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The Availability and Limitations of the Private Nuisance Doctrine in Wyoming

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THE AVAILABILITY AND LIMITATIONS OF THE PRIVATE NUISANCE DOCTRINE IN WYOMING*

INTRODUCTION

There is currently sufficient statutory authority to enable the Wyoming Public Health Department to maintain the quality of Wyoming waters in their present high state. There is proposed a legislative scheme that would insure it.[1] But this proposed legislation and that already on the books is directed toward administrative regulation of pollution, and neither creates express remedies for an *individual* suffering the effects of water pollution. To the extent that individual relief is available in Wyoming, it arises out of the common law. In the western states, the remedies arising at common law are largely derivative of prior appropriation water law and the common law doctrine of nuisance. Regarding Wyoming water law, the appropriation doctrine provides significant protection based on the existence of a water right; it is of no use absent a water right. The primary protection afforded the holder of a senior right is from pollution by a junior that interferes with the legitimate exercise of the senior water right.[2] Some measure of protection is afforded a junior to the extent that generally a change in use by an upstream senior (and of course junior) cannot be made to the detriment of other existing rights.[3] This would prevent a senior from changing his use to one which would increase pollution sufficiently to interfere with use of the water by the downstream junior. And as between one without a water right and one with such a right, the holder of the right is protected from pollution that interferes with that right.[4]

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1. For current laws see WYO. STAT. §§ 35-184 to -200. A proposed water quality acts was introduced and defeated in the 1971 session of the Wyoming legislature, but it or a revised version thereof will undoubtedly be introduced in 1973.
2. CLARK, WATERS & WATER RIGHTS § 212.2 (1967).
3. Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954).
4. CLARK, *supra* note 2.

There are, however, many private uses of water (recreational, aesthetic, and commercial)[5] which are not dependent upon a water right and yet deserve protection from the effects of water pollution.[6] Such uses may suffer direct monetary effects from pollution, as in the case of livestock poisoning, or indirect, as in the destruction of the aesthetic value of property fronting on a stream. In either case, the loss is real and the values destroyed are deserving of protection. That protection may be available in the common law doctrine of nuisance—a remedy as yet untested in Wyoming in the water pollution context. It is this remedy that will be examined herein to determine its utility in protecting water use not dependent upon a water right.[7]

PRIVATE NUISANCE

As is customary when discussing nuisance, it should first be noted that the term and doctrine have historically been loosely applied and have generated much judicial imprecision. The conceptual distinctions between negligence, trespass and nuisance have not been maintained nor has the distinction between public and private nuisance. This latter distinction, critical to an intelligent discussion of nuisance has reference to the right invaded. The obvious distinction is that public nuisance is related to the invasion of a public right, whereas private nuisance arises upon the invasion of an individual's right.[8] It is the latter, private nuisance, that would normally provide a remedy for an individual and so will be first examined in the Wyoming context. Public nuisance will be later treated to the extent that it is available for a personal remedy and to the extent that it poses a defense in a private nuisance action.

5. Though recreational and aesthetic uses not dependent on water right are obvious, commercial uses may not be. Examples are non-diversionary natural irrigation, small scale stock watering, and recreational business such as leasing of fishing rights.

6. For a fundamental technical discussion and definition of water pollution see Matthew, *Practical Comment: A Lawyer's Pollution Primer*, 16 S.D. L. REV. 309 (1971).

7. It should be noted that the existence of a water right in a plaintiff does not preclude a private nuisance action, given the appropriate elements of nuisance.

8. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966).

Wyoming, like other jurisdictions, has not avoided the conceptual difficulties characteristic of nuisance as evidenced by *Lore v. Town of Douglas.*[9] In that case private nuisance, apparently raised as an afterthought in oral argument, was defined as "a class of wrongs which arises from an unreasonable, unwarranted or unlawful use by a person of his own property, working an obstruction or injury to the right of another."[10] Though it is unclear from the opinion, apparently the court did not rely on the belated nuisance argument but rather on a negligence theory. This is to the credit of the court; the plaintiff suffered damage from a physical invasion of waters backed up into his cellar by a municipal sewage system, rather than from a non-trespassory interference, which is the characteristic element of private nuisance. Fortunately then, this inadequate definition is dicta and need not be relied upon. In *Sussex Land & Live Stock Co. v. Midwest Refining Co.,*[11] a Wyoming case decided in federal court, the plaintiff based his action on a "continuing trespass which amounts to nuisance," apparently unaware of the fact that, definitionally, one precludes the other.[12] The factual situation might account for the plaintiff's eclectic theory; it had apparent aspects of both physical trespass and non-trespassory interference. The court, however, relied solely on the basis of the physical trespass of oil deposited on the plaintiff's pasture.[13] Consequently, the appropriate theory would have been unintentional trespass rather than nuisance. Nevertheless, the court decided the case on the basis of a "continuing trespass amounting to a nuisance," neither clarifying nor commenting on the theory of action.

