interference with the property rights of the plaintiff,"[24] and the actor must have made a reasonable effort to mitigate the injurious effects of the activity.[25] This "weighing" process is, however, foreign to the law of trespass.[26] Thus it may be seen that the remedy for intentional interferences with possessory rights is more comprehensive than that for intentional interferences with use and enjoyment since, once the trepassory entry has been established, there is no inquiry into the reasonableness of defendant's conduct and there need be no showing of damages.

II. Entry Capabilities of Tangible as Opposed to Intangible Objects

A trespass is occasioned only through the entry of some person or thing.[27] It is generally assumed that entry must be accomplished by a tangible object capable of occupying space, thereby depriving the possessor of his right to exclusive possession.[28] Entries accomplished by fumes,[29] soot,[30] dust,[31] light rays,[32] ashes and sawdust,[33] or gases,[34] have been held by the great majority of courts[35] to be nuisances—

24. 6A American Law of Property § 28.26 (Casner ed. 1954).

25. DeBlois v. Bowers, 44 F.2d 621 (D. Mass. 1930).

26. Prosser § 13, at 62-63.

27. Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948); Prosser § 72, at 409.

28. Ryan v. City of Emmetsburg, 232 Iowa 600, 4 N.W.2d 435 (1942); Amphitheaters, Inc. v. Portland Meadows, supra note 27; Norwood v. Eastern Ore. Land Co., 130 Ore. 25, 5 P.2d 1057 (1931). See Prosser, § 72; Keeton, Trespass, Nuisance, and Strict Liability, 59 Colum. L. Rev. 457 (1959).

29. E.g., Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954); Ryan v. City of Emmetsburg, supra note 28; Morgan v. High Penn Oil Co., 238 N.C. 185, 77 S.E.2d 682 (1953); Waschak v. Moffat, 379 Pa. 441, 109 A.2d 310 (1954); Madison v. Ducktown Sulphur, Copper & Iron Co., 113 Tenn. 331, 83 S.W. 658 (1904); Stanolind Oil & Gas Co. v. Smith, 290 S.W.2d 696 (Tex. Civ. App. 1956); Gulf Oil Corp. v. Vestal, 231 S.W.2d 523 (Tex. Civ. App. 1950); cases collected at 54 A.L.R.2d 764 (1957).

30. E.g., King v. Columbian Carbon Co., 152 F.2d 636 (5th Cir. 1945); McGee v. Yazoo & M.V.R.R., 206 La. 121, 19 So. 2d 21 (1944); Burford Oil Co. v. Wadley, 41 S.W.2d 689 (Tex. Civ. App. 1931).

31. Marvel Wells, Inc. v. Seelig, 115 S.W.2d 1011 (Tex. Civ. App. 1938); Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924); Annot., 3 A.L.R. 312 (1919).

32. Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948).

33. E.g., York v. Stallings, 217 Ore. 13, 341 P.2d 529 (1959); Bourne v. Wilson-Case Lumber Co., 58 Ore. 48, 113 Pac. 52 (1911).

34. E.g., United Verde Extension Mining Co. v. Ralston, 37 Ariz. 554, 296 Pac. 262 (1931); Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 Pac. 450 (1916); Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922).

35. See notes 27-33 supra.

normally without consideration of the trespass possibility. Owners who have been injured by such particulates must seek their remedy in nuisance. Still other courts have avoided passing on the entry capabilities of particulates by holding that the entry was indirect or consequential,[36] since intervening forces such as wind or gravity are usually necessary to carry particulates onto plaintiff's land.

