

## WHAT DID RONALD COASE KNOW ABOUT THE LAW OF TORT?

Style Definition: Quote

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*In 1996, the late Brian Simpson criticised the legal competence of the discussion of the nineteenth century land law case of Sturges v Bridgman in the late Ronald Coase's 'The Problem of Social Cost,' and Coase responded to these criticisms. The discussion of Sturges v Bridgman was central to Coase's law and economics, and Simpson's aim in showing it to be unacceptable as legal scholarship was to reveal fundamental ethical and theoretical shortcomings in Coase's general approach. In revisiting this neglected debate, our aim is not so much to shed new light on the debate itself but to draw fresh insight from that debate in order to address current issues in economics and in law. Without denying Simpson's criticism of Coase's legal scholarship, we will show that the approach Simpson criticised was, indeed, one Coase himself rejected. By explaining how Coase came to treat Sturges v Bridgman in the way he did, we will seek to develop key aspects, not only of Simpson's criticism, but of Coase's response, and of the original arguments in 'The Problem of Social Cost' to which both refer. Though Coase's attempt to draw on legal materials in 'The Problem of Social Cost' was highly commendable in its intent, the roles played by Sturges v Bridgman in particular and by the positive law of private nuisance in law and economics generally are difficult ones which have generated a great deal of misunderstanding of Coase's theoretical argument. Paradoxically, it turns out that Coase's analysis of nuisance*

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*cases leads to there being too much state and not nearly enough voluntary exchange in his seminal article. We argue that this contributed to an excessive emphasis on Posnerian wealth maximisation in subsequent law and economics, and therefore to an inadequate appreciation of the possibilities of exchange in economic and legal policy.*

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## I INTRODUCTION

It must be counted as a remarkable achievement even amongst the very many achievements which distinguished the career of the late Brian Simpson that he unarguably once came out best from a debate with the late Ronald Coase. In a 1996 article,<sup>1</sup> Simpson made some fundamental criticisms of the competence of Coase's handling of the law in 'The Problem of Social Cost,'<sup>2</sup> particularly the law of nuisance in *Sturges v Bridgman*<sup>3</sup> on which Coase had focused. The response which Coase made simply failed to deal with these criticisms,<sup>4</sup> indeed it served only an occasion for Simpson to somewhat forcibly reaffirm them,<sup>5</sup> and this failure was due to the very good reason that those criticisms were perfectly accurate. Though Coase never made any pretension to ability in legal scholarship,<sup>6</sup> and did not see TPoSC as a contribution to such scholarship in any direct sense,<sup>7</sup> it obviously is more than a little embarrassing that the article which is one of the foundations of law and economics does not competently handle the law. The, as it were, theoretical rather than doctrinal contribution

<sup>1</sup> AW Brian Simpson, 'Coase v Pigou Reexamined' (1996) 25 *Journal of Legal Studies* 53, revised as 'The Story of *Sturges v Bridgman*: The Resolution of Land Use Disputes Between Neighbours' in Gerald Korngold and Andrew P Morriss (eds) *Property Stories* (Foundation Press, 2004) 9. Unless another intention is expressed, hereinafter references are to the revised version. In a 2009 2nd ed of Korngold and Morriss, Simpson's paper is reproduced exactly as it was in the first edition except that, instead of running from pp 9-40, it runs from pp 11-42.

<sup>2</sup> Ronald H Coase, 'The Problem of Social Cost' (1960) 3 *Journal of Law and Economics* 1, reprinted in *The Firm, the Market and the Law* (University of Chicago Press, 1988) 95. Unless another intention is expressed, hereinafter references are to the reprinted version referred to as TPoSC.

<sup>3</sup> (1879) 11 Ch D 852 (Eng). Argument at first instance in the Chancery Division of the High Court and the judgment delivered there by Jessell MR is at 854-59. Argument in the Court of Appeal and the single judgment delivered there by Thesiger LJ is at 860-66.

<sup>4</sup> Ronald H Coase, 'Law and Economics and AW Brian Simpson' (1996) 25 *Journal of Legal Studies* 103.

<sup>5</sup> AW Brian Simpson, 'An Addendum' (1996) 25 *Journal of Legal Studies* 99. See also below n 178.

<sup>6</sup> Coase, above n 4, 105. In Ronald H Coase, 'Blackmail' (1988) 74 *Virginia Law Review* 655, Coase made a similar disavowal of competence in the law and then proceeded to make some extremely penetrating comments on the law relating to blackmail.

<sup>7</sup> Coase, above n 4, 104-105, quoting Ronald H Coase, 'Law and Economics at Chicago' (1993) 36 *Journal of Law and Economics*, 239, 250-51.

which Coase undoubtedly thought he had made ‘to the analysis of the law of nuisance’<sup>8</sup> cannot be properly made out unless it is expressed in doctrinally competent terms.

It is surprising, then, that this debate between Simpson and Coase has been largely ignored, not just in the disciplines of law and of economics as they continue to draw on TPoSC, but in the specific field of law and economics itself. Simpson was strongly and bitterly of the opinion that the significance of his criticisms had been very insufficiently appreciated, and in the book on which he was working at the time of his death in January 2011 he wrote of his article: ‘No serious response has yet been made to the arguments there presented; devotees of law and economics pretend the piece does not exist.’<sup>9</sup>

In this article we intend to put forward such a response. It will not dispute Simpson’s evaluation of Coase’s handling of *Sturges v Bridgman* as legal scholarship; indeed we will say something about Coase’s undergraduate legal studies that rather reinforces what, we repeat, were perfectly accurate criticisms. But our response nevertheless amounts to an affirmation of Coase’s views because, whilst Coase handles the formal law badly, Simpson’s handling of the theoretical issues behind the law is far worse. This was the gist of the response Coase himself made to Simpson,<sup>10</sup> but we believe that this response could and should have been developed much more systematically than Coase himself did. Simpson by no means criticised Coase’s legal scholarship in order just to make a point about the quality

<sup>8</sup> Coase, above n 6, 656.

<sup>9</sup> AW Brian Simpson, *Reflections on the Concept of Law* (Oxford University Press, 2011) 136. In a review of Simpson’s magisterial history of the impact of the establishment of the European Convention on the law of public order in the decolonising British Empire, one of the current authors did comment on Simpson’s criticism of Coase and Simpson certainly was aware of this: David Campbell, ‘Human Rights and the Critique of the Common Law’ (2005) 26 *Cardozo Law Review* 791, 812-18 (reviewing AW Brian Simpson, *Human Rights and the End of Empire* (2001)). But overall it is fair to say that the details of Simpson’s criticism have attracted little attention. Even in those contributions to legal scholarship which directly address the key themes involved, the debate is relegated to the footnotes: eg Daniel A Farber, ‘Parody Lost/Paradigm Regained: The Ironic History of the Coase Theorem’ (1997) 83 *Virginia Law Review* 397; Ward Farnsworth, ‘Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral’ (1999) 66 *University of Chicago Law Review* 373; Ron Harris, ‘The Uses of History in Law and Economics’ (2003) 4 *Theoretical Inquiries in Law* 659 and Herbert Hovenkamp, ‘The Coase Theorem and Arthur Cecil Pigou’ (2009) 51 *Arizona Law Review* 633. See further below n 91.

<sup>10</sup> [Coase, above n 4, 105.](#)

of that scholarship. Simpson was profoundly averse to law and economics as he understood them and, generously acknowledging the impact of Coase's 'celebrated Article' on a 'legal world [which] has never been quite the same since,'<sup>11</sup> he used his criticisms of Coase's legal scholarship as the springboard for a dismissal of Coase's views in general.<sup>12</sup> But, as is not unknown in criticisms of Coase's law and economics, Simpson showed such little understanding of Coase's approach that he essentially criticised positions the rejection of which is central to that approach.

Our overall aim, however, is not just to restate Coase's discussion of *Sturges v Bridgman* so that its basic value survives Simpson's criticisms. It is to build on this to advance the understanding of the possibilities of exchange, particularly in respect of the law of nuisance. It will emerge that the principal obstacles to more robustly restating Coase's position in legal terms are not the shortcomings of Coase's handling of the law, though we repeat that these are not denied, but the difficulties inherent in the conception of private property that lies behind *Sturges v Bridgman* and behind the law of private nuisance in general. The positive law of private nuisance is, we will argue, particularly unsuitable as an illustration of a real world application of Coasean bargaining since that law is not a system of what Calabresi and Melamed called property rules, but a liability rule generally qualifying property rights in the public interest, though that interest is generally but unclearly formulated. Once this is understood, it is unsurprising that much of the discussion of TPoSC has been led by Coase's manner of argument to concentrate, not on Coasean bargaining, but on alternatives to such bargaining: the firm, the government, and cases decided by courts which stipulate outcomes. For courts making decisions by stipulating outcomes are not providing a framework for the parties to reach their own decisions but are intervening just as much as a government pursuing prescriptive regulation through statute. There is, in the end,

<sup>11</sup> Simpson, above n 1, 9, 28.

<sup>12</sup> Ibid 24-29, mounts a particular defence of Pigou against Coase's criticisms of him. We put this to one side.

too much state and not nearly enough voluntary exchange in TPoSC. We regard this as the chief factor contributing to the excessive emphasis on Posnerian wealth maximisation in law and economics, an emphasis which has most unfortunately predominantly been regarded as following from a commitment to ‘free markets’ when it is, indeed, its opposite.

## II COASE’S USE OF *STURGES V BRIDGMAN*

In ‘The Federal Communications Commission,’ the article on broadcasting policy of which he famously intended TPoSC to be a generalising restatement, Coase used the nineteenth century land law case of *Sturges v Bridgman* to illustrate the theoretical argument which underlay the policy proposal made in the first article and which was brought to the fore in the second.<sup>13</sup> *Sturges* is also the first<sup>14</sup> of ‘four actual cases’ which Coase used in section V of TPoSC to ‘clarify’ and ‘illustrate’ his argument in that article up to that point.<sup>15</sup> That argument had two components, each of which has proven to be enormously influential and now are so well known as to need only brief exposition here.

<sup>13</sup> RH Coase, ‘The Federal Communications Commission’ (1959) 2 *Journal of Law and Economics* 1, 26-27. Coase referred to this discussion, without citation of the case, when setting up his argument in section II of TPoSC.

<sup>14</sup> At the beginning of section V of TPoSC, Coase, above n 2, 104, had briefly mentioned two cases as illustrations that ‘The harmful effects of the activities of a business can assume various forms.’

One of these is an ancient case about the obstruction of the flow of wind to a windmill which we do not think can be precisely identified but which Coase knew from its discussion in the then current edition of a standard English work on land law: M Bowles, *Gale on Easements* (Sweet and Maxwell, 13<sup>th</sup> ed, 1959) 237-39. This case had been discussed in *Gale* since its first edition: CJ Gale and TD Whatley, *A Treatise on the Law of Easements* 197-98 (Forgotten Books, first published 1839, 2010 ed). On the but very poorly known facts it is very difficult to reconcile this case with the modern law of easements of light and air, and TPoSC, above n 2, 121, later briefly notes that a modern case (discussed in *Gale* and in *Sturges v Bridgman*, above n 3, 855, 857 (Ch D, Eng), 864 (CA, Eng)) does not follow it: *Webb v Bird* (1863) 13 CB (ns) 841, 143 ER 332 (CP, Eng). The ancient authorities are in fact now only of historical interest and are described as such in the current edition of *Gale*, their discussion having been eliminated since the 14th edition of 1972: Jonathan Gaunt and the Honourable Mr Justice Morgan, *Gale on Easements* (Sweet and Maxwell, 19<sup>th</sup> ed, 2012) para 8.02 n 6. *Webb v Bird* was itself variously commented upon, followed or distinguished in three of the four cases Coase sought to use to illustrate their common approach in section V. This unsatisfactory thread of argument, if this is the right description, in ‘The Problem of the Social Cost’ does demonstrate shortcomings which do directly follow from the deficiencies of Coase’s legal scholarship which we discuss in Section IV below.

The other case concerns obstruction of the sunshine formerly benefitting the outdoor recreational areas of a hotel: *Fountainbleu Hotel Corp v Forty-Five Twenty Five Inc*, 114 So 2d 357 (Fla App 1959, USA). Coase no doubt cited this only because it was a timely illustration, having been decided as he was drafting his article, but, largely because of his use of it, it has become a much cited case in US legal scholarship.

<sup>15</sup> TPoSC, above n 2, 104-105.

In sections I-II of TPoSC,<sup>16</sup> Coase had set up the problem of the harmful incidental effects of economic action and had shown that these could be analysed as an instance of the general problem of allocating scarce resources between competing uses, and so amenable to the toolset of modern economics. As we shall show, much of the debate between Simpson and Coase turns on the shortcomings of the way Coase sought to illustrate this theoretical argument with concrete case material. It is therefore worthwhile to examine Coase's treatment of this material in much more detail than is normal in the secondary literature on TPoSC.

In section II of TPoSC, Coase had shown, as it was put in the heading of that section, 'The Reciprocal Nature' of problems such as pollution. To regard a side-effect of an economic activity such as the factory emission of smoke in the course of industrial production, which Coase rightly says is a 'standard example,'<sup>17</sup> as a harm can be very misleading when seeking to formulate policy toward such a side-effect. Describing the side-effect as a harm implies that it should be prevented. But prevention imposes the costs of preventive measures and of lost output, and complete prevention of this sort of harm is inconsistent with industrial production, which would have to cease. To those who place a positive value on industrial production, prevention of such a harm cannot, then, be the aim of policy. The aim must be determining the optimal level of the activity taking the economic value of its overall effects into account, whether or not those effects are conventionally regarded as desirable or harmful. On this basis, without further consideration of the issues, it is difficult to see why the level of side-effects should be determined in a different way than any other aspect of economic action, the level of which should be determined by exchange.