Two additional Wyoming cases, *Hazard Powder Co. v. Volger,*[14] and *Hillmer v. McConnell Brothers,*[15] granted relief to private parties based expressly on nuisance theories. However, the facts indicate, though the court did not, that each

9. 355 P.2d 367 (Wyo. 1960).
10. *Id.* at 370.
11. Sussex Land & Live Stock Co. v. Midwest Refining Co., 276 F. 932 (D. Wyo. 1922), *aff'd* 294 F. 597 (8th Cir. 1923).
12. If the interference is with the plaintiff's exclusive possession, it is a trespass; if not, i.e., non-trespassory, it is a nuisance. It can't be both.
13. Sussex Land & Live Stock Co. v. Midwest Refining Co., *supra* note 11, at 937.
14. 58 F. 152 (8th Cir. 1893).
15. 414 P.2d 972 (Wyo. 1966).

case was a public nuisance situation in which an individual derived a right of action due to special circumstances. Strangely enough, two spite fence cases[16] are the only Wyoming cases that factually fit the private nuisance category. *Lore* and *Sussex* are factually trespass cases; *Hazard* and *Hillmer* are actually public nuisance; and the balance[17] not discussed here are expressly public nuisance cases. And, though both of the spite fence cases factually fit into the private nuisance category, only one, *Schork v. Epperson,*[18] provides any conceptual assistance. Fortunately, however, it expressly adopts the Restatement criteria[19] for determining what constitutes a private nuisance and thereby provides a solid foundation for subsequent Wyoming private nuisance actions.[20] It is worth noting that, absent *Schork,* a Wyoming plaintiff would be hard pressed to frame a nuisance action based on Wyoming law and would be dependent on either textbook law or precedent from other jurisdictions. Given the adoption of the Restatement concept of nuisance, the plaintiff is provided with a precise conceptual framework into which he can fit his fact situation.

The characteristic element of the Restatement definition[21] of private nuisance is a non-trespassory interference with a person's use and enjoyment of his land.[22] It is this element

16. Schork v. Epperson, 74 Wyo. 286, 287 P.2d 467 (1955); Erickson v. Hudson, 70 Wyo. 317, 249 P.2d 523 (1952).
17. *See* 6 WYOMING DIGEST, *Nuisance.*
18. Schork v. Epperson, 74 Wyo. 286, 287 P.2d 467 (1955).
19. *Id.* at 471.
20. In Schork, the court used the Restatement criteria to determine whether a spite fence was unreasonable and therefore a nuisance and enjoinable.
21. RESTATEMENT OF 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 enjoymen 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.

Tent. Draft No. 17 (1971) RESTATEMENT (SECOND) OF TORTS § 822 is somewhat modified but the changes recommended do not materially affect the discussion herein.

22. See RESTATEMENT OF TORTS § 823 (1939) for what rights in land are necessary to maintain a private nuisance action.

that distinguishes it from other tort concepts: it is first defined by the right invaded rather than the activity causing the invasion. Given that invasion, the activity causing it can be intentional, negligent, or merely inappropriate to its location.[23] But, without an interference with a use or enjoyment of land, it is not a nuisance; nor is there a nuisance if the interference results from a physical invasion constituting a trespass, for the invasion must be non-trespassory. The initial question, then, is whether the interference is with a use or enjoyment of land and whether it is non-trespassory. With this basic element of nuisance established, the next question is to what extent that particular use is protected. As is apparent from the Restatement definition,[24] this turns on the reasonableness[25] of the interference, which is determined by the utility of the conduct causing the interference in relation to the gravity of the harm inflicted.[26] The ultimate question then is, does the gravity of the harm suffered from the interference outweigh the utility of the conduct. Thus, in the abstract, the task of the plaintiff is to show[27] that the defendant is unreasonably polluting water to the extent that it is interfering with the plaintiff's enjoyment of his property.