One of the first wedges to be driven into the direct-indirect dichotomy was in the field of vibrations caused by blasting.[37] It is not always clear, however, whether recovery was permitted because vibrations constituted a trespass, or because ultrahazardousness was thought an appropriate basis for liability in nuisance.[38] These decisions are based on a common-sense recognition that there is no great logic in permitting recovery without proof of negligence where defendant's blasting operations have thrown rock onto plaintiff's house, and denying recovery without proof of negligence where concussion has succeeded in wreaking an equal amount of havoc. However, a few courts still regard concussion as indirect or consequential and require proof of negligence.[39] The tenacious clinging of those courts to basic conceptual distinctions between trespass and nuisance has been explained as a "marriage of procedural technicality with scientific ignorance."[40]

---

36. Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954); O'Neill v. San Pedro, L.A. & S.L.R.R., 38 Utah 475, 114 Pac. 127 (1911); Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S.E. 451 (1922).

37. Exner v. Sherman Power Const. Co., 54 F.2d 510 (2d Cir. 1931); Britton v. Harrison Const. Co., 87 F. Supp. 405 (S.D. W. Va. 1948); Central Iron & Coal Co. v. Vanderheuk, 147 Ala. 546, 41 So. 145 (1906); McKenna v. Pacific E. Ry., 104 Cal. App. 538, 286 Pac. 445 (1930); Watson v. Mississippi River Power Co., 174 Iowa 23, 156 N.W. 188 (1916); Adams & Sullivan v. Sengel, 177 Ky. 535, 197 S.W. 974 (1917); Louden v. City of Cincinnati, 90 Ohio St. 144, 106 N.E. 970 (1914); Smith, Liability for Substantial Physical Damage to Land by Blasting—The Rule of the Future, I & II, 33 Harv. L. Rev. 542, 667 (1920).

38. Compare Britton v. Harrison Const. Co., supra note 37; Central Iron & Coal Co. v. Vanderheuk, supra note 37, with Watson v. Mississippi River Power Co., supra note 37.

39. Bessemer Coal, Iron & Land Co. v. Doak, 152 Ala. 166, 44 So. 627 (1907); Whitla v. Ippolito, 102 N.J.L. 354, 131 Atl. 873 (Ct. Err. & App. 1926); Coley v. Cohen, 289 N.Y. 365, 45 N.E.2d 913 (1942); Holland House Co. v. Baird, 169 N.Y. 136, 62 N.E. 149 (1901); Booth v. Rome, W. & O. Ry., 140 N.Y. 267, 35 N.E. 592 (1893); Benner v. Atlantic Dredging Co., 134 N.Y. 156, 31 N.E. 328 (1892); Indian Territory Illuminating Oil Co. v. Rainwater, 140 S.W.2d 491 (Tex. Civ. App. 1940). See Campbell v. Adams, 228 Ky. 156, 14 S.W.2d 418 (1929); Hickey v. McCabe, 30 R.I. 346, 75 Atl. 404 (1910); Prosser § 13, at 56.

40. Prosser § 59, at 336.

Early Exceptions to the Physical Entry Rule in Trespass

Courts have experienced little difficulty in finding a trespass where a tangible object entered the land, and recovery in trespass has even been allowed in cases involving objects quite small but *not* clearly of a type requiring categorization as a nuisance. Thus, recovery was allowed in trespass when pellets from defendant's shotgun landed on plaintiff's property,[41] and when spray from a cooling tower on the roof of defendant's theatre fell on the patio of plaintiff's luncheonette, precluding use of the area as a summer garden.[42] Indeed, an early New York case[43] permitted recovery in trespass when gas from defendant's underground main seeped into plaintiff's property and killed his shade trees.

Thus, with the above exceptions, under the present majority view, if a plaintiff's interest in use and enjoyment of his land is invaded by the emission of obnoxious fumes from a neighboring factory, whose owner realizes that the invasion will necessarily occur, plaintiff can only recover if the court is convinced that the utility of the defendant's conduct is outweighed by the plaintiff's interest in use and enjoyment. On the other hand, if a defendant were to dismantle a factory in a remote area and intentionally cause some of the bricks to fall upon unoccupied neighboring land, defendant would be strictly liable for the invasion even in the absence of actual damage. However, it cannot be said that defendant was any more at "fault" in the latter situation than in the former.[44]

III. A Possible Solution—The Reynolds Metals Cases

Two recent decisions have pioneered condemnation of artificial distinctions based on the entry capabilities of various injurious substances and have indicated that the controlling criterion should *not* be the size or mass of the object but rather the force or energy of its entry.