<sup>16</sup> The section headings of 'The Problem of Social Cost' are set out in Appendix A.

<sup>17</sup> TPoSC, above n 2, 95. The use of this example in the literature of modern welfare economics can be traced to Arthur Cecil Pigou, *Economics of Welfare* (Transaction Publishers, first published 1920, 2002 ed) 184, and indeed to its forerunner: AC Pigou, *Wealth and Welfare* (Macmillan, 1912) 159.

In section III of TPoSC headed ‘The Pricing System with Liability for Damage,’ Coase had shown that, assuming zero transaction costs, bargaining between the actor conventionally thought to be inflicting the harm and the actor conventionally thought to be its victim would allow us to arrive at the optimal level of the harm, for that bargaining would establish the highest valued overall allocation of resources between the parties. In this optimal allocation, the level of harm might be zero but it equally could assume any other level depending on the outcome of the negotiations. In Coase’s terms, the optimal level of harm is that which maximises the overall value of production. In the absence of transaction costs, that outcome is invariant with respect to the initial allocation of liability, in quite the same way that the optimal allocation of resources in a perfectly competitive market is independent of the initial allocation of those resources. Coase illustrates this in section IV headed ‘The Pricing System with no Liability for Damage’ where he repeats the analysis on the basis of the opposite initial position. Taken together, these sections establish what has in various forms been called the ‘Coase Theorem,’ a term and to a considerable extent a concept first invoked, not by Coase,<sup>18</sup> but by George Stigler,<sup>19</sup> with the result that in the period immediately after its publication TPoSC was largely interpreted through the conceptual lens of the Theorem. This has had the overall malign effect that the remainder of the TPoSC after section IV still remains to be properly understood in all the various fields of scholarship in which that article has been so widely acknowledged.

In *Sturges v Bridgman*, a plaintiff doctor was granted a perpetual prohibitory injunction against a confectioner’s use of machinery in neighbouring premises in such a way as caused noise and vibration which unreasonably interfered with the doctor’s use of his consulting room. Coase’s discussions of the case in ‘The Federal Communications Commission’ and in

<sup>18</sup> Ronald H Coase, ‘Notes on the Problem of Social Cost’, in *The Firm, the Market and the Law*, above n 2, 157 and Ronald H Coase, ‘The Institutional Structure of Production’, in *Essays on Economics and Economists* (University of Chicago Press, 1994) 3, 10-11.

<sup>19</sup> George J Stigler, *The Theory of Price* (Macmillan, 3<sup>rd</sup> ed, 1966) 113.



section V of TPoSC were similarly brief, in the latter case consisting of two long paragraphs occupying less than three pages.<sup>20</sup> In fact it was briefer than that, for the actual account of the case was conveyed in the shorter, first of the two paragraphs and amounted to no more than we have just conveyed, save that Coase ended the paragraph with an unattributed quotation from the judgment of the Court of Appeal to which we will return.<sup>21</sup>

Most of the discussion in the longer, second paragraph considered the bargaining possibilities which Coase thought were open to the parties once the court had settled the question of liability. The doctor having been granted the injunction, the possibilities were identified by Coase in the following way:

The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location, from having to curtail his activities at this location, or (and this was suggested as a possibility)<sup>22</sup>—from having to build a wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have had to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation, or move his confectionery business to some other location.<sup>23</sup>

Coase argued that, if the injunction had been refused, then ‘The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery.’<sup>24</sup> ~~But although~~ the judgment would affect who has to initiate negotiations, the possibilities and the outcome would be the same.

In essence, Coase used *Sturges v Bridgman* to clarify and illustrate what have come to be known as the ‘invariance’ and the ‘efficiency’ aspects of the Coase Theorem. Whether the confectioner or the doctor had to start the negotiations, ‘The solution of the problem depends

<sup>20</sup> TPoSC, above n 2, 105-107. In the original article, above n 2, these paragraphs were at 8-10. Coase’s discussion of *Sturges v Bridgman* is set out in full in Appendix B.

<sup>21</sup> See text accompanying n 107 below.

<sup>22</sup> Simpson, above n 1, 31 rightly argues that this is not so. The passage in the report to which Coase presumably refers was part of the report of the confectioner’s evidence at trial which was aimed at showing that the way the claimant had built his consulting room had in part caused the dispute, as, indeed, it appears was the case: *Sturges v Bridgman*, above n 3, 854.

<sup>23</sup> TPoSC, above n 2, 106. See Appendix B.

<sup>24</sup> Ibid. [See Appendix B.](#)

essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.'<sup>25</sup> In this account, the courts did not stipulate the outcome. The courts' statement of the initial legal position provided the framework in which the parties chose the outcome:

the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible by transactions on the market to modify the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it will lead to an increase in the value of production.<sup>26</sup>

The fundamental reason why these views have attracted such attention is Coase's contention that, if left to bargaining, the 'correct' level of the harmful side-effect will not depend on how rights are initially allocated. All that this initial allocation specifies is which of the parties needs to start the bargaining if it sees scope for economic gain by engaging in market exchange which will alter the level of the effect. The result is Pareto efficient in the sense that, if all affected parties are involved in the bargaining process, the result which all agree will be one which leaves them all at least as well off as they initially were, whilst all opportunities to improve the position of any individual party will have been exhausted. This outcome can rightly and usefully be described as perfectly efficient in the way that it gives complete effect to voluntary choice.<sup>27</sup> The Coase Theorem has all the attractions of Pareto efficiency though it applies to situations previously thought categorically to be outside of the Pareto domain. What is more, the efficiency of the outcome seems to be spontaneous in the strong sense that it is invariant regardless of whether the confectioner or the doctor has to start the bargaining: 'With costless market transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources.'<sup>28</sup> The bargaining

<sup>25</sup> Ibid. [See Appendix B.](#)

<sup>26</sup> Ibid 114.

<sup>27</sup> There can be no doubt that, in expressing himself in terms of, as in the passage just quoted, 'an increase in the value of production', Coase unwittingly caused confusion of the sense in which he conceived of efficiency, and this confusion has, in a sense, been the foundation of law and economics. See text accompanying n 164 below.

<sup>28</sup> TPoSC, above n 2, 106. [See Appendix B.](#)

which Coase describes in his account of the case is essentially that in the now famous hypothetical example he had used in sections III-IV of TPoSC: ‘The basic conditions are exactly the same in this case as they were in the example of the cattle which destroyed crops.’<sup>29</sup> In this way *Sturges v Bridgman* was to serve, as we have seen Coase maintain, as an ‘actual’ case illustrative of his argument.<sup>30</sup>

In the remainder of his longer, second paragraph, Coase turned to an analysis of the thinking of the judges in *Sturges v Bridgman*: ‘It was of course the view of the judges that they were affecting the working of the economic system – and in a desirable direction.’<sup>31</sup> This is an entirely different line of thought and, with respect, Coase provided the occasion for much of the subsequent confusion by failing to set this different line out in a new paragraph starting with the sentence just quoted. We shall discuss this at length below,<sup>32</sup> but first let us consider Simpson’s criticisms of Coase’s account of the case as we have described it so far.

### III SIMPSON’S CRITICISM OF COASE’S ACCOUNT OF *STURGES V BRIDGMAN*

Simpson argued that Coase’s account of *Sturges v Bridgman* was highly inaccurate and, as legal history, wholly unacceptable. As Simpson is right and as our concern here is not so much with legal history as with the theoretical issues of law and economics that Simpson raised, we will be very brief.

Though neither in the passage of TPoSC we have just discussed nor in ‘The Federal Communications Commission’ does Coase describe *Sturges v Bridgman* as a case of private nuisance, he does do so later in TPoSC and elsewhere,<sup>33</sup> and he undoubtedly saw it as such a

<sup>29</sup> Ibid. [See Appendix B.](#)

<sup>30</sup> Ibid 105.

<sup>31</sup> Ibid 106-107. [See Appendix B.](#)

<sup>32</sup> See Pt V, [C](#) below.

<sup>33</sup> TPoSC, above n 2, 113 n 13 and Ronald H Coase, ‘Alfred Marshall’s Mother and Father’, in *Essays on Economics and Economists*, above n 18, 119, 121 n 11.

case, being aware that nuisance is a core private law doctrine regulating interference with another's enjoyment of their land and so dealing with the problem of competing uses he sought to address. In this sense, as we have noted, Coase saw TPoSC as contributing 'to the analysis of the law of nuisance.'<sup>34</sup> But the reported case of *Sturges v Bridgman* wholly contradicts the way Coase established both 'The Reciprocal Nature of the Problem' and what was to become the Coase Theorem.

What Coase saw as the reciprocal aspect of the case was completely dealt with in the first sentence of Jessell MR's judgment at first instance: 'I think this is a clear case for the Plaintiff. There is really no dispute as to this being a nuisance; in fact, the evidence is all one way.'<sup>35</sup> That is all that was said there, and in the Court of Appeal nothing much was said in addition: 'It has been proved that ... a noise was caused which seriously inconvenienced the Plaintiff in the use of his consulting-room ... which ... would constitute an actionable nuisance.'<sup>36</sup> As Simpson in essence pointed out,<sup>37</sup> there is simply nothing in the *ratio* of the case that justified Coase's claim that *Sturges v Bridgman* is evidence of a judicial perception of the reciprocal nature of the problem. Quite the opposite in fact. Though the language of harm is not used at all, the noise and vibration was indeed seen as a harm which should be prevented.<sup>38</sup> No sense that the doctor's use of his consulting room (and his wish to be free of noise and vibration in order to do so) was only a competing use not in any way intrinsically superior to the confectioner's use of his machinery (and his wish to cause noise and vibration in order to do so) forms part of the *ratio* at all.

<sup>34</sup> Coase, above n 6, 656.

<sup>35</sup> *Sturges v Bridgman*, above n 3, 854-55.

<sup>36</sup> *Ibid* 864.

<sup>37</sup> Simpson, above n 1, 35: 'There were no suggestions that Dr Sturges' activities were causing any problem for Mr Bridgman.' However, Simpson, *ibid* 29, also insists that 'The case certainly illustrates the reciprocal nature of the problem of social cost,' and we shall return to this, indeed explaining how Simpson can take up both of these positions is an important aim of this article: see text accompanying n 163 below.

<sup>38</sup> Simpson, *ibid* 20, mentions the doctrinal issues of causation that could possibly arise [at this point here](#), -but discussion of these, about which Coase no doubt was largely ignorant, cannot be justified here.

Nor did anything like the Coase Theorem play any part in deciding the outcome of the case. The case actually was argued and decided on the basis of it raising a flat clash of unqualified property rights. As (once the facts were proved)<sup>39</sup> the decision that the confectioner was causing a nuisance was reached instantly, *Sturges v Bridgman* as argued is barely a nuisance case at all, though we shall see it does involve, and has come to be authority for, an important implication of the basic principle of the positive law of private nuisance. It effectively being decided at the outset that the noise and vibration was a nuisance, ‘The only serious point’ in the actual argument was whether ‘the Defendant was entitled ... to ... commit a nuisance’ because he ‘had acquired a right to impose the inconvenience [that otherwise] would constitute an actionable nuisance.’<sup>40</sup>

Two in substance identical arguments, one at statute and one at common law, that the confectioner had acquired such a right by prescription were actually considered in the case.<sup>41</sup> At the time of *Sturges v Bridgman*, acquisition by prescription had been made subject to The Prescription Act 1832,<sup>42</sup> which is still in force. Though it seems that the Act was meant completely to supersede common law prescription, shortcomings in its drafting meant that it signally failed to do so,<sup>43</sup> and the legal fiction of ‘the doctrine of lost modern grant’ remained, and continues to remain, part of the English law.<sup>44</sup> Both the statutory and common law arguments were possible because the confectioner had long used the machinery in the

<sup>39</sup> Using court documents lodged in the UK Public Records Office, Simpson, above n 1, 14-15 valuably sets these facts out in greater detail than the report of the case itself.

<sup>40</sup> *Sturges v Bridgman*, above n 3, 859 (Ch D, Eng), 862 (CA, Eng).

<sup>41</sup> *Ibid* 855 (Ch D, Eng), 863 (CA, Eng).

<sup>42</sup> 2 and 4 Will 4 c 71 (UK).

<sup>43</sup> Simpson’s own account of these shortcomings is as clear as the subject permits and it concludes that ‘The Act is a classic example of an incompetent attempt to reform the law’: AWB Simpson, *A History of the Land Law* 269 (Oxford University Press, 2<sup>nd</sup> ed, 1986).

<sup>44</sup> Of this situation, Lord Neuberger, then the Master of the Rolls and now President of the UK Supreme Court, said in *London Tara Hotel v Kensington Close Hotel Ltd* [2011] EWCA Civ 1356, 2 All ER 554, para [20] (CA, Eng): ‘The law [of] long use has been bedevilled with artificial doctrines developed over many centuries, and ... has been complicated rather than assisted by the notoriously ill-drafted Prescription Act 1832, whose survival on the statute book for over 175 years provides some support for the adage that only the good die young.’

way of which the doctor complained, and we shall return to this important fact.<sup>45</sup> But, for reasons of space, we shall not explain why both of these arguments failed,<sup>46</sup> save to say that they were again considered as part of the definition of what would be, as defined, unqualified property rights.