What constitutes such a showing in a factual setting is an unanswered question in Wyoming. The only Wyoming nuisance case dealing with water pollution, *Sussex,* turned out, in fact, to be a trespass case. There is, however, limited case law from other jurisdictions in which nuisance was successfully employed in a pollution context.[28] The Restatement also

23. RESTATEMENT OF TORTS, *supra* note 21.
24. *Id.*
25. Reasonableness is an element of liability under both sub-paragraphs (d) (i) and (d) (ii) of the Restatement definition because unreasonableness is found in reckless, negligent and ultrahazardous conduct.
26. RESTATEMENT OF TORTS § 826 (1939).
27. For a discussion of burden of proof problems see Krier, *Environmental Litigation and the Burden of Proof,* LAW AND THE ENVIRONMENT, 105 (Baldwin and Page ed. 1970).
28. American Cyanamid Co. v. Sparto, 267 F.2d 425 (5th Cir. 1959); Indianapolis Water Co. v. American Strawboard Co., 53 F. 970 (D. Ind. 1893); Nolan v. New Britain, 69 Conn. 668 38 A. 703 (1897); Hodges v. Pine Product Co., 135 Ga. 134, 68 S.E. 1107 (1910); West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N.E. 879 (1904); Newton v. Grundy Center, 246 Iowa 916, 70 N.W.2d 162 (1955); Livezey v. Bel Air, 174 Md. 568, 199 A. 838 (1938); Weeks-Thorn Paper Co. v. Glenside Woolen Mills, 64 Misc. 205, 118 N.Y.S. 1027 (1909), *aff'd* 204 N.Y. 635, 97 N.W. 1118; Pennsylvania R.R. Co. v. Sagamore Coal Co., 281 Pa. 233, 126 A. 386 (1924); Shoffner v. Sutherland, 111 Va. 298, 68 S.E. 996 (1910).

provides some further assistance in making such a determination because it defines reasonableness in terms of utility of conduct and gravity of harm, followed by an extensive discussion thereof.[29] A point of particular significance in pollution suits which has received attention in Wyoming is that one element of utility of conduct, as defined by section 828 of the Restatement, is its social value. This obviously may present a significant obstacle if the defendant is a municipality or large employer.[30] The issue was raised in *Sussex*[31] but apparently was not determinative of the result and received no direct treatment by the court. It was, however, given implicit recognition in the court's discussion of "comparative injury"[32] and was expressly recognized by the Eight Circuit Court of Appeals.[33] In light of the current awareness of the social costs of pollution, it is conceivable that recognition of the social value of the defendant's conduct would work in favor of the plaintiff. These costs would certainly offset to some degree the social utility of a particular enterprise. This public interest in reducing pollution has been expressly recognized, though not in Wyoming, as relevant in a *private* action seeking abatement of a *private* nuisance.[34]

The topic of comparative injury arose in *Sussex* in the court's discussion of whether an injunction would issue as requested or whether the plaintiff would have to settle for damages. The decree evolving from that discussion is exemplary of the basic rule: an activity may be reasonable when payment is made for the harm it causes but unreasonable absent such compensation.[35] The court decreed that damages be paid for past injury, that annual rental be paid for the continuing future damage and that, in the event of a failure to so pay, an injunction would issue. Though an injunction is

29. RESTATEMENT OF TORTS §§ 826-28 (1939).
30. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 17, 1971) recommends the addition of a fourth consideration to section 828 for determining the utility of conduct: "whether it is impractical to maintain the activity if it is required to bear the cost of compensating for the invasion." If this were adopted the burden on the plaintiff seeking damages would be raised in that situation to the equivalent of that required for damages.
31. Sussex Land & Live Stock Co. v. Midwest Refining Co., *supra* note 11, at 934.
32. *Id.* at 947.
33. 294 F. 597, 603 (8th Cir. 1923).
34. Renken v. Harvey Aluminum, Inc., 226 F. Supp. 169, 172 (D. Ore. 1963).
35. RESTATEMENT OF TORTS, ch. 40, Scope & Introductory Note, at 224 (1939).

probably the preferred remedy in most private nuisance cases, it requires a substantially greater showing of unreasonableness than does an action for damages. Accordingly, a prudent plaintiff should, in most situations where abatement is desired, seek damages in addition or at least as an alternative to injunction. Then, in the event a showing sufficient to justify injunction is not made, he may at least be compensated for the harm suffered as a result of the defendant's pollution. This, of course, requires evidence as to the value of damages, and in the absence thereof, as in *Hillmer,* when all the evidence is directed toward justifying an injunction, damages will not be awarded.