The first of these cases, *Fairview Farms Inc. v. Reynolds Metals*

---

41. Whittaker v. Stangvick, 100 Minn. 386, 111 N.W. 295 (1907).

42. B & R Luncheonette, Inc. v. Fairmont Theatre Corp., 278 App. Div. 133, 103 N.Y.S.2d 747 (1951), appeal denied, 100 N.E.2d 194 (1951). Accord, Shellabarger v. Morris, 115 Mo. App. 566, 91 S.W. 1005 (1905) (banging on tin pans held trespass); Ingmundson v. Midland Continental R.R., 42 N.D. 455, 173 N.W. 752 (1919) (emission of smoke and cinders from railroad train held trespass).

43. Donohue v. Keystone Gas Co., 181 N.Y. 313, 73 N.E. 1108 (1905). It should be noted that in this case the *underground* entry of gas into plaintiff's property does not conform to the traditional juridical expectation that gas will cause an invasion of use and enjoyment as an airborne agent. Moreover, in at least three of the cases cited in notes 40-42 supra, the invading agent was dangerous in itself, although, admittedly, the courts attached no independent significance to this.

44. Miller, supra note 11.

Co.,[45] arose in a federal district court in Oregon. It involved the emission from defendant's aluminum reduction plant of invisible fluoride particles which fell on plaintiff's dairy farm, causing eventual deterioration of his grazing lands. Plaintiff was eager to persuade the court that his cause of action lay in trespass, since two-thirds of the damages[46] depended upon application of Oregon's six year statute of limitation on trespass[47] as opposed to the two year nuisance statute.[48] The deposit of the particles on plaintiff's land was held to be a trespass. Recognizing the historical distinction between trespass and nuisance,[49] the court indicated that traditionally a direct invasion "could only be sustained on a trespass theory if the Court could see some physical intrusion by tangible matter."[50] The court, however, concluded that three Oregon cases[51] allowing recovery in nuisance where particulates entered the land were not authority for the proposition that injurious particulates can *never* constitute a trespass, since in each case "the moving party relied solely on the theory of nuisance . . . [and] a finding of nuisance does not preclude the existence of a trespass."[52] The court also distinguished decisions[53] in other states which held that invading particulates constitute a nuisance:

> Many of these cases are distinguishable on the basis that plaintiff failed to prove that any solid matter was deposited on his land, while in others there is no indication that the theory of trespass was presented to the court. A few cases hold directly

45. 176 F. Supp. 178 (D. Ore. 1959).

46. The particulates in this case had been deposited on plaintiff's land over a period of approximately eight years. Thus, under the statute of limitations for trespass plaintiff could have recovered damages for the six year period immediately preceeding the bringing of this action, whereas he would have been limited to two years under the statute for nuisance.

47. Ore. Rev. Stat. § 12.080 (1959).

48. Ore. Rev. Stat. § 12.110 (1959).

49. 176 F. Supp. at 185, quoting from Restatement, Torts, Introductory Note ch. 40, pp. 218-19 (1939).

> The action for private nuisance originated in the assize of nuisance which dates back to as early as the Twelfth Century. This action was complementary to the assize of novel disseisin. While the assize of novel disseisin was an action for redressing interference with the seisin of land, the assize of nuisance provided redress where the injury was not a disseisin, as where there was no entry on the plaintiff's land but was an indirect damage to the land or an interference with its use and enjoyment. The assize of novel disseisin was directed to secure an undisturbed possession; the assize of nuisance to secure its free enjoyment.

50. 176 F. Supp. at 185.