Simpson's account of the way the case was understood by the parties to it and by the judges who heard it was right to place the assertion of mutually exclusive unqualified property rights at the heart of the matter, and, believing himself to have established 'the gulf which separates Coase's economic analysis from legal analysis,'<sup>47</sup> he undoubtedly showed that Coase's account of the case is, as legal history, just wrong:

From a legal point of view the ... question to settle was whether Mr Bridgman was, as he claimed, entitled to continue his noisy activities, through having, over the years, acquired a right to do so ... It was more or less conceded that unless Mr Bridgman could show that he had acquired such a right he had invaded the rights of the doctor. The judge ruled that no such right had been acquired ... and Dr Sturges got his injunction. Plainly, the issue in the case, as seen by Sir George Jessell, had nothing to do with the question 'whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's.' In the legal scheme of things that was not a matter which had to be decided, or indeed had any relevance to the outcome ... The case was then taken on appeal, and the main issue ventilated was the same – had Mr Bridgman acquired the right to make the noise? The judges thought he had not ... the particular decision pays not the least attention to the two conflicting forms of land use ... the judicial opinions in the case, like the affidavits on which they are based, make not the least attempt to investigate the economic or social value of the activities of either confectioner or doctor.<sup>48</sup>

In our opinion, nothing that Coase said in his reply to Simpson alters this,<sup>49</sup> but to the extent that the main themes of that reply seem to have been a separation of the professional competences of economists and lawyers<sup>50</sup> and a refusal to defend the positions specifically

<sup>45</sup> See text accompanying n 90 below.

<sup>46</sup> Incidentally to the discussion of another of the four cases he uses for illustrative purposes in section IV, TPoSC, above n 2, 113 n 13 does essentially capture the main reason the lost grant argument failed in *Sturges v Bridgman*. Simpson himself, above n 1, 35, really adds nothing to what Coase says in this footnote, on which he does not comment. We repeat that a full explanation of the position, and of the similar position under the Act, would not be justified here.

<sup>47</sup> *Ibid* 23.

<sup>48</sup> *Ibid* 35-37.

<sup>49</sup> Coase, above n 4, 109.

<sup>50</sup> *Ibid* 103 epigraph, quoting George J Stigler, 'Does Economics Have a Useful Past?' (1969) 1 *History of Political Economy* 217, 219.

set out in TPoSC,<sup>51</sup> themes which we regard as eccentric abnegations of his achievement, Coase hardly seemed to wish to effect such an alteration. Nevertheless, the first answer we would give to the question which forms the title of this article is, on the evidence of Coase's treatment of *Sturges v Bridgman* as we have discussed it so far, very little.

Simpson's criticism of Coase's handling of *Sturges v Bridgman* formed the basis of an argument that the Coase Theorem did not, could not, and should not form the basis of deciding nuisance cases: There were, in our opinion, three main points to this criticism: (1) the Coase Theorem is 'purely theoretical;' (2) deciding nuisance cases 'does not,' as a matter of positive law, 'entail attempting to reach an economically efficient solution;' and (3) as a matter of normative law and economics, solving nuisance cases by means of Coasean bargaining would be 'offensive.' In now quoting from Simpson's article to illustrate this, we shall insert this numbering into what he said:

(1) the Coase Theorem ... that in the absence of transaction costs the allocation of resources reached by negotiation and bargain, assuming economic rationality, would be unaffected by the rule as to civil legal liability ... stated in the discussion of *Sturges v Bridgman* ... is of course a purely theoretical view as to what would happen in a world which does not exist ... one of the problems over positing never-never worlds is that we are commonly not told what other features they share with the real world ... Presumably there have to be ... assumptions made about the Coasean world ... for example ... psychological assumptions about human behaviour ... for apparently in the Coasean world individuals are inspired by the profit motive ... Be that as it may Coase relates his thinking to the real world by arguing, surely correctly, that in a case such as *Sturges v Bridgman* the parties might have reached an economically satisfactory position, or one that seemed to them to be economically satisfactory, by making a bargain, a point which is clear enough without any need for the theory expressed in the Coase Theorem and quite independent of it. Presumably the reason they did not do so, *pace* Coase, was either the impediment of transaction costs, or the fact that one of them did not behave with economic rationality, or because of differing expectations as to the probable outcome of the litigation ... Although we do not know the details it would be quite astonishing ... if the doctor and the confectioner approached the matter by supposing that 'The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's' ... Coasean cost benefit analysis bears no relationship at all to how neighbours behave in real life situations ... It may be that in some imagined world some such analysis would take place, but lawyers are concerned with the real world. Law involves practical reason. It is unclear to me what lawyers can learn from an imagined world.

(2) The reason why a market transaction ... is usually not possible in such situations is that the parties are not willing to place their rights in the market. Once this is understood, it becomes offensive not to respect their unwillingness ... Hence solving a conflict of this character in a particular case does not entail attempting to reach an economically efficient solution ... Nor does it mean agreeing to a market transaction whose paradigm is a sale.

<sup>51</sup> Coase, above n 4, 118.

(3) How ought cases like *Sturges v Bridgman* be handled by courts? ... the whole idea of an ideally efficient solution is itself, from a practical point of view, vacuous ... whatever the theoretical utility of the ideal conception of economic efficiency may be, it is devoid of empirical or practical significance. It is the crock of gold at the end of a rainbow ... That could not be a new and better way to decide nuisance cases.<sup>52</sup>

The first, but only the first, thing that must be said is that no-one has pressed the point about the purely theoretical nature of the Coase Theorem more than Coase himself, and in what follows we will explore the implications of this. So completely did Simpson, as Coase alleged in his reply, misunderstand Coase's theoretical views that he rested his positive and normative arguments about the law of nuisance upon criticism of the Coase Theorem, with the result that those arguments are much inferior to positive and normative arguments about that law derived from Coase himself. In this sense, the answer to the question that forms the title of this article is: yes, a very great deal, far more, in fact, than one of the greatest post-war academic lawyers. But before turning to how this paradoxical state of affairs could arise, we would like to say a little more about the nature of Coase's legal historical mistakes in his discussion of *Sturges v Bridgman*.

#### IV AN EXPLANATION OF COASE'S ACCOUNT OF *STURGES V BRIDGMAN*

An evaluation of Simpson's criticisms can helpfully begin by asking why Coase relied on *Sturges v Bridgman* to the extent he did in 'The Federal Communications Commission' and TPoSC. One needs to bear in mind that Coase's chief concern in the former article was not with harmful side-effects.<sup>53</sup> Though he addressed the then general belief that broadcasting interference was a side-effect which necessitated government allocation, his main concern, as a specialist on the economics of public utilities in general and broadcasting in particular, was to establish that broadcasting frequencies should be allocated, not by administrative fiat, but through market-based solutions. His strategy for establishing this point was devastatingly

<sup>52</sup> Simpson, above n 1, 18, 19, 31, 32, 33, 40.

<sup>53</sup> Matthias Klaes, 'Ronald Harry Coase (1910-2013)' (2014) 21 *European Journal for the History of Economic Thought* 520.



simple: rather than arguing directly why a market-based solution was superior, he sought to demonstrate that the question of allocating resources for the purpose of broadcasting was not different in kind from questions of how to allocate economic resources in general. He argued that, given that in the American economy answers to such questions generally were entrusted to markets, the same should obtain in the broadcasting sector. Rights in frequencies are not different in kind from, for example, rights in land, and once established they allow for the market mechanism to operate in quite the same way as it does in the case of real estate. Broadcasting interference could be effectively regulated by the creation of private rights of exclusive use in frequencies, just as ownership of land regulates potential conflicting uses of land.<sup>54</sup> It was considerations like this which led Coase to consider an actual 'land use' case as a key illustration for his overall argument in 'The Federal Communications Commission.'

But why *Sturges v Bridgman*? Though we have made no detailed inquiry into this,<sup>55</sup> *Sturges v Bridgman* certainly was regarded as a significant case when it was heard. We assume this played some part in its being placed on the list of the Master of the Rolls, Sir George Jessell, one of the limited number of High Court judgments given by the Master of the Rolls in the brief period between the passage of the Judicature Acts and it being decided that the Master of the Rolls' caseload should be entirely appellate.<sup>56</sup> The case was thought sufficiently important to be reported, not only in *The Law Reports*, but in four other series of

<sup>54</sup> Coase, above n 13, 25-26.

<sup>55</sup> Though, as we have seen and as we shall discuss below, Simpson uncovered material of very considerable interest (and, characteristically of him, considerable amusement value) about *Sturges v Bridgman*, he does not provide a comprehensive account of the contemporary or later legal doctrinal significance of the case in the way he usually did. The significance the case had for him was that Coase had so heavily relied on it. Simpson may therefore have gone too far when he claimed (Simpson, above n 1, 10) that he had provided 'a very full account' of the case, for he did not really undertake the searching 'legal archaeological' inquiry of the sort that has become so identified with him that it is widely called 'doing a Simpson.' But his focus was never on *Sturges v Bridgman* so much as on Coase.

<sup>56</sup> The creation and operation of the modern Chancery Division under the Judicature Acts is described by Professor Polden in *The Oxford History of the Laws of England* (Oxford University Press, 2010) vol XI, pt 3, ch X (2010).

reports<sup>57</sup> and in *The Times* of London.<sup>58</sup> As Simpson tells us,<sup>59</sup> it was also noted in one of the professional journals of the medical profession.<sup>60</sup> But Coase, we have no doubt, did not properly know and would not have been concerned about the detailed contemporary or historical legal significance of the case and we strongly suspect that he came to it, as so many practising and academic lawyers, not to speak of economists and social theorists, often do, because he saw it cited in a textbook as authority for a legal proposition he thought interesting.

*Sturges v Bridgman* is still routinely cited in English secondary authorities in connection with a number of propositions in land law and the law of nuisance,<sup>61</sup> and Theigier L.J.'s observation that 'what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey'<sup>62</sup> is now so widely recognised as almost to have attained within the Commonwealth the status of a legal maxim. Though again we have made no detailed inquiry into the matter, *Sturges v Bridgman* undoubtedly had attained something like this status by 1929,<sup>63</sup> the year in which Coase began his undergraduate studies for his Bachelor of

<sup>57</sup> 43 JP 716 (1879), 48 LJ Ch 785 (1879), 28 WR 200 (1879) and 41 LT 219 (1879) (Ch D, Eng).

<sup>58</sup> Anon, '*Sturges v Bridgman*', *The Times* (London), 4 June 1878, 4 (Ch D, Eng).

<sup>59</sup> Simpson, above n 1, 11 n 7. Simpson wrongly gives the date of the article as 20 July 1878.

<sup>60</sup> Anon, 'Quiet Consulting Rooms', *The Medical Times and Gazette* (London), 3 June 1878, 623: 'A case of considerable interest to the profession.' This account of the judgment in the Chancery Division is far more accurate than most accounts in law textbooks.

<sup>61</sup> It is cited 5 times in *Halsbury's* statement of the law of nuisance: *Halsbury's Laws of England* (5<sup>th</sup> ed, 2008ff) vol 28, paras 110, 125, 193, 198, 231. It is also cited in the statement of the law of commons, *ibid* vol 13, para 472, in connection with the doctrine of lost modern grant.

<sup>62</sup> *Sturges v Bridgman*, above n 3, 865. This was a hypothetical example unrelated to the actual case, for, although Wigmore Street and Wimpole Street are both now part of a very expensive professional use and residential neighbourhood, they were then quite different from Belgrave Square (though Wigmore Street more so than Wimpole Street) and, to a smaller degree, they remain so as Belgravia, the area around Belgrave Square (the Square itself now being largely occupied by foreign embassies) must be one of the most expensive residential neighbourhoods in the world. The disappearance of industrial use from Bermondsey makes the hypothetical comparison now entirely inapt.

In fact it appears that Mr Bridgman's and Dr Sturges' premises are both now being used, not as a confectionary or even a doctor's consulting rooms, but as the offices of firms of solicitors. We are grateful to Professor Stephen Littlechild for drawing this evidence of the changing use of Wigmore Street and Wimpole Street to our attention.

<sup>63</sup> *Sturges v Bridgman* was cited 16 times in the *Halsbury* in use when Coase was an undergraduate: *Laws of England* (1<sup>st</sup> ed, 1907-17) vol 4 (commons) 487; vol 11 (easements) 240, 241, 259, 261, 262, 264, 266, 271,

Commerce degree at the London School of Economics.<sup>64</sup> As we had previously surmised but as Coase has himself said,<sup>65</sup> he was led to cases such as *Sturges v Bridgman* in the course of these studies. We have consulted the LSE Calendars for the years 1929-30 which contain the syllabuses and reading lists for the subjects which Coase read for his degree,<sup>66</sup> which may be identified from his Academic Record which we have also consulted. These Calendars lead one to think that Coase would not have made any detailed study of the law of tort but would have studied it to the extent necessary to come to terms with commercial subjects, especially regarding negligence in connection with what would now be called employment law and compensation for industrial injury.<sup>67</sup> But this was not at all a profound extent in regard of tort in general and, in respect of nuisance, Coase's studies no doubt were rudimentary.