The equitable remedy of injunction has received substantial attention in Wyoming litigation in both nuisance and other types of actions.[36] The Wyoming Supreme Court has expressed the usual prerequisite for the granting of injunction—no adequate remedy at law[37]—and the usual purpose of preventing future wrongful acts.[38] It has also given express recognition, in the nuisance context, to the much maligned doctrine of balancing of the equities.[39] This doctrine is given further support in *Sussex*[40] under the comparative injury label and so is seemingly well entrenched in Wyoming. Some very narrow points on injunction have also received attention in Wyoming litigation, one of which is that abatement of a condition constituting a nuisance extends only to the part thereof that offends the standard of reasonableness. For example, a spite fence need not be entirely removed[41] nor a dam of excessive height completely destroyed.[42] The Tenth Circuit held that in Wyoming an owner in possession is obliged to

36. The Restatement recognizes that the principles governing injunctive relief are constant whether the basis of action is negligence, nuisance, or trespass, so each type of action may be precedent for the other with respect to the principles of injunction. It also points out that a nuisance action for damages may not be precedent for an injunction because of the different showing required. RESTATEMENT OF TORTS ch. 40, Introductory Note, at 228 (1939).

37. Miller v. Hagie, 59 Wyo. 383, 140 P.2d 746 (1943).

38. Brown v. J. C. Penney Co., 54 F. Supp. 488 (D. Wyo. 1943); Olsen v. Leith, 71 Wyo. 316, 257 P.2d 342 (1953).

39. Hillmer v. McConnell Bros., 414 P.2d 972, 973 (Wyo. 1966).

40. Sussex Land & Live Stock Co. v. Midwest Refining Co., *supra* note 11.

41. Schork v. Epperson, *supra* note 16; Erickson v. Hudson, *supra* note 16.

42. State v. Hiber, 48 Wyo. 172, 44 P.2d 1005 (1935).

abate a nuisance even though it was created by his predecessor. It added that notice and request to abate is a prerequisite thereto, unless the owner had prior notice and denied the existence of the nuisance.[43] An interesting point for a defendant ordered to abate was made in *Clarke v. Chicago*.[44] The court there said that if the order was not followed the court could let a contract to have the nuisance abated.

DEFENSES

In spite of the limited use of nuisance doctrine in Wyoming, most of the defenses common thereto have apparently been raised, although to limited advantage. As an extreme example, in *Big Horn Power Co. v. State*,[45] the Wyoming Supreme Court said that even though a structure was constructed with the express approval of a state officer, the state could sue for its abatement as a nuisance. It should be noted that this harsh statement was unnecessary to the result because the state officer did not, in fact, approve the structure as built.[46] A traditional defense not available in Wyoming is that of "coming to the nuisance."[47] It was expressly rejected in *Hazard*[48] and rejected in principle if not by name in *Clarke*.[49] While recognizing the disapproval of this defense, a plaintiff should realize that nuisance is defined in terms of reasonableness and that conduct unreasonably offensive in one setting may not be in another. If he chooses to acquire land for a home in an industrial area, he may not be subject to a defense of "coming to the nuisance," but the same result may obtain because the defendant's conduct may be found to be reasonable in light of its location. Contribution by others to the interference with plaintiff's use of his land is subject to the same analysis. Joint tort-feasors are each individually liable and contribution by another is not a defense.[50]

43. Clarke v. Boysen, 39 F.2d 800 (10th Cir. 1930), *cert. denied* 282 U.S. 869.
44. Clarke v. Chicago B. & Q. R.R. Co., 62 F.2d 440 (10th Cir. 1932), *cert denied*, 290 U.S. 629.
45. 23 Wyo. 271, 148 P 1110, 1115 (1915).
46. *Id.* at 1115.
47. Purchasing land and moving in next to a nuisance after it is already in existence.
48. Hazard Powder Co. v. Volger, 58 F. 152, 156 (8th Cir. 1893).
49. Clarke v. Boysen, *supra* note 43, at 819.
50. Sussex Land & Live Stock Co. v. Midwest Refining Co., *supra* note 11, at 939.