51. Amphitheaters, Inc. v. Portland Meadows, 184 Ore. 336, 198 P.2d 847 (1948); Lindley v. Hyland, 173 Ore. 93, 144 P.2d 295 (1943); Bourne v. Wilson-Case Lumber Co., 58 Ore. 48, 113 Pac. 52 (1911).

52. 176 F. Supp. at 185.

53. See cases collected 54 A.L.R.2d 764 (1957).

> contra to the holding of this Court, but a reading of those cases leaves this Court with the impression that the foreign jurisdiction was looking past the initial question of whether there was in fact a trespass and was concerned with balancing the equities to determine the existence or nonexistence of a trespass.[54]

After pointing out that modern science could accurately determine the fact of the entry of "tangible" *or* "intangible" matter, the court concluded that "air-borne liquids and solids deposited upon [plaintiff's] lands constituted a trespass."[55]

The second case, *Martin v. Reynolds Metals Co.*,[56] involved the same defendant and interference, and was decided contemporaneously with the *Fairview* case. Here plaintiff alleged that deposits of flouride compounds on his land rendered it unfit for raising livestock. The Oregon Supreme Court alluding to modern theories of the identity of mass and energy, approached the subject more directly, and concluded that any measurable force, even light, *could* constitute a trespass. In that case the recovery would be determined by weighing the reasonableness and amount of interference against plaintiff's interest in exclusive possession.

Initially, like the federal court, the Oregon Supreme Court reasoned (1) that trespass and nuisance were not mutually exclusive, and that the same conduct could result in an actionable invasion of both interests, and (2) if the nuisance theory is relied on, a court is not required to discuss the applicability of the law of trespass to the same facts. The court refused to follow the traditional visible object requirement, and indicated that such a distinction may have been justified in the days when men did not understand the forces surrounding them, but that "in this atomic age, even the uneducated know the great and awful force contained in the atom and what it can do to a man's property if it is released."[57] The court, preferring to emphasize the object's energy or force rather than its size, ultimately proposed a redefinition of trespass as: "any intrusion which invades the possessor's protected interest in exclusive possesion, whether that intrusion is by visible or invisible pieces of matter or by energy which can be measured only by the mathematical language of the physicist."[58]

Recognizing that such a departure from the traditional definition without more, would impose an almost intolerable burden upon indus-

---

54. 176 F. Supp. at 186.

55. Ibid.

56. 342 P.2d 790 (Ore. 1959), cert. denied, 362 U.S. 918 (1960).

57. 342 P.2d at 793.

58. Id. at 794.

try, the court imported into the law of trespass both the *de minimis* principle[59] and the weighing process so familiar in the law of nuisance.[60]

IV. Effect of the Modification of Trespass

Importation of Weighing Process and De Minimis Concept into Trespass

The application of the *de minimis* concept to trespass would, in effect, require a showing of substantial damage before it could be said that any protectible interest of the plaintiff had been violated. The Oregon court felt that this would be a desirable innovation since, "Once recognizing that actual damage need not be shown in making out an actionable invasion, the plaintiff's right to insist upon freedom from interference with his possession seems almost limitless."[61] The court buttressed its position by pointing out that the absolute remedy available in trespass came about because of its original criminal nature and that when the criminal and civil aspects of the action were separated, the civil action retained the absoluteness of relief found in the criminal action, and not without good cause, since it was still a valuable means of preventing breaches of the peace, as trespass was likely to do in early England.[62] Today, however, the rule permitting recovery without a showing of actual damages persists largely to protect the possessor's proprietary or dignitary interest in the land.[63]

If, as the *Martin* case suggests, the test of liability for the invasion of particles is whether the defendant has invaded any protectible interest of the plaintiff and this determination is in turn dependent upon whether the plaintiff has suffered any damage, then how is the

59. Ibid.

> In every case in which trespass is alleged the court is presented with a problem of deciding whether the defendant's intrusion has violated a legally protected interest of the plaintiff. In most cases the defendant's conduct so clearly invades the well established possessory interest of the plaintiff that no discussion of the point is called for. But where neither the defendant's conduct nor the plaintiff's use fall within the familiar trespass pattern of the past the courts are faced with a preliminary inquiry as to whether the plaintiff has a protectible interest under the law of trespass. This in turn calls for the inquiry as to whether the defendant's conduct was such as to constitute an invasion of that interest.