Coase evidently learned how to find at least some cases in the law reports during his undergraduate studies,<sup>68</sup> and he did actually consult the reports of *Sturges v Bridgman* and the other cases discussed in section V (and, as we shall see, also in section VII) of TPoSC,<sup>69</sup>

272, 302, 328; vol 21 (nuisance) 509, 531, 532, 563. It would be tedious and of very limited value to list here all the references to *Sturges v Bridgman* in important English torts textbooks at the time of Coase's studies. Of the three such textbooks which Coase cited in TPoSC, above n 2, 121 n 17, only *Salmond* had been written when Coase was an undergraduate. *Sturges v Bridgman* is cited four times in both the edition Coase may then have read and in the current edition, which is badly out of date: WTS Stallybrass, *Salmond on the Law of Torts* (Sweet and Maxwell, 7<sup>th</sup> ed, 1928) 258, 261, 264, 268 and RFV Heuston and RA Buckley, *Salmond and Heuston on the Law of Torts* (Sweet and Maxwell, 21<sup>st</sup> ed, 1996) 58, 61 n 84, 70 n 64, 75-76.

<sup>64</sup> Ronald H Coase, 'Ronald H Coase' in William Breit and Barry T Hirsch (eds) *Lives of the Laureates* (MIT Press, 5<sup>th</sup> ed, 2009) 189, 192.

<sup>65</sup> Ronald H Coase, 17th Annual Coase Lecture, 1 April 2003, <http://www.youtube.com/watch?v=yqT6koFnEwA&feature=youtu.be>

<sup>66</sup> We have also consulted the Calendar for 1931-32, the year in which, but for the award of the scholarship which allowed him to undertake the travel in the United States which had such an effect on the thinking that led to 'The Nature of the Firm,' Coase would have undertaken further studies that would have led to the award of a different degree with more legal content and, in Coase's own view, above n 64, 192, would 'undoubtedly' have led to his becoming a lawyer.

<sup>67</sup> The result of Coase's studies in these specific areas, parallel in significance but rather better on the law, is the treatment of 'the directions of an entrepreneur' in Ronald H Coase, 'The Nature of the Firm' in *The Firm, the Market and the Law*, above n 2, 33, 39.

<sup>68</sup> Coase, above n 64, 200. It may have been misleading for Coase to claim to have obtained a 'familiarity' with the law reports as a result of his studies, but, of course, this is all relative, and by any standard other than the lawyer's own, he did have such a familiarity. The sometimes daunting difficulties of searching the various reports have, of course, largely been eliminated in these days of computerised research, but *Sturges v Bridgman* would have been quite an easy case to find by the old technique of going to a library shelf.

<sup>69</sup> *Ibid* 201.

but he will have done so with very limited training at best in the use of primary legal sources, and those cases, including *Sturges*, are difficult cases. As we have said, Coase made no pretension to ability in legal scholarship, and his discussion of *Sturges v Bridgman* as we have examined it so far would lead one to think he was wise not to do so. We nevertheless cannot but feel that Simpson has been somewhat parochial and extremely uncharitable about all this. To purport to actually discuss legal cases in detail in an article of the nature of TPoSC as Coase did was an extraordinary thing for an economist to do in 1960. More importantly than leaving oneself open to possible exposure of error by lawyers, one certainly courted flat incomprehension or rejection by economists, and this is really what overwhelmingly happened to Coase's other than purely theoretical argument for more than two decades after his article was published.

The story of how Coase defended his analysis as he had first formulated it in 'The Federal Communications Commission' before some of the Faculty of the Department of Economics at Chicago, and how this led to his being invited to write up the argument more fully in the form it eventually took in TPoSC, is too well known to need rehearsing here.<sup>70</sup> But this important instance of Coase persuading an initially sceptical audience of economists is an exception that proves a rule. Much more typical of the reception of TPoSC was Arrow and Scitovsky's decision not to include it in pt III, on 'Social and Private Costs and Benefits,' of the essays on welfare economics they collected in 1969 as volume XII of the American Economic Association's very prestigious Series of Republished Articles in Economics. 'Unfortunately,' Arrow and Scitovsky told us, Coase's article 'with its many legal examples, was too long for inclusion here.'<sup>71</sup> We ourselves think that Coase took an enormously bold step in giving reported cases such prominence in TPoSC, for which Simpson does not give

<sup>70</sup> This is summarised by Coase in his reply to Simpson: Coase, above n 4, 107.

<sup>71</sup> Kenneth J Arrow and Tibor Scitovsky (eds) *Readings in Welfare Economics* (George Allen and Unwin, 1969) 184.

him any credit, and, amazing to say, for which we do not think he has since generally received sufficient credit.

The enormous credit Coase has received for work in the vein of TPoSC largely been for advocating the Coase Theorem as a guide to practical policy.<sup>72</sup> Although Coase stressed that the government, the ‘custodian of the frequencies,’<sup>73</sup> had an essential role in ‘the creation of ... rights in the use of ... frequencies,’<sup>74</sup> it is fair to say that Coase did have something like the Coase Theorem in mind as the impulse for his plea for replacing administrative allocation of broadcasting frequencies by government with a market-based solution. But already in TPoSC his arguments were expressed in a much more nuanced fashion as a result of [his the](#) explicit consideration of [the effect of](#) transaction costs on the results of his analysis.<sup>75</sup> There is thus more than a little to his repeated complaints that his ‘point of view has not in general commanded assent, nor has my argument, for the most part, been understood.’<sup>76</sup>

The extensive discussion [of TPoSC] in the journals has concentrated almost entirely on the “Coase Theorem”, a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be ... if I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers ... discussion of the Coase Theorem is ... but a preliminary to the development of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>77</sup>

<sup>72</sup> After it had been rescued from obscurity, the way *The Nature of the Firm* has influenced discussion of industrial organisation has much more commonly been based on an essentially accurate interpretation of Coase’s actual argument in that article. It is, however, a puzzle that Coase did not comment on the way that the ‘agency theory’ of the firm, to which economists he admired made major contributions, completely contradicts his views.

<sup>73</sup> Coase, above n 13, 21.

<sup>74</sup> *Ibid.*, 25-26.

<sup>75</sup> Matthias Klaes, ‘Transaction Costs, History Of’ in Lawrence Blume and Steven Durlauf (eds) *The New Palgrave Dictionary of Economics*, vol 8 (Palgrave Macmillan, 2<sup>nd</sup> ed, 2008) 363.

<sup>76</sup> Ronald H Coase, ‘The Firm, the Market and the Law’ in *The Firm, the Market and the Law*, above n 2, 1.

<sup>77</sup> *Ibid.* 15.

In sum, though ‘The world of zero transaction costs has often been described as a Coasean world ... Nothing could be further from the truth. It is the world of modern economic theory, one which I was hoping to persuade economists to leave’.<sup>78</sup>

Most economists, lawyers and social theorists still hold to Simpson’s representative position that Coase believed that the Coase Theorem *could* be a guide to practical policy. That Coase gave some sanction for this in the way he himself treated cases such as *Sturges v Bridgman* in TPoSC does not absolve those who remain wedded to such a restricted and simplistic reading of the article, but we shall now try to overall assess the extent to which Coase gave them a warrant for this.

#### V THE THEORETICAL SHORTCOMINGS AND THE THEORETICAL VALUE OF COASE’S ACCOUNT

##### *A Where Coase Went Quite Wrong*

It can hardly be denied that TPoSC is a poorly organised article and we wish to argue here that this poor organisation has played a considerable part in the widespread misunderstanding of its argument. It will be recalled that *Sturges v Bridgman* was one of four ‘actual’ cases discussed in section V in order to ‘clarify’ and ‘illustrate’ the previous argument which had set up what has come to be known as the Coase Theorem. But however laudable Coase’s wish to relate this theoretical argument to actual cases, to bring these cases in at this point was rather ill-advised, for, because they are actual cases, the last thing one could say about them is that they illustrate what would happen at zero transaction costs, which is the assumption on which Coase proceeds in section V. As Simpson put it: ‘if we turn from economic theory to the mundane world of legal decision, as exemplified in the story of

<sup>78</sup> Coase, ‘Notes on The Problem of Social Cost’, above n 18, 174. We have taken quotations from materials potentially available to Simpson in 1996. Coase’s later rejections of the Coase Theorem were often even more strongly stated, eg in a 2012 interview he said: ‘I never liked ‘the Coase Theorem’ ... I don’t like it because it’s a proposition about a system in which there were no transaction costs. It’s a system which couldn’t exist. And therefore it’s quite unimaginable’: Interview by Russ Roberts, *EconTalk*, 8 May 2012, [http://www.econtalk.org/archives/2012/05/coase\\_on\\_extern.html](http://www.econtalk.org/archives/2012/05/coase_on_extern.html)

*Sturges v Bridgman*[, then] the issue in the case, as seen by Sir George Jessell, had nothing to do with the question “whether the continued use of the machinery adds more to the confectioner’s income than it subtracts from the doctor’s”.<sup>79</sup> Coase, it must be said, principally got around this difficulty in section V by talking about bargaining which [simply](#) did not happen in the reported case and which certainly did not form part of its *ratio*.<sup>80</sup> In mitigation of what Coase did, one could say that he succumbed here to a typical methodological strategy of the economist: that of the hypothetical thought experiment. Once economists have established the key features of an economic setting, they will often then consider variations in those features, and this seems to underlie Coase’s procedure when he recast *Sturges v Bridgman* in a hypothetical bilateral bargaining setting which conveniently abstracts from any complexities arising in a world of positive transaction costs.

Ironically, *Sturges v Bridgman* was, as we have mentioned, an early case heard in the English civil courts reformed under the Judicature Acts passed, of course, in response to public disgust at the delay, error and expense of the civil legal process so memorably condemned by Dickens in *Bleak House*. But nevertheless, as Simpson repeatedly insisted, litigation such as *Sturges* was ‘very expensive,’<sup>81</sup> and ‘Given the costs of litigation,’<sup>82</sup> to use such a process to illustrate an economically efficient bilateral bargaining solution was, as we have said, rather ill-advised, for it was bound to mislead. Even though it might be allowed that his overall intentions are clear, one cannot but level at Coase’s use of *Sturges* (and the other cases in section V) the criticism he himself famously levelled at those economists who had used the lighthouse as an illustration of the argument for public goods: the illustration

<sup>79</sup> Simpson, above n 1, 29, 35.

<sup>80</sup> See, however, n 188 below.

<sup>81</sup> *Ibid* 19 n 25.

<sup>82</sup> *Ibid* 30, 31.

serves only ‘to provide “corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative”.’<sup>83</sup>

Coase began section VI, headed, ‘The Cost of Market Transactions Taken into Account,’ by saying that ‘The argument has proceeded up to this point on the assumption (explicit in sections III and IV and tacit in section V) that there were no costs involved in carrying out market transactions. This is of course a very unrealistic assumption.’<sup>84</sup> Section VI then proceeded on the basis of positive transaction costs, when, as we shall see, ‘The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used.’<sup>85</sup> In section VII, headed ‘The Legal Delimitation of Rights and the Economic Problem,’ Coase sought to show how, when transaction costs were positive, decisions were reached in a number of actual cases, and

<sup>83</sup> Ronald H Coase, ‘The Lighthouse in Economics’ in *The Firm, The Market and the Law*, above n 2, 187, 211. Coase was borrowing a line from WS Gilbert’s libretto for *The Mikado*. This article has itself been criticised for not getting the relevant facts right: Elodie Bertrand, ‘The Coasean Analysis of Lighthouse Financing: Myths and Realities’ (2006) 30 *Cambridge Journal of Economics* 389. Coase’s work is at the moment being subjected to a general criticism in this regard since his overall aim when applying empirical argument was in most cases illustrative rather than systematic, and in many instances was based on selective reference to secondary literature or official material. Those parts of his work that result from specialist, in-depth study of the relevant empirical context, and in his case his outstanding specialism was the broadcasting industry in general and the British Broadcasting Corporation in particular, do seem to have stood the test of time: Ronald H Coase, *British Broadcasting: A Study in Monopoly* (Longmans, Green and Co, 1950). See further Richard Collins and Zoe Sujon, ‘UK Broadcasting Policy: The “Long Wave” Shift in Conceptions of Accountability’, in Paolo Baldi and Uwe Hasebrink (eds) *Broadcasters and Citizens in Europe* (Intellect, University of Chicago Press, 2007) 39, 42; Andrea Prat and David Strömberg, ‘The Political Economy of Mass Media’, in Daron Acemoglu, Manuel Arellano and Eddie Dekel (eds) *Advances in Economics and Econometrics, Tenth World Congress*, vol II (Cambridge University Press, 2013) 181.

<sup>84</sup> TPoS. above n 2, 114.

<sup>85</sup> Coase, ‘Notes on the Problem of Social Cost’, above n 18, 178. The most succinct statement of his actual position can be found in his Nobel Lecture, Coase, ‘The Institutional Structure of Production’, above n 18, 11:

If we move from a regime of zero transaction costs to one of positive transaction costs, what becomes immediately clear is the crucial importance of the legal system in this new world ... While we can imagine in the hypothetical world of zero transaction costs that the parties to an exchange would negotiate to change any provision in the law which prevents them from taking whatever steps are required to increase the value of production, in the real world of positive transaction costs such a procedure would be extremely costly and would make unprofitable, even when it was allowed, a great deal of such contracting around the law. Because of this, the rights which individuals possess, with their duties and privileges, will be, to a large extent, what the law determines. As a result, the legal system will have a profound effect on the working of the economic system and may in certain respects be said to control it.



we shall argue that he was theoretically right about this. The opportunity surely was there to contrast how cases would have been decided at zero transaction costs in section V (illustrative of sections III-IV) with how they were decided when transaction costs were positive in section VII (illustrative of section VI).