However, due to the number or character of the contributors to the nuisance, the individual or collective conduct may be found to be reasonable and thereby defeat the action on the same grounds under a different label.

The class of defenses based on elapsed time has also received considerable attention in Wyoming litigation. The claim of a prescriptive right to maintain a nuisance was rejected in *Clarke,* though the court expressly precluded this defense only in the case of public nuisance without commenting on its availability in a private nuisance action.[51] A defense not rejected in *Clarke* but found to be factually inappropriate was that of laches.[52] Since the court distinguished it instead of rejecting it, by negative inference laches is probably a viable defense to a nuisance action. This inference, however, would have to be confined to the case of private nuisance because neither the statute of limitations nor laches run against a public nuisance.[53] If raised in a private nuisance action, both laches and the statute of limitations commence running when the defendant's conduct constitutes an unreasonable interference with the plaintiff's use or enjoyment of his land, thereby making it actionable.[54]

When the absence of malicious intent was raised as a defense in *Schork,* the court adopted the Restatement formula[55] holding that malicious intent is determinative for the plaintiff only when it is the sole motivation for the offensive conduct. If it is not, as in *Schork,* then the normal balancing of utility and gravity is employed to make a determination of reasonableness. A most fundamental defense was raised and rejected in *Big Horn Power Co.*[56] The defendant claimed that the decree ordering him to remove the superstructure of a dam which constiuted a nuisance was an unconstitutional tak-

51. Clarke v. Boysen, *supra* note 43, at 818.
52. *Id.*
53. RESTATEMENT (SECOND) OF TORTS, § 821 (c), at 15 (Tent. Draft No. 17, 1971). The obvious implication is that where there is a coincidence of public and private nuisance, an individual can avoid the statute of limitations or laches by bringing the action based on a public nuisance with a particular damage rather than on private nuisance.
54. PROSSER, TORTS § 89, at 595 (4th ed. 1971).
55. Schork v. Epperson, *supra* note 18, at 470.
56. Big Horn Power Co. v. State, 23 Wyo. 271, 148 P. 1110 (1915).

ing without just compensation. The rationale for dismissing this defense is not entirely clear from the court's statement. It held that the taking was not for a public use but rather an exercise of the police power of the state to remove a nuisance.[57] Whatever the rationale, had that defense prevailed, nuisance doctrine in Wyoming would have become in many instances a cause without a remedy.

PUBLIC NUISANCE

Absent the common label, there is little relation between public and private nuisance. While private nuisance is concerned solely with private rights incident to property, public nuisance embraces all those rights held by the public.[58] What constitutes an unreasonable invasion of a public right may be either conclusively established by statute,[59] regulation or ordinance[60] or may in the absence thereof be determined by the same criteria used for private nuisance.[61] The significance of public nuisance for the individual seeking a remedy is twofold. First, it may present an avenue for abating a nuisance or recovering damages. Second, it may be raised as a defense in a private nuisance action. With respect to the first, a public nuisance is actionable by an individual when he has suffered or is suffernig particular harm different in kind from that suffered by other members of the public.[62] This can arise as in *Hazard*[63] where the plaintiff's home was destroyed when a powder magazine exploded which had been maintained in violation of a city ordinance, or as in *Hillmer*[64] where the plaintiff sued to enjoin the operation of a rabbit processing plant operated in violation of statute.

57. *Id.* at 1115.
58. There is currently no treatment of public nuisance in the RESTATEMENT OF TORTS but the RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 17, 1971) has included a new section on public nuisance. This new section incorporates most of what Prosser says in his article, Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997 (1966).
59. Hillmer v. McConnell Bros., *supra* note 39.
60. Town of Green River v. Fuller Brush Co., 65 F.2d 112 (10th Cir. 1933).
61. Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 1004 (1966).
62. *Id.* at 1005; Knight v. City of Riverton, 71 Wyo. 459, 259 P.2d 748 (1953); Anthony Wilkinson Livestock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364 (1905).
63. Hazard Powder Co. v. Volger, *supra* note 48.
64. Hillmer v. McConnell Bros., *supra* note 39.