60. 342 P.2d at 795. "[T]he tort of trespass involves a weighing process, similar to that involved in the law of nuisance, although to a more limited extent than in nuisance and for a different purpose, i.e., in the one case to define the possessor's interest in exclusive possession, and in the other to define the possessor's interest in use and enjoyment."

61. Id. at 796.

62. Ibid.

63. 342 P.2d at 797.

possessor of land to protect himself against the ripening of prescriptive rights or settle boundary disputes? The answer would seem to be that where the defendant's conduct, if uninterrupted, would lead to the ripening of such rights, it is itself sufficiently damaging to maintain the action so as to stop the running of the statute of limitations.

Further, where any measurable particle or force would satisfy the trespassory entry requirement, the weighing process serves as a useful limitation upon the unwarranted extension of tort liability. This is illustrated by the *Martin* decision's handling of *Amphitheaters, Inc. v. Portland Meadows.*[64] The owner of a drive-in movie theatre contended that he had suffered damage in the form of a less efficient movie screen due to the intrusion of light rays from the defendant's neighboring race track. The court, in holding that trespass would not lie for such an invasion stated that "The mere suggestion that the casting of light upon the premises of a plaintiff would render a defendant liable without proof of any actual damage, carries its own refutation."[65] The court in *Martin* chose to distinguish the *Amphitheaters* case by ignoring its express holding and interpreting it to mean that the defendant simply had not violated a legally protected interest of the plaintiff, *not* that the invasion of light or other intangible forces can *never* constitute a trespass.[66] Thus the case was limited to its own facts. The *Martin* case indicates that since the *de minimis* principle is applicable, there would be no recovery where the defendant cast the light from a candle beam upon the screen of the theatre since "the defendant's conduct is not substantial enough to be regarded as a trespassory intrusion"[67] or alternatively, that the plaintiff has no legally protectible interest, that is, one has no absolute right to be free from such minimal annoyances. However, had the intrusion been the intense glare of floodlights, then the court would have invoked the balancing process so familiar to the law of nuisance since the entry is no longer *de minimis.* Although plaintiff would have a legally protectible interest, the "invasion" might not constitute an *actionable* trespass if, upon the balancing of the equities, the court found that the use of the lights had a degree of social utility which outweighed the plaintiff's interest. Thus, not every technically sufficient entry would be actionable. The determination would be made "in view of the nature of plaintiff's use and the manner in which the defendant interferred with it."[68]

64. 184 Ore. 336, 198 P.2d 847 (1948).

65. Id. at 343, 198 P.2d at 850.

66. 342 P.2d at 794. "In denying recovery the court [Amphitheaters] found that there was no damage, apparently because whatever harm the plaintiff suffered was damnum absque injuria."

67. Ibid.

68. Ibid.

The view of the *Martin* case is less a wholesale departure from the traditional application of trespass law than might on first view appear, since even the absolute trespass has, on occasion, involved a certain amount of weighing by the courts. With the advent of air travel, the courts were anxious to relieve aviators from the strict liability which would result from a mere flight over another's land, since the traditional view employed the Roman law maxim, *cujus est solum ejus esque ad coelum,* which gave the surface occupant a right to exclusive possession upward *ad infinitum.*[69] Thus the courts adjusted trespass theory to meet the needs of a changing society by narrowing the area in which a trespass could be committed. Today, one in possession of land is protected only from such invasions as impair his present use of the property.[70] Harm is made the test of the surface occupant's rights. The *Restatement of Torts,* on the other hand, retained the *ad coelum* doctrine, maintaining, however, that although flight over another's land is a technical trespass, it is privileged by law.[71]