But of the four cases discussed in section V, Coase returns only to *Sturges v Bridgman* in section VII,<sup>86</sup> and the contrast does not at all emerge between its treatment there (when transaction costs are positive) and in section V (when transaction costs are zero). This was for two very good reasons. First, as we have examined it so far, the account Coase gave of the case in section V was entirely made up, in line with his use of the case as a hypothetical, although any fair reading would take what Coase said to be an account of what actually happened in the case. Secondly, when Coase did turn to the actual decision in *Sturges v Bridgman* in section V, at the end of the longer, second paragraph of his discussion of the case, he anticipated what he should have said, but only very briefly and unsatisfactorily did say, in section VI, when that material simply does not belong in section V. Coase no doubt was right to complain of the very pronounced focus on sections III and IV, and corollary neglect of ‘other aspects of the analysis,’ in commentary on TPoSC,<sup>87</sup> but it must be said he invited it. What he did was path-breaking, but it was also very confusing. Much subsequent work of reinterpretation has been required to dispel this confusion. But in the course of this work, many commentators have actually moved away from the bargaining framework for economics fundamentally offered by Coase, and it is in this sense that we here seek to, as it were, complete this reinterpretation by relating it back to the detail of the argument of TPoSC itself.

<sup>86</sup> TPoSC, above n 2, 122-23.

<sup>87</sup> Coase, above n 76, 13.

### B *Where Coase was Very Right*

If, as Simpson was right to claim, the parties in *Sturges v Bridgman* and the judges hearing the case understood it as a case of a clash of incompatible unqualified property rights, then one is obliged to ask why and how that clash was resolved in the doctor's favour. As we have seen, the principal legal question actually addressed in the case was, it being immediately taken the confectioner was causing a nuisance, whether he had acquired a prescriptive right to do so, and it was decided that, despite the confectioner having long used the machinery in the way of which the doctor complained, he had not. Continuing to put the common law and statute of prescription to one side, we want to address the vital question which surely arises for the understanding of the case and for understanding the doctrinal and theoretical issues in the law of nuisance which underpin it: why was it believed to be so obvious that the confectioner was committing a nuisance?

To the layperson and to students first coming to the case, the very peculiar feature of *Sturges v Bridgman* is that, though the confectioner was liable, it was the doctor who, in the view of the layperson and the neophyte, caused the nuisance. The confectioner (and his Father) had carried out the same business on the same premises for more than 60 years and had been using the machinery in the way of which the doctor complained for 26 years prior to the litigation.<sup>88</sup> It was only when in 1873, five years before the matter reached the Chancery Division, that the doctor built the consulting room, one of the walls of which was a party-wall with the confectioner, that the nuisance arose.<sup>89</sup> The wall was built to normal standards, but being a party-wall it very effectively transmitted the noise and vibration. Tort students

<sup>88</sup> *Sturges v Bridgman*, above n 3, 853-54 (Ch D, Eng). Simpson, above n 1, 11, 13-14, very helpfully gave previously unknown concrete details of this aspect of the case, of which torts scholars (and TPoSC, above n 2, 105) had been only generally aware from the reporter's statement of the facts (*Sturges v Bridgman*, above n 3, 853-54), particularly that Dr Sturges only began to lease the premises in 1865, and lived and conducted his profession there without any problem until he built the consulting room eight years after moving in.

<sup>89</sup> *Ibid* 855 (Ch D, Eng).

typically struggle to appreciate how the doctor was able to, as they initially see it, cause the problem and yet the confectioner be held liable for the nuisance.

*Sturges v Bridgman* is now mainly known as authority for the paradoxical proposition that a plaintiff can ‘move (or come) to a nuisance.’ This possibility arises from the nature of the modern law of private nuisance. That law does not prevent ‘interference’ with the enjoyment of land. It prevents ‘unreasonable’ interference with such enjoyment. This, of course, makes determining whether the interference, and the use that gives rise to the interference, is reasonable or unreasonable central to the tort. The modern law of nuisance is, not a matter of unqualified property rights, but rather is wholly contingent.<sup>90</sup> The legal history of the emergence of the modern law of nuisance has been most informatively described in celebrated articles by Professors Brenner and McLaren<sup>91</sup> as a process by which distance was

<sup>90</sup> David Campbell, ‘Of Coase and Corn: A (Sort of) Defence of the Law of Private Nuisance’ (2000) 63 *Modern Law Review* 197, 203.

<sup>91</sup> Joel Franklin Brenner, ‘Nuisance Law and the Industrial Revolution’ (1974) 3 *Journal of Legal Studies* 403 and John PS McLaren, ‘Nuisance Law and the Industrial Revolution: Some Lessons from Social History’ (1983) 3 *Oxford Journal of Legal Studies* 155. See further Ben Pontin, ‘Tort Law and Victorian Government Growth: The Historiographical Significance of Tort in the Shadow of Chemical Pollution and Factory Safety Regulation’ (1998) 18 *Oxford Journal of Legal Studies* 661. A very valuable later contribution has added to our understanding of the relationship of common law and public regulation: Noga Morag-Levine, *Chasing the Wind* (Princeton University Press, 2009) ch 3.

In his more recent work, Pontin has sought to revisit the issue of the relative importances of the substance of and of access to the law raised by Brenner and McLaren. Despite its great interest, the only brief discussion of Simpson in this work renders it somewhat tangential to the core issues we wish to discuss and, for reasons of space, we cannot properly consider this [nuanced](#) work here: Ben Pontin, ‘Integrated Pollution Control in Victorian Britain: Rethinking Progress within the History of Environmental Law’ (2007) 19 *Journal of Environmental Law* 173; B. Pontin, ‘The Secret Achievements of Nineteenth Century Nuisance Law: *Attorney-General v Birmingham Corporation* (1858-95) in Context’ (2007) 19 *Environmental Law and Management* 271; Ben Pontin, ‘*Tipping v St Helens Smelting* (1865): “Anti-development” or “Sustainable Development”?’ (2007) 19 *Environmental Law and Management* 157; Ben Pontin, ‘Nuisance Law and the Industrial Revolution: A Reinterpretation of Doctrine and Institutional Competence’ (2012) 75 *Modern Law Review* 1010; ~~and~~ Ben Pontin, ‘The Common Law Clean Up of the “Workshop of the World”: More Realism About Nuisance Law’s Historic Environmental Achievements’ (2013) 40 *Journal of Law and Society* 173 [and Ben Pontin, \*Nuisance Law and Environmental Protection\* \(Lawtext Publishing, 2013\).](#)

Pontin, ‘Nuisance Law and the Industrial Revolution’, *loc cit* n 68 and Pontin, ‘Common Law Clean Up’, *loc cit* nn 4, 5, [and Pontin, \*Nuisance Law and Environmental Protection\*, \*loc cit\* 68, 83, 92-95](#) cite AW Brian Simpson, ‘Victorian Judges and the Problem of Social Cost: *Tipping v St Helen’s Smelting Company* (1865)’ in *Leading Cases in the Common Law* (Oxford University Press, 1995) 163 in support of Pontin’s [more](#) recent argument. Simpson’s treatment of this famous case is discussed in the text accompanying note 121 below.

For the same reason that we do not discuss Pontin’s recent work, we also do not discuss the very valuable Leslie Rosenthal, *The River Pollution Dilemma in Victorian England* (Ashgate, 2014).

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taken from the maxim *sic utere tuo ut alienum non laedas*,<sup>92</sup> under which the defendant was subject to strict, if not absolute,<sup>93</sup> liability for any interference. Liability depends on ‘what is reasonable [use] according to the ordinary usages of mankind living in ... a particular society’<sup>94</sup> and ‘is a matter of balancing the conflicting interests of the two neighbours.’<sup>95</sup> Under ‘the rule of give and take,’<sup>96</sup> occupiers must accept as much interference with each other’s enjoyment as is reasonable in the neighbourhood in question.

The principal reason given for why nuisance liability has come to be decided on a give and take basis rather than by adherence to the *sic utere* maxim is that the latter would hinder or even prevent economic growth. The spirit of the ‘reasonable use’ at the core of the English law of private nuisance is as it was expressed in 1858 in *Hole v Barlow*:

It is not everybody whose enjoyment of life and property is rendered uncomfortable by the carrying on of an offensive or noxious trade in the neighbourhood that can bring an action. If that were so ... the ... great manufacturing towns of England would be full of persons bringing actions for nuisances arising from the carrying on of noxious or offensive trades in their vicinity, to the great injury of the manufacturing and social interests of the community.<sup>97</sup>

By broadly regarding industrial pollution as reasonable interference, the law of private nuisance made, it is argued, industrialisation possible.

<sup>92</sup> *Broom’s Legal Maxims* (10<sup>th</sup> ed, 1939) 238: ‘enjoy your own property so as not to injure that of another person.’

<sup>93</sup> A very great deal of what one does on one’s own land can be shown by the standards of the physical sciences to ‘interfere’ with neighbouring land, but the *sic utere* rule did not, of course, turn on these standards. The law of nuisance has always in part distinguished reasonable and unreasonable interference by regarding some interference as *de minimis* or, perhaps part of the same idea, so much an inevitable, and practically irreparable, part of social co-existence as to be *damnum sine injuria*. This is the background to the difficulty of Coase’s reference to the ancient windmill case, above n 14, which seems to turn on obstruction of the general flow of wind.

<sup>94</sup> *Sedleigh-Denfield v O’Callaghan* [1940] AC 880, 903 (HL, Eng).

<sup>95</sup> *Miller v Jackson* [1977] QB 966, 981 (CA, Eng)

<sup>96</sup> *Bamford v Turnley* (1862) 3 B and S 66, 84; 122 ER 27, 33 (Ex Ch, Eng).

<sup>97</sup> (1858) 4 CB(ns) 334, 335; 140 ER 1113, 1114 (CP, Eng). As in *Sturges v Bridgman*, Belgrave Square is given as a hypothetical example of a neighbourhood where industrial use unarguably would be a nuisance. See also *AG v Doughty* (1752) 2 Ves Sen 453; 28 ER 290 (Ch Ct, Eng). Coase cites *Doughty* in a note to section VII (TPoSC, above n 2, 121 n 18) and gives as a US comparison the obscurely reported but nevertheless well-known *dictum* of Musmanno J in *Versailles Borough v McKeesport Coal and Coke Co*, 83 Pittsburgh Legal Journal 379, 385 (Allegheny (PA) County Court of Common Pleas 1935, USA): ‘Without smoke, Pittsburgh would have remained a very pretty village.’ Finding for the defendant smoke emitter, Musmanno J consoled the plaintiffs with the observation that ‘it is probable that upon reflection they will, in spite of the annoyance which they suffer, still conclude that, after all, one’s bread is more important than landscape or clear skies.’

*Sturges v Bridgman* illustrates the contingent nature of private nuisance particularly well. In what had been a manufacturing neighbourhood but was at the time of the case an ‘improving’ neighbourhood becoming dominated by professional practices and concomitant residential use,<sup>98</sup> noise and vibration such as was being caused by the confectioner was a nuisance. If that noise and vibration had been caused in a neighbourhood dominated by manufacturing use and thought to have no other prospect, it would not have been a nuisance. This is the gist of the famous *dictum* we have already quoted that ‘what would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey.’<sup>99</sup> The particular difficulty arises, however, that neighbourhoods do not remain of the same character. A court faced with possible changing use must in effect decide which use is most valuable in order to decide whether there is a nuisance.

Though, as we have said, there is no actual discussion of why the confectioner’s use was regarded as a nuisance, the Belgrave Square hypothetical example sheds light on why this was so readily taken to be the case. Thesiger L.J. considered the confectioner’s argument that if the refusal to find that the confectioner’s use gave rise to a prescriptive right:

were carried out to its logical consequences, it would result in the most serious practical inconveniences, for a man might go - say into the midst of the tanneries of *Bermondsey*, or into any other locality devoted to a particular trade or manufacture of a noisy or unsavoury character, and, by building a private residence upon a vacant piece of land, put a stop to such trade or manufacture altogether. The case also is put of a blacksmith’s forge built away from all habitations, but to which, in course of time, habitations approach.<sup>100</sup>

To this Thesiger L.J. responded:

We do not think that either of these hypothetical cases presents any real difficulty. As regards the first, it may be answered that whether anything is a nuisance or not is a question to be determined, not merely by an abstract consideration of the thing itself, but in reference to its circumstances what would be a nuisance in *Belgrave Square* would not necessarily be so in *Bermondsey*; and where a locality is devoted to a particular trade or manufacture carried on by the traders or manufacturers in a particular and established manner not constituting a public nuisance, Judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong. As regards the blacksmith’s

<sup>98</sup> Simpson, above n 1, 12-13 again provides instructive detail about this process of improvement that previously tort scholars knew only in a general sense.

<sup>99</sup> *Sturges v Bridgman*, above n 3, 865.

<sup>100</sup> *Ibid.*

forge, that is really an *idem per idem* case with the present. It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand in an equally degree unjust, and, from a public point of view, inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption, and which the law gives no power to prevent. The smith in the case supposed might protect himself by taking a sufficient curtilage to ensure what he does from being at any time an annoyance to his neighbour, but the neighbour himself would be powerless in the matter. Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.<sup>101</sup>

When it is a question of a private resident moving into a neighbourhood it is believed will remain industrial, there is no nuisance. When it is a question of a blacksmith seeking to continue as a smith in an area thought to have prospects of becoming residential, there is a nuisance. When it is a question of a doctor moving into an industrial neighbourhood thought to have prospects of becoming one of professional use, there is a nuisance. To these possibilities considered in *Sturges v Bridgman* we should add the paradigm case that lies behind these other cases, of the industrial polluter beginning production in a formerly unpolluted neighbourhood but where industrial use is thought to be the future, when the industrial use and the interference by pollution will be found to be reasonable. It seems to us perfectly sensible for Coase to call this ‘planning and zoning by the judiciary,’<sup>102</sup> and we take it to be a measure of Simpson’s failure to grasp the fundamental issue that he dismissively criticises the idea that a ‘zoning’ problem was involved at all.<sup>103</sup>

<sup>101</sup> Ibid. Jessell MR had considered the blacksmith example below, *ibid* 858-59, and his view was that the blacksmith should not be allowed effectively to prevent residential development when land ‘which is useless as a barren moor ... becomes available for building land by reason of the growth of a neighbouring town’ because this would be to say ‘that the owner has lost the right to this barren moor, which has now become worth perhaps hundreds of thousands of pounds, by being unable to build upon it by reason of this noisy business?’