Hazard is exemplary of the simple particular damage situation; *Hillmer* presents a special situation where public and private nuisance coincide. The rabbit processing plant was a public nuisance by legislative declaration, but it also constituted an interference with the plaintiff's use and enjoyment of his adjacent land. It was, therefore, a private nuisance. The important point is that, although the damage suffered by the individual is the same in kind as that of the public (obnoxious odors), because the right in that individual derives also from his possession of land, it is an interference with his use or enjoyment thereof and gives rise to an actionable private nuisance. This actionable private nuisance constitutes *in itself* "particular damage" from the public nuisance and, therefore, the plaintiff may maintain an action for either private nuisance or public nuisance—even absent injury different in kind due to the coincidence of private nuisance.[65] In *Hillmer,* the court did not specify whether the nuisance upon which it based the injunction was public or private, but it seems clear that it should have been based on a finding of private nuisance, rather than on public nuisance with injury different in kind.

This raises the second reason that public nuisance may be important to the individual. In such a situation, the defendant could have raised the public nuisance doctrine in defense asserting that a public nuisance absent particular damage different in kind is not actionable by an individual. Since the damage suffered was not different in kind, this defense would have defeated the action if the plaintiff was unaware of the coincidence of private nuisance giving him standing, even absent damage different in kind. An example used by Prosser illustrates this concept in the water pollution context: "Thus the pollution of a stream which merely affects a large number of riparian owners is a private nuisance only, but it becomes a public one when it kills the fish."[66] Here, the existence of the public nuisance does not destroy the private nuisance; a

65. Prosser, *supra* note 61, at 1018.

66. *Id.* at 1001.

riparian[67] who suffers an interference with the use or enjoyment of his land still has a viable action. For example, that interference might be with the use of his land for fishing—a private right associated with his ownership of the land as opposed to the public loss of the fish in the stream. The measure of damages would reflect this approach, being the value of the loss of the use of the land for fishing rather than the value of the fish lost.[68] Since the coincidence of public and private nuisance is common to pollution cases, the recognition of a private nuisance in a public nuisance setting may give a landowner a cause of action otherwise overlooked or allow rebuttal of an otherwise determinative defense.

Another area of confusion arising out of the relationship of public and private nuisance is the role played by statutes, regulations, and ordinances.[69] In the first instance, statutes can and do declare that certain conditions constitute a public nuisance.[70] Such declarations are binding on a court in a public nuisance action. Secondly, there are statutes that are identical to the nuisance statutes in that they prescribe a penalty and provide for abatement by a public official, yet they do not use the term nuisance.[71] A third category is that in which these two kinds of enactments additionally create an express private remedy for violation of the standards estab-

67. The term riparian is used in the sense of one owning land adjacent to the stream rather than one whose rights to the use of the stream are defined by riparian water law doctrine.

68. Hodges v. Pine Product Co., 135 Ga. 134, 68 S.E. 1107, 1109 (1910).

69. Statutes, regulations and ordinances will all be treated under the label of statute and will be considered for the sake of simplicity as being of the same effect. The power of the state and of Wyoming cities to declare that particular conditions constitute a nuisance has been expressly recognized in Wyoming. *See* notes 59-60 *supra.* Though regulations have the same force as statutes, they have not always been given as much weight in the nuisance field as have the statutes. RESTATEMENT (SECOND) OF TORTS, § 286, at 26 (1965). Additionally, some jurisdictions differentiate between statutes and ordinances. PROSSER, TORTS § 36, at 201 (4th ed. 1971); *see also* Note, *Water Quality Standards in Private Nuisance Actions*, 79 YALE L.J. 102 (1969).

70. For nuisance statutes related to water pollution see WYO. STAT. § 35-462 (1957) (depositing or placing refuse matter into rivers); WYO. STAT. § 35-464 (1957) (throwing sawdust into streams); WYO. STAT. § 35-479 (1957) (pollution of waters). Wyoming water quality standards have been enacted under the authority of WYO. STAT. §§ 35-184, 185 (1957).