Such conceptual manipulation would not have been necessary had a doctrine similar to the *Martin* decision been followed: The court there would say that although an airplane flying at a substantial height satisfies the "force and energy" requirement for a trespassory entry, the possesor's interest in exclusive possession, upon a weighing of the equities, would be found wanting.[72] On the other hand, the possessor *would* have a protectible interest in not being "buzzed" by inconsiderate pilots since such an interference would not be *de minimis.*[73]

Statutes of Limitation

A significant problem would arise under the redefinition of trespass with reference to statutes of limitation.[74] It is generally held that a cause of action in trespass becomes complete when the land is

69. For an enlightening discussion of this problem, see Sweeney, Adjusting the Conflicting Interests of Landowner and Aviator in Anglo-American Law, 3 J. Air L. 329 (1932); Note, 31 Ill. L. Rev. 499 (1937).

70. Rochester Gas & Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y. Supp. 469 (Sup. Ct. 1933). See Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 817 (1934).

71. Restatement, Torts § 194 (1939). The Restatement position is defended in Thurston, Trespass to Air Space, Harvard Legal Essays 501 (1934).

72. See note 59 supra.

73. See note 60 supra.

74. A secondary problem in this area concerns the intention to be imputed to the legislature in establishing longer periods of limitation for trespassory invasions than for non-trespassory invasions. If it is intended that trespass and nuisance be defined in terms of the definitions in use in the courts at the time the applicable statute became effective, then the common law has become immutable. However, it would seem to be more reasonable to interpret this as an indication by the legislature that they are intended the statutes to apply to trespass or to nuisance, as the actions are or may become defined by the courts.

entered,[75] whereas the statute does not begin to run on nuisance until the interference causes substantial harm,[76] regardless of the time when the cause of the injury came into existence. Thus, if entry of particulates may constitute a trespass, and if the conventional rule as to the accrual of the cause of action in trespass is followed, it would be impossible in many situations to determine just when the land was first entered, and therefore, when the statute should begin to run. But if, as under the *Martin* case, the trespass is not actionable until the right to exclusive possession has been invaded, and the invasion, by logic of the *de minimis* rule, is in turn dependent upon a showing of damage, then the statute should run from the time when it is possible to show that the invasion of the particulates had, in some way, damaged the plaintiff. This is, in effect, an adoption of the nuisance rule as to the time when a cause of action shall accrue.

V. Conclusion

Although a redefinition of trespass as proposed by the court in the *Martin* decision would do violence to long established principles of the law of trespass, it is clear that the extent of liability attendant upon the operation of industrial activities would not be significantly increased, since the use of the balancing process and the *de minimis* concept would effectively prevent unjustified actions. Thus, giving an injured landowner a right of action in trespass for the entry of invisible particles would result in no net gain for him, since a weighing of the interests would not permit recovery in trespass any more readily than the same interference would have been remediable in a nuisance action.

The net effect of any such redefinition would be a clarification of the entry requirement in trespass: if there has been an invasion by a measurable force, the entry requirement for trespass is satisfied. Thus the artificial and arbitrary "visible object" rule would be repudiated.

The major substantive change would be the abolition of the absolute rights afforded to possessors of land to be free from *any* invasion of their possessory interests. Their right to recover nominal damages for a purely technical trespass would be at an end. However, with the exception of disputes over boundaries and prescriptive rights, suits for purely technical trespass are quite rare anyway due to court costs and attorneys' fees. Further, there seems to be little justification for the continuation of such absolute rights for landowners in the Twentieth Century, where persons live in such close proximity to each other and inoffensive entries onto another's property have become accepted and commonplace.

75. Kansas Pac. Ry. v. Mihlman, 17 Kan. 224 (1876); National Copper Co. v. Minnesota Mining Co., 57 Mich. 83, 23 N.W. 781 (1885).

76. Heckaman v. Northern Pac. Ry., 93 Mont. 363, 20 P.2d 258 (1933).