<sup>102</sup> TPoSC, above n 2, 123; quoting Charles M Haar, *Land-use Planning: A Casebook on the Use, Misuse and Re-use of Urban Land* (Little Brown, 1959) 95 (now Charles M Haar and Michael Allan Wolf (4<sup>th</sup> ed, 1986) 90). This phrase is to be found in a chapter entitled ‘Reconciliation by the Judiciary of Discordant Land Uses.’ See further the treatment of the ‘limitations’ of the *sic utere* rule and ‘planning by private law devices’ in Charles M Haar and Michael Allan Wolf, *Land-use Planning and the Environment* (Environmental Law Institute, 2010) ch 2.

<sup>103</sup> Simpson, above n 1, 12-13. See further *ibid* 22.

In TPoSC, Coase refers to the passage from the Court of Appeal's judgment we have just quoted as evidence that 'the judges were thinking of the economic consequences of alternative decisions.' One must read this in the context of the general observation Coase makes that, though it 'would be of great interest' to do so, he had 'not been able' to make 'A thorough examination of the presuppositions of the courts in trying such cases,' but that nevertheless his 'cursory study' had shown 'that the courts have often recognised the economic implications of their decisions,' albeit that they 'do not always refer very clearly to the economic problems posed by the cases brought before them.'<sup>104</sup> Read in this context, his view of the nuisance aspect of *Sturges v Bridgman* is wonderfully penetrating. It is, in our opinion, not merely the best but the only basis of an explanation of the give and take basis of the modern law of nuisance in general: 'a comparison between the utility and harm produced is an element in deciding whether a harmful effect should be considered a nuisance ... the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and how resources are to be employed.'<sup>105</sup> That this explanation needs to be restated in terms more conversant with the legal doctrines of nuisance seems almost a carping criticism when set next to the fact, a remarkable achievement by anyone, not merely one who made no pretence to competence in legal scholarship, that it *can* be set out in such a way.<sup>106</sup>

It will be recalled that in our earlier discussion of Coase's treatment of *Sturges v Bridgman* in section V of TPoSC we mentioned that Coase ended the first paragraph of that analysis, which purports to be of the actual argument in the case but is not, with an

<sup>104</sup> TPoSC, above n 2, 119-20, 123.

<sup>105</sup> Ibid 120, 132-33.

<sup>106</sup> It is very instructive to compare the doctrinally superficial but theoretically profound discussion of the requirement that a nuisance be 'substantial' in TPoSC with the almost simultaneous, but independently arrived at, doctrinally impeccable discussion of that requirement in Guido Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1961) 70 *Yale Law Journal* 499, 534-40.

unattributed quotation from the Court of Appeal’s judgment.<sup>107</sup> It is the concluding sentence clause of the concluding sentence of the long quotation just given:

Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes.<sup>108</sup>

It will also be recalled that we also ended our discussion of Coase’s analysis in section V before the end of its second paragraph, at the start of a passage we now quote in full:

It was of course the view of the judges that they were affecting the working of the economic system - and in a desirable direction. Any other decision would have had “a prejudicial effect upon the development of land for residential purposes,” an argument which was elaborated by examining the example of a forge operating on a barren moor, which was later developed for residential purposes. The judges’ view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.<sup>109</sup>

As an analysis of the actual arguments which were, or might have been, made in the case, this is completely inaccurate. It had no business being made part of an account of *Sturges v Bridgman*. It had no business appearing in section V at all because it is worse than useless as an illustration of the Coase Theorem. But as an analysis of the background thinking that led to the courts that heard the case to believe that the nuisance issue (which to the layperson and the neophyte is a particularly vexed one) was so straightforward that it needed no more than a gestural discussion, it is seminal.

## VI ANALYSIS OF THE DETAIL OF SIMPSON’S CRITICISM

Simpson, as we have seen, accepts none of this and we have argued that there are three main points to the criticism which leads him to refuse to do so: the Coase Theorem is ‘purely theoretical,’ deciding nuisance cases ‘does not,’ as a matter of positive law and economics,

<sup>107</sup> See text accompanying n 21 above and Appendix B.

<sup>108</sup> *Sturges v Bridgman*, above n 3, 865.

<sup>109</sup> TPoSC, above n 2, 106-107. See Appendix B.



‘entail attempting to reach an economically efficient solution,’ and, as a matter normative law and economics, solving nuisance cases by means of Coasean bargaining would be ‘offensive.’ Let us consider each of these in turn.

*A The Coase Theorem is ‘Purely Theoretical’*

It is helpful here to juxtapose two passages which we have quoted above expressing Simpson’s principal criticism of the Coase Theorem and Coase’s own views about that Theorem:

the Coase Theorem ... is of course a purely theoretical view as to what would happen in a world which does not exist ... Coasean cost benefit analysis bears no relationship at all to how neighbours behave in real life situations ... It may be that in some imagined world some such analysis would take place, but lawyers are concerned with the real world. Law involves practical reason. It is unclear to me what lawyers can learn from an imagined world ... the whole idea of an ideally efficient solution is itself, from a practical point of view, vacuous ... whatever the theoretical utility of the ideal conception of economic efficiency may be, it is devoid of empirical or practical significance. It is the crock of gold at the end of a rainbow.<sup>110</sup>

The extensive discussion [of TPoSC] in the journals has concentrated almost entirely on the “Coase Theorem”, a proposition about the world of zero transaction costs. This response, though disappointing, is understandable. The world of zero transaction costs, to which the Coase Theorem applies, is the world of modern economic analysis, and economists feel quite comfortable handling the intellectual problems it poses, remote from the real world though they may be ... ~~if~~ I am right, current economic analysis is incapable of handling many of the problems to which it purports to give answers ... ~~Th~~ discussion of the Coase Theorem is ... but a preliminary to the development of an analytical system capable of tackling the problems posed by the real world of positive transaction costs.<sup>111</sup>

Though it understandably drew a rebuke from Simpson as the complaint should have been better put,<sup>112</sup> we think Coase was entitled to complain that Simpson did not grasp the important argument that had emerged in the vast literature on TPoSC that the Coase Theorem *is* purely theoretical and of no direct value in the formulation of policy.<sup>113</sup> By 1996,<sup>114</sup> the year the debate we are discussing was published, the belief that Coase thought that the Coase Theorem could have such a value had been shown to be quite wrong. The way was led by

<sup>110</sup> Simpson, above n 1, 18, 32, 40.

<sup>111</sup> Coase, above n 76, 15.

<sup>112</sup> Simpson, above n 5, 101.

<sup>113</sup> Coase, above n 4, 105.

<sup>114</sup> David Campbell, ‘On What is Valuable in Law and Economics’ (1996) 8 *Otago Law Review* 489, 498-505.

Medema in economic history<sup>115</sup> and Schlag in law,<sup>116</sup> but Coase himself was the main contributor. Simpson seems to have had some inkling that his criticisms of Coase were not entirely accurate.<sup>117</sup> But a complete lack of sympathy with ‘economic rationality’ prevented him from seeing that Coase was one of the most a-radical (and successful) critics of key dimensions of the neo-classical modern economies in the mainstream line neo-classical of modern economic tradition, and this led Simpson continually to attribute to Coase positions it was the entire purpose of TPoSC to reject. The issues of theoretical interest in the interpretation of Coase now lie elsewhere,<sup>118</sup> and there is no need to show that Simpson profoundly misunderstands Coase’s theoretical views in general. But let us take up those parts of his misunderstanding that have a direct bearing on the law of nuisance as it is and as it could be.

*B Solving Nuisance Cases ‘Does Not Entail Attempting to Reach an Economically Efficient Solution’*

We have argued that Coase was right to maintain that some notion of economic efficiency does lie behind decision-making in nuisance cases. As we have seen, Simpson flatly denied this, and, as a matter of legal history, he claimed that: ‘After some controversy it came to be settled in mid-nineteenth century common law that this basic principle was not to be displaced by the public interest in economic development.’<sup>119</sup> Making this claim involved him taking a very different line than the works of legal history which argued that the modern

<sup>115</sup> Medema’s first contribution was Steven G Medema, ‘The Myth of Two Coases: What Coase Is Really Saying’ (1994) 28 *Journal of Economic Issues* 208.

<sup>116</sup> Schlag’s first contribution was Pierre Schlag, ‘An Appreciative Comment on Coase’s The Problem of Social Cost: A View from the Left’ [1986] *Wisconsin Law Review* 919. Schlag was able to build on points which had been raised by Calabresi, but Calabresi’s first article, as it were, dedicated to the reinterpretation of Coase was Guido Calabresi, ‘The Pointlessness of Pareto: Carrying Coase Further’ (1991) 100 *Yale Law Journal* 1211.

<sup>117</sup> Eg Simpson, above n 1, 17.

<sup>118</sup> David Campbell and Mathias Klaes, ‘The Principle of Institutional Direction: Coase’s Regulatory Critique of Intervention’ (2005) 29 *Cambridge Journal of Economics* 263, 277.

<sup>119</sup> Simpson, above n 1, 38.

law of nuisance is based on its distance from the *sic utere* rule to which we have previously referred, and he did so, not so much in the article we are discussing, but in a chapter of his *Leading Cases in the Common Law* written at about the same time.<sup>120</sup> This chapter examined a very important Victorian nuisance case which Simpson claimed resolved the conflict between the *sic utere* and the give and take principles in favour of the former: *St Helen's Smelting Co v Tipping*.<sup>121</sup> Simpson's outstanding eminence as a legal historian and the fact that he is but recently deceased make one reluctant to say, as we are obliged to do, that his doing this involved misinterpreting both *Tipping*, which actually was part of the process of abandonment of the *sic utere* rule, and of one of the important works of legal history we have mentioned.

In *Tipping* a private landowner obtained an injunction against a neighbouring copper smelting works and ultimately forced the works to close. Very noxious emissions, principally from a chimney less than half a mile from the landowner's property, were found to have *inter alia* damaged trees and other cultivated plants on the property. But *Tipping* turned on a distinction which was drawn between 'material injury to the property,' such as the visible damage done to the trees and plants, and more general 'inconvenience and interference with one's enjoyment,'<sup>122</sup> and this distinction has been repeatedly observed in subsequent nuisance cases. This distinction is, of course, ultimately unsustainable and irrelevant to the basic issue anyway, but its significance is that it effectively condoned industrial pollution of a general sort. In the terms Simpson used in the article we are discussing, *Tipping* is a landmark case in the erosion of protection from 'less tangible interference' that he thought it was the very

<sup>120</sup> Simpson, above n 91. In a 2001 edition of *Leading Cases* the preface and the publishing record of which leads one to think it is simply a reprint of the 1995 edition, a reference to the article we are discussing was added: AW Brian Simpson, *Leading Cases in the Common Law* (Oxford University Press, reprint ed, 2001) 194 n 126. This chapter was cited in support of the argument of the article we are discussing: Simpson, above n 1, 38.

<sup>121</sup> (1865) XI HL Cas 642; 11 ER 1483 (HL, Eng).

<sup>122</sup> *Ibid* 650; 1486.

function of the law of nuisance to provide.<sup>123</sup> Simpson unintentionally actually provided what we believe was formerly unknown evidence of this erosion when he told us that, after being forced to close, ‘the company moved its operations ... some three miles away, from where it could continue to pollute the [plaintiff’s] estate, albeit much less severely.’<sup>124</sup> Having shown that the [plaintiff](#) landowner, an extremely rich and eccentrically obstinate person, had been prepared to spend simply enormous effort and expense on winning the action he brought, Simpson does not explain this plaintiff’s acceptance of what he must have found just as intolerable an interference in his strict rights, were those rights strict.<sup>125</sup> The only explanation is that private nuisance rights are not strict but are inherently contingent in the way we have claimed.

The account of *Tipping* we have just given condenses that of Brenner as essentially affirmed by McLaren.<sup>126</sup> These works are cited in Simpson’s chapter on *Tipping* but not discussed in any detail.<sup>127</sup> He does, however, sum up McLaren’s work, in praise of which he is fulsome,<sup>128</sup> thus: ‘J.P.S. McLaren, in a notable study ... has shown how the common law of nuisance played a relatively unimportant part in controlling pollution, not primarily because of its doctrinal form, but because other social and institutional factors diminished its utility.’<sup>129</sup> By these factors Simpson means the transaction costs of legal action and the unequal distribution of the capacity to absorb those costs consequent upon inequality of wealth. These obviously are highly important, and in his article McLaren examined the

<sup>123</sup> Simpson, above n 1, 38.

<sup>124</sup> Simpson, above n 91, 191.

<sup>125</sup> *Ibid.* Simpson also tells us that the plaintiff did not even try to obtain an injunction, which was the only remedy he would have thought adequate, against another somewhat more distant smelting works, but offers only what seems to be a very insufficient reason for this.

<sup>126</sup> Brenner, above n 91, 212-25 and McLaren, above n 91, 156-58.

<sup>127</sup> Simpson, above n 91, 172 note 35.

<sup>128</sup> In the first version of the article we are discussing he describes this article as ‘a classic’: Simpson, ‘Coase v Pigou Reexamined’, above n 1, 82.

<sup>129</sup> Simpson, above n 91, 193.

relative significance of ‘what the courts said and did’ and of ‘institutional or social impediments to suit’ as factors ‘which hampered legal action to counteract industrial pollution,’<sup>130</sup> and essentially concluded, he maintains *contra* Brenner, that the latter played a far greater role than the former in rendering the common law impotent in face of the polluting effects of the Industrial Revolution.

But, though it happens that we have a number of points of disagreement with McLaren, on the point of interest here, the substance of the legal doctrine, we have no disagreement. The analysis McLaren puts forward essentially is that of Brenner, with which McLaren himself did not disagree. McLaren summarises Brenner’s analysis thus:

In essence, what the courts, and especially the House of Lords in *St Helen’s Smelting Co v Tipping*, did was to take the traditional maxim of *sic utere tuo ut alienum non laedas*, which prior to the nineteenth century had always worked in favour of hallowed residential and agricultural uses of land, and to redefine it, giving it a more relative quality which allowed for sympathetic discussion of the economic context and social utility of industrial activity.<sup>131</sup>

Of this analysis, McLaren says: ‘As far as his analysis goes, there is no doubt that Brenner is correct.’<sup>132</sup> With respect, it is quite wrong, then, of Simpson to use McLaren’s article as support for his argument about the substance of the law of nuisance as opposed to the social effect, or lack of social effect, of the common law. The views of Brenner on the substance of the law, not challenged by McLaren, contradict Simpson’s argument.

It is, in truth, impossible to deny that use of the language of ‘economics’ is not uncommonly to be found in the judgments in the leading nineteenth century nuisance cases,

<sup>130</sup> McLaren, above n 91, 159.

<sup>131</sup> Ibid 157. In his article which we are discussing, Simpson, above n 1, 10 n 3, 12 n 3, 19 n 25 refers to McLaren three times, on the first and third occasions in connection with points not in dispute here but on the second to make a claim about McLaren’s argument that we suspect involves the misinterpretation of McLaren which we believe we have identified. Brenner’s conclusion about *Tipping*, above n 91, 413-14, was that:

*St Helen’s* made actions in respect of discomfort virtually impossible in the industrial Midlands and in [similar] regions such as Swansea and Cardiff. This is not to say that a successful action in respect of discomfort caused by an industrial nuisance was no longer conceivable in an industrial town, but the discomfort would have had to be direct, immediate, and obviously physical as in trespass. An eye put out by a cinder would have done, but not severe personal discomfort.

McLaren’s comment that Brenner’s analysis is correct so far as it goes specifically includes this view of *Tipping*.

<sup>132</sup> McLaren, above n 91, 158.

including *Sturges v Bridgman* and *St Helen's Smelting Co v Tipping*, in much the jumbled way that Coase claimed, and, having, as we have seen, told us that 'the common law rejected the idea of permitting the economically efficient level of pollution,' Simpson then said:

However, the judges, and no doubt juries, in determining what is to count as an actionable nuisance, which is bound to involve questions of degree, have always accepted the idea that some level of mutual tolerance and adjustment between landowners is necessary if life is to go on, given the fact that effects of land use are bound to cross boundaries, and no doubt a rough and ready economic calculus has been significant at the margins. To this weak extent the reciprocal nature of problems of conflicting land use has been accepted by the oracles of the law, and no doubt also by juries. But in so far as economic considerations have been taken into consideration this does not mean a rigorous system of analysis has replaced a less rigorous legal analysis; economic arguments, in so far as they feature in legal decisions, have been impressionistic only.<sup>133</sup>

If one acknowledges that all important cases are 'at the margins,' which is why they are important, and that Coase made no claim whatsoever about the rigour of the courts' approach, quite the opposite in fact, this is, in our opinion, an effective agreement with Coase's position.

The lack of sympathy that nevertheless led Simpson to press his criticism of Coase so doggedly ultimately turned on their differing conceptions of property rights and the role of such rights in economic and legal reasoning, and to this we now turn.

### *C Solving Nuisance Cases by Means of Coasean Bargaining Would Be 'Offensive'*

#### *1 Bargaining Outcomes and Imposition of Outcomes in Law and Economics*

Simpson was rightly of the belief that his criticism of Coase raised issues about the nature of the fundamental freedoms to be enjoyed in liberal democratic society. It will be recalled that he rejected the idea he attributed to Coase that the aim in nuisance cases should be to 'reach an economically efficient solution' because 'parties are not willing to place their rights in the market' and it would be 'offensive not to respect their unwillingness.' The offensiveness arises from the value of the institution of private property, the core of which [he](#) believed to be captured in Blackstone's conceptualisation of property as 'that sole and despotic dominion

<sup>133</sup> Simpson, above n 1, 38.

[to] one man ... over ... external things of the world, in total exclusion of the right of any other individual in the universe.’<sup>134</sup> Having quoted the relevant passage of *The Commentaries*,<sup>135</sup> Simpson said:

Despotic dominion is what the right of private property is all about, and it includes a right to behave in ways which make no contribution to the national wealth. If I own a Renoir or a Picasso I may refuse every offer to purchase it and do so since I have decided to burn it ... [in nuisance cases] notions of economic or social value are wholly irrelevant. They must be in a capitalist system which respects the right of private property, for it is not the business of the courts to substitute their despotic dominion to that of the litigants ... It does not in the least follow that in particular cases property rights should be allocated to those who will produce the most wealth ... the law allows gifts to be made to the feckless and improvident, and testamentary dispositions too. Nincompoops may inherit, and contracts of sale are in no way affected by the fact that the purchaser is a shopaholic who has not the least use for the goods he purchases.<sup>136</sup>

The point is, as Professors Korngold and Morriss, the editors who reprinted Simpson’s article, put it, that ‘Professor Simpson questions the use of *efficiency* as a guiding star for decisions and instead supports the *freedom* of owners to do what they like with their property, free of ... social engineering by courts.’<sup>137</sup> This article is written because we are in complete agreement about the value that Korngold and Morriss placed on this freedom. But it is this very freedom that informs Coase’s views, and those views far better articulate what is involved in economically and legally institutionalising that freedom than do Simpson’s own.

Simpson does not, in fact, believe in despotic dominion, for the very good reason that no-one can possibly believe in it.<sup>138</sup> At the level at which we need to engage with the issue,

<sup>134</sup> *Commentaries on the Laws of England*, vol 2, \*2.

<sup>135</sup> Simpson, above n 1, 34-35.

<sup>136</sup> *Ibid* 35, 37, 39.

<sup>137</sup> Gerald Korngold and Andrew P Morriss, ‘Introduction’ in Morris and Korngold (eds) above n 1, 1, 3-4. Simpson makes a very similar but in some respects superior argument in his chapter on *Tipping*, and there contrasts ‘economic analysis’ to an ‘ethical’ ‘concern’ with the protection of property rights: Simpson, above n 91, 175.

<sup>138</sup> Blackstone did conceive of private property as an ‘absolute’ right, and opposed such rights to ‘relative’ rights which ‘result from, and are posterior to the formation of states and societies’: *Commentaries on the Laws of England*, vol I, \*124. But, putting to one side the background understanding of natural and positive law which gives the distinction its full meaning, it is unsustainable as a distinction within the positive law of private property, and that law is always relative, even in Blackstone’s own treatment of it. When first placing property on the list of absolute rights, *ibid* vol I, \*138, he defines it as the ‘free use, enjoyment, and disposal of all his acquisitions without any control or diminution, *save only by the laws of the land* [emphasis added].’

Blackstone’s treatment, whilst of the first importance in a legal sense [of course](#), is not of great help in addressing the most profound theoretical issues: see further Charles S Telly, ‘The Classical Economic Model and the Nature of Property in the Eighteenth and Nineteenth Centuries’ (1978) 13 *Tulsa Law Journal* 406.

the point may be simply made. Even if, to use Simpson's example, we allow that one's private property in a Picasso may enable one to burn it,<sup>139</sup> one cannot burn it by throwing it on a fire that a neighbour has started to dispose of rubbish on her land, or burn it on one's own land in such a way that would unreasonably interfere with the neighbour's enjoyment of her land. One could go on. Social life inevitably imposes limits on despotic dominion. Simpson is, of course, perfectly well aware of this, and he spoke of the law of nuisance as a law which 'intervenes when either party engages in activities which significantly abridge the freedom of their neighbour.'<sup>140</sup> But he did not recognise that the issue is not social coexistence as such but the way that the law of nuisance institutionalises freedom of ownership so that, far from being absolute or even strict, it has been contingent, broadly giving a social engineering priority to economic growth over the *sic utere* rule. The very freedom that Simpson sought to protect is the freedom that it is of the nature of the positive law of private nuisance not to protect.

The fundamental theoretical point on which Simpson's argument turned was its failure to come to terms with the distinction between property rules and liability rules which may well be the most important conceptual innovation made within law and economics other than Coase's own contribution to the conceptualisation of the transaction cost.<sup>141</sup> Of the relevance of this distinction Simpson said:

Valuable though the distinction is, confusion can be caused here by contrasting entitlements protected by property rules from entitlements protected by liability rules, or property *rights* with liability *rules*. The statement of a property right is the statement of an entitlement which the law protects; in a sense it is a statement of an ideal ... The enthusiasm or intensity of protection varies,

<sup>139</sup> Simpson, above n 1, 35. We are grateful to Professor Robert Burrell for pointing out, however, that in many jurisdictions one's property right in a Picasso might not allow destruction of the painting. This is because, for at least as long as copyright continues to subsist (as it does in Picasso's works), the author's 'moral rights' would provide a right against destruction. This has long been true in civil law countries, but is also increasingly true in common law countries: eg 17 USC § 106A(3)(B): the author of a work of visual art shall have the right 'to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right' (USA). See also Copyright Act 1969 (Cth), s 195AK (Australia).

<sup>140</sup> Simpson, above n 1, 37.

<sup>141</sup> Guido Calabresi and A Douglas Melamed, 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral' (1972) 85 *Harvard Law Review* 1089.



so that in relation to personal property, much of which is fungible, orders for specific restitution are commonly not available. [With rights in land, specific recovery in cases of dispossession is available partly because it is more practicable, and partly because land is not treated as fungible.] To view this as a legal recognition that people can take other people's property so long as they pay for it seems to me to be profoundly mistaken. In the world we live in, which is partly structured by law, that is not the understanding. To do so will usually, but not always, constitute a criminal offence.<sup>142</sup>

Simpson's use of the word 'take' when he said that 'people can take other people's property so long as they pay for it' elides the basis of the distinction between property rules and liability rules [in a most instructive way](#). The distinction is not between economic goods which can and cannot be bought but between two different ways of determining the value at which the sale takes place.<sup>143</sup> Goods legally institutionalised by property rules may be bought only at a value subjectively determined by their private owner. Goods legally institutionalised by liability rules may be bought at a value objectively determined by the state.<sup>144</sup> A party therefore may buy a good institutionalised by a property rule only if she secures the voluntary agreement of the owner to the sale by offering what the owner believes is an acceptable price. That it is possible to take property by paying for it in this way is market exchange, though the word 'take' is inapt to describe a process based on voluntary agreement. On the other hand, it is possible to 'buy' a good institutionalised by a liability rule without the voluntary agreement of the owner by imposing what the state determines is the correct price. The obvious example is eminent domain, but regulated pricing of all types (including the regulation of terms which go to the adequacy of consideration) imposes a price on sales between private parties. The word 'take' is, to various degrees, apt to describe this process.

<sup>142</sup> Simpson, above n 1, 37. We have moved the sentence in square brackets.

<sup>143</sup> As we have just put it, this is in a sense misleading, but we will continue to speak in this way as the simplification involved is valuable and unobjectionable once one is clear one is making it. Simpson, *ibid*, rightly said that goods are a bundle of legal rules, including property and liability rules. He does not seem to be aware that Calabresi and Melamed, above n 141, 1093 made the same point. [Behind this point lies the fact that, As](#) all the institutions of modern society, including private property, rest on a constitutional framework provided by the state, ultimately there are no property rules. ~~but a~~ Nevertheless, [it is submitted](#), the distinction between such rules and liability rules retains its value. As it was put by WS Jevons, *The State in Relation to Labour* (Macmillan, 4<sup>th</sup> edn, 1910) 12: 'No laws, no customs, no rights of property are so sacred that they may not be made away with, if it can be clearly shown that they stand in the way of the greatest happiness. *Salus populi, suprema lex.*'

<sup>144</sup> [Calabresi and Melamed, above n 141, ~~ibid~~](#) 1092.

One who respects the sense of freedom involved in despotic dominion that Simpson endorses will find liability rules *prima facie* objectionable, but, of course, social engineering cases can be made out for them based on the public interest, and Simpson was, in fact, himself highly sympathetic to eminent domain.<sup>145</sup> In a celebrated lecture to the Selden Society on *Bradford v Pickles*,<sup>146</sup> Simpson strongly criticised the refusal of the law of England and Wales to develop a law of abuse of rights in order to curtail what Simpson saw (as it happens quite wrongly) as a private landowner's attempt to exercise his despotic dominion over water percolating through his land, to the frustration of the City of Bradford which wished to tap the water.

Simpson's strongly expressed views in this lecture completely contradict the views expressed in the article we are discussing and in his chapter on *Tipping*, but we will put this to one side. However, if one starts with an idea that private property in land should involve ownership on the *sic utere* basis which most closely approximates to despotic dominion, what is completely unacceptable about the positive law of private nuisance is, not that it places a value on allowing interference, but that it institutionalises a liability rule under which the value of the interference is determined by the courts and that value is often zero. If a nuisance is found but a perpetual prohibitory injunction is denied and compensatory damages awarded, the court determines the value of the interference. If interference is shown but it is found to

<sup>145</sup> AWB Simpson, *Victorian Law and the Industrial Spirit* (Selden Society, 1995). In the course of his argument in this lecture, Coase was once again criticised for putting forward 'some ideal theoretical world' in which 'everyone behaves with economic rationality': *ibid* 7. This lecture was the starting point for the definitive historical account of *Bradford v Pickles* in an equally celebrated book published in the series of *Oxford Studies in Modern Legal History* under Simpson's General Editorship: Mike Taggart, *Private Property and Abuse of Rights in Victorian England* (Oxford University Press, 2002). One of the current authors has discussed Simpson's lecture and Taggart's book elsewhere: David Campbell, 'Gathering the Water: Abuse of Rights after the Recognition of Government Failure' (2010) 7 *The Journal Jurisprudence* 487.

<sup>146</sup> *The Mayor, Alderman and Burgesses of the Borough of Bradford v Pickles* [1895] AC 587 (HL, Eng).

be reasonable so that there is no nuisance, the court is allowing that interference at zero cost.<sup>147</sup>

If the law of nuisance were to approximate to the institutionalisation of a property rule, then nuisance would have to be based on strict liability for interference rather than the give and take principle, and the normal remedy would have to be a perpetual prohibitory injunction.<sup>148</sup> This would be to grant a chose in action to the owner of the affected land and a neighbour whose use would lead to interference would have to buy off the injunction at a price which the owner voluntarily agreed. This obviously would be something like the hypothetical situation Coase examined in section III of TPoSC: ‘The Pricing System with Liability for Damage.’ If it was made similarly clear that no nuisance would be found (it is hard to conceive of the legal design of the necessary right), then this would be like the section IV hypothetical situation: ‘The Pricing System with No Liability for Damage.’ It certainly would be far more like these situations than the positive law of private nuisance.<sup>149</sup>

The problems with either of Coase’s hypothetical situations are manifest.<sup>150</sup> Once it is realised that the injunction can be bought off, it is not that ‘The Pricing System with Liability for Damage’ would simply prevent industrialisation. It is that, *prima facie*, the transaction costs of negotiating the permissions to interfere necessary to, for example, allow industrial

<sup>147</sup> For a review of the range of possibilities see Donald Harris et al, *Remedies in Contract and Tort* (Cambridge University Press, 2<sup>nd</sup> ed, 2005) 513-18. [An interesting comment – recent survey of the on UK law and practice](#) has [recently](#) been provided by Professor Ben Pontin, [who we have noted is](#) a leading authority on the Victorian history of nuisance ([and](#) ~~(whose work on this history is cited above n 91) above~~): [Ben Pontin, \*Nuisance Law and Environmental Protection\*, above n 91, ch 1. \(Lawtext Publishing, 2013\).](#)

<sup>148</sup> Richard A Epstein, ‘Nuisance Law, Corrective Justice and Its Utilitarian Constraints’ (1979) 8 *Journal of Legal Studies* 49. See further Richard A Epstein, ‘A Theory of Strict Liability’ (1973) 2 *Journal of Legal Studies* 151.

<sup>149</sup> The thought immediately strikes the tort lawyer that strict liability under ‘the rule in *Rylands v Fletcher*’ would, therefore, be the basis of a superior law: *Ryland and Horrocks v Fletcher* (1868) LR HL 330 (HL, Eng). But, without arguing it here, we believe that this rule has been so diluted that it is now as contingent as private nuisance. Simpson discussed *Rylands v Fletcher* in AW Brian Simpson, ‘Bursting Reservoirs and Victorian Law: *Rylands and Horrocks v Fletcher* (1868)’ in *Leading Cases in the Common Law*, above n 91, 195.

<sup>150</sup> Though in the paper we are discussing Simpson, above n 1, 34 is so insistent on despotic dominion that he simply denies the force of problems such as the hold-up problem. We put this to one side.

smoke pollution would be impossibly high. The result of liability for damage would, then, amount to much the same thing as simple prevention:

Once the cost of carrying out market transactions are taken into account, it is clear that ... a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions, the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.<sup>151</sup>

It would be much the same in the situation of ‘The Pricing System with No Liability for Damage,’ except, of course, that *prima facie* the transaction costs of negotiation would mean that ~~no substantial~~ limits ~~would~~ not normally be placed on general interference caused by industrial use. This is essentially what happened in Victorian Britain. But as the basis of the discussion in sections III and IV is that transaction costs are assumed to be zero, it inevitably follows that the optimal level of interference is established, whether or not there initially is liability, as a logical consequence of this assumption.<sup>152</sup>

The point is that, far from assuming this assumption did apply, Coase thought it would never apply, and in section VI turned his attention to the situation when ‘The Cost of Market Transactions [is] Taken into Account.’ We believe it is now possible to precisely identify the reason his argument in TPoSC encouraged confusion about that argument. To repeat: prior to section VI, Coase had in sections III and IV discussed the issues on the assumption of zero transaction costs, and in section V he illustrated this by reference to actual cases such as *Sturges v Bridgman*. It must be said that his accounts of those cases are, as we have shown in respect of *Sturges*, profoundly misleading, and this was necessarily the case because the assumption of zero transaction costs cannot possibly apply to actual cases. Coase’s way of illustrating his argument in section V is exceedingly unfortunate.

<sup>151</sup> TPoSC, above n 2, 115.

<sup>152</sup> Though Coase himself for a while engaged with it, we put to one side the problem whether the hold-up problem can be conceived as a consequence of transaction costs or a property of economic action regardless of transaction costs.

In section VII Coase engaged with these cases again after having, in section VI, dropped the assumption of zero transaction costs. The consequence of dropping this assumption is that the market may not yield the optimum outcome:

the assumption of zero transaction costs ... is, of course, a very unrealistic assumption [The operations necessary] In order to carry out a market transaction ... are often extremely costly, sufficiently costly at any rate to prevent many transactions that would be carried out in a world in which the pricing system worked without cost ... One arrangement of rights may bring about a greater value of production than any other. But the costs of reaching [this] result by altering and combining rights through the market may be so great that this optimal arrangement of rights may be so great that this optimal arrangement of rights, and the greater value of production it would bring, may never be achieved.<sup>153</sup>

In section VI this led Coase to consider the alternative governance structures of the firm and the government and, most importantly, to set up the principle of determining policy for the empirical world as 'one of choosing the appropriate social arrangement.'<sup>154</sup> Before turning to the significance of this, we must note that when in section VII Coase again turned to actual cases, including *Sturges v Bridgman*, now assuming that transaction costs are positive, his argument was that the decisions in those cases show that 'the courts directly influence economic activity'<sup>155</sup> when they reach judgments aware, if 'not always ... very clearly,'<sup>156</sup> of the reciprocal nature of the problem:

In a world in which there are costs of rearranging the rights established by the legal system, the courts, in cases relating to nuisance, are, in effect, making a decision on the economic problem and determining how resources are to be employed ... the courts are conscious of this and they often make ... a comparison between what would be gained and what would be lost by preventing actions which have harmful effects.<sup>157</sup>

Rather than facilitate the bargaining by which the parties determine the outcome, the courts are here themselves stipulating the outcome. This is an essentially accurate account of what does go on in nuisance cases. But this does not prevent the way Coase handled the point being extremely misleading in terms of the argument he sought to advance. Despite the

<sup>153</sup> Ibid 114-15.

<sup>154</sup> Ibid 118. There also is, Coase says here, the 'further alternative, which is to do nothing at all.'

<sup>155</sup> Ibid 119.

<sup>156</sup> Ibid 123.

<sup>157</sup> Ibid 133.

apparent realism of section V, the bargaining Coase described in TPoSC is the bargaining at zero transaction cost that in sections III and IV effectively sets up the Coase Theorem. Sections VI and VIII then allowed positive transaction costs, and, most curiously, bargaining played no further part whatsoever in Coase's argument! When transaction costs are positive, Coase, in section VI, considered the firm and government as alternative governance structures to common law decision-making, and then, in section VII, considered decision-making by the courts rather than decision-making by the parties, ~~the latter which~~ almost completely disappears from his article. The presence of transaction costs, which of course prevents theoretical Pareto efficiency being achieved, led Coase to drop bargaining as a plausible governance structure altogether, with the consequence that, incredible to say in light of the history of the interpretation of the article, there is actually no examination of the empirical use of 'Coasean bargaining' in TPoSC.

This was not, of course, Coase's intention, and it is a particularly difficult point of interpretation because the article on 'The Federal Communications Commission' of which, as we have mentioned, TPoSC was intended to be a generalising restatement, is a paradigmatic policy argument for Coasean bargaining, proposing what would now be called a quasi-market in broadcasting frequencies then thought of their nature to be public goods. But in the restatement in TPoSC, no positive proposals for bargaining when transaction costs are positive, or for the design of a legal framework for bargaining in these circumstances, are made. Having set out in section VI the reasons why we must consider the firm and government as alternative forms of 'appropriate social arrangement'<sup>158</sup> to the market, Coase returned to the factory emission of smoke which he took as a 'standard example' of a harm at the start of section I. In a very significant passage he almost immediately then said that it is 'particularly likely' that 'government administrative regulation' will 'lead to an improvement

<sup>158</sup> Ibid 118.

in economic efficiency' when, 'as is normally the case with the smoke nuisance, a large number of people is involved and ... therefore the costs of handling the problem through the market or the firm may be high.'<sup>159</sup> To the extent, [then](#), that Coase puts forward any concrete policy proposal in TPoSC, ~~then~~ it is in fact one of government intervention.

The significance of this has escaped the many who, like Simpson, believe Coase was extremely biased against such intervention,<sup>160</sup> for surely it is an instance of what we believe is most valuable in Coase, his insistence on even-handedness when choosing the 'appropriate social arrangement.'<sup>161</sup> Now it may well be the case that the factory smoke harm is unamenable to bargaining solutions, indeed it may be a paradigm case of a lack of such amenability, but it shows how little Coase was concerned in TPoSC, unlike in 'The Federal Communications Commission,' to actually explore the real world possibility of employing bargaining that the smoke harm was the first example he mentioned in section VI when, crucially, 'The Cost of Market Transactions [is] Taken into Account.'<sup>162</sup>

## [2 Coase and the Nature of Law and Economics](#)

—The principal confusion to which TPoSC has given rise is, as we can now see, caused by the way when, putting aside his wholly inaccurate use of actual cases such as *Sturges v Bridgman* to illustrate the Coase theorem, Coase describes what did happen in actual nuisance cases. This description is accurate, but it simply does not emerge that the description is not of bargaining solutions but of court imposition of solutions. Though it was a

<sup>159</sup> Ibid.

<sup>160</sup> Simpson, above n 1, 16. What Simpson precisely says is that 'a deep scepticism as to the desirability of government intervention' 'runs through all Coase's writings.' Now, in fact, this could be said to be true of all of Coase's later writings, but Simpson does not mean 'scepticism,' he means 'bias against.'

<sup>161</sup> TPoSC, above n 2, 118. See further Campbell, above n 114, 496-505 and Campbell and Klaes, above n 118.

<sup>162</sup> TPoSC, above n 2, 114. Even three decades later, when the wider ramifications of his transaction cost arguments had become much more apparent, he explains his analysis in TPoSC with explicit reference to the simplifying assumption of prohibitive levels of transaction costs that rule out bargaining solutions: Coase, above n 17, 175.

development at common law, this was, just as much as prescription ~~ve legislation by~~ [government and legislature](#), the stipulation of an outcome by ~~the state government~~. Simpson was entirely right to point to this as a serious anomaly,<sup>163</sup> and it is difficult to overstate the amount of confusion Coase's argument has caused here.

Let us quote again the passage which we believe expresses the core of the attractiveness of the Coase Theorem, which is its application of market generated Pareto efficiency to situations previously thought to be outside the Pareto domain:

the immediate question faced by the courts is *not* what shall be done by whom *but* who has the legal right to do what. It is always possible by transactions on the market to modify the initial legal delimitation of rights. And, of course, if such market transactions are costless, such a rearrangement of rights will always take place if it will lead to an increase in the value of production.<sup>164</sup>

Though Coase argues for a bargaining solution to problems of 'harm,' he rests his doing so on the claim 'that it will lead to an increase in the value of production.' Now, Coase means by this that it is such an increase that will motivate the parties to bargain, and the mutual expectation of advantage is what does, indeed, motivate all bargaining. But, as James Buchanan observed,<sup>165</sup> this is a misleadingly 'objectivist' way of putting Coase's point. It seems to envisage some overall increase in the value of production as a total social value ~~which as the driver of~~ the process, when the entire point of private bargaining solutions, as opposed to planned solutions, is that the parties define the 'increase in value' entirely subjectively in terms of expectation of increase in their own advantage. A Pareto efficient outcome is possible only because these subjective expectations, coordinated by the invisible hand, express the autonomous choices of economic actors.

<sup>163</sup> Simpson, above n 1, 21.

<sup>164</sup> TPoSC, above n 2, 114.

<sup>165</sup> James M Buchanan, 'Cost, Choice and Catallaxy: An Evaluation of Two Related but Divergent Virginia