71. For nuisance type statutes related to water pollution see WYO. STAT. § 35-196 (1957) (contamination of streams); WYO. STAT. § 35-189 (1957) (pollution by industrial plants); WYO. STAT. § 35-188 (1957) (sewage to be purified); WYO. STAT. § 30-96.6 (Supp. 1971) (open cut reclamation, impoundment of effluent).

lished by the statute.[72] These three situations are relatively straightforward in application. The difficulty is in a fourth category. Here there is a coincidence of private nuisance with a statutory public nuisance. The difficulty arises out of the application of the statutory declaration to the determination of the reasonableness of the interference with the use of an individual's land. There are three alternatives: violation of the statutory standard is conclusive of an unreasonable interference, is merely evidence thereof, or is of no relevance whatsoever. Wyoming has not addressed this question in the nuisance context.[73] However, it has arisen several times in the automobile accident negligence area. The Tenth Circuit concluded as to the state of Wyoming law on this point as follows:

> It would seem that while the Wyoming [Supreme] Court has not drawn a clear distinction between the terms negligence per se and evidence of negligence, it is nonetheless committed to the doctrine that a violation of a traffic law or regulation will impose liability only when it is the proximate cause of the resulting injuries.[74]

The main thrust of the rule is probably of little help in the nuisance category since proximate cause would rarely be an issue. It does, however, apparently stand for the proposition that violation of a statute is at least relevant in establishing the requisite standard of care in a negligence action. This logically should apply as well in delineating the standards in

72. Search of the Wyoming Statutes disclosed no statute related to water pollution that creates an express private remedy.

73. The Wyoming Supreme Court did specifically say in *Hillmer v. McConnell Brothers* that the pertinent statute was binding on the court in determining whether maintenance of a processing plant was a nuisance. However, the court did not specify that it was referring to a private nuisance, and the next sentence had reference to the police power of the state, the prior statement was probably in reference to a public nuisance. Had the court specified the basis of the action, i.e., public or private nuisance, the significance of the above statement would be clear, but in the absence thereof, it would be risky to rely upon *Hillmer* for the proposition that violation of a statute is conclusive of an unreasonable interference.

74. Grayson v. Williams, 256 F.2d 61, 64 (10th Cir. 1958). This conclusion was cited with approval in Zanetti Bus Lines, Inc., v. Hurd, 320 F.2d 123, 128 (10th Cir. 1963) and Checker Yellow Cab Co., Inc., v. Shiflett, 351 P.2d 660 (Wyo. 1960).

a nuisance action. Assuming but not concluding[75] that such is the case, a Wyoming court can treat a violation of a nuisance or nuisance type statute as either conclusive of or evidence of an unreasonable interference with the use of land. Casting the proposition in the reciprocal—of what effect is compliance with a statute—points up an apparent logical constriction in that choice. If violation constitutes nuisance per se, then compliance should be determinative that the interference is not unreasonable. This constraint, however, is apparent rather than real.[76] Compliance may be but a minimum general standard and not preclude a conclusion that under the circumstances the objectionable conduct is unreasonable even though in compliance with the applicable statute. This recognizes that public and private rights, even of the same nature, are not necessarily coextensive. The problem can, of course, be avoided by treating a violation as evidentiary rather than as conclusive. This more flexible approach recognizes the difference in extent of public and private rights and precludes an unreasonable judgment resulting from a mechanistic approach.[77]

CONCLUSION

There are those who are generally skeptical of the usefulness of the private nuisance action in the environmental context.[78] This skepticism may well be justified if the perspective is regional or national and oriented toward systematic reform. However, within the broad context of that perspective, the private nuisance action may well provide a remedy to the individual whose situation was overlooked in the grand design. Whether it will in Wyoming is as yet an unanswered question; there is no specific precedent for it.

75. Though a rational conclusion, a Wyoming court could certainly decide otherwise. To rely, therefore, entirely on a violation of statute to prove an unreasonable interference would undoubtedly be risky.

76. PROSSER, TORTS § 36, at 203 (4th ed. 1971).

77. *Id.* at 202; RESTATEMENT (SECOND) OF TORTS § 286 provides a set of tests to determine whether or not the statutory standard should be adopted, but it specifically limits the application thereof to negligence actions. *Id.* § 286, at 27. Nevertheless, it is analytically helpful in the nuisance context.

78. Johnson, *The Changing Role of Courts in Water Quality Management*, WATER RESOURCES MANAGEMENT & PUBLIC POLICY, 200-01 (Campbell & Sylvester ed. 1968).

But the absence of factual precedent does not preclude a successful private nuisance action to attack pollution. "What is 'reasonable' depends on a variety of considerations and circumstances,"[79] and pollution is becoming less reasonable with each passing day.

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79. Sussex Land & Live Stock Co. v. Midwest Refining Co., 294 F. 597, 602 (8th Cir. 1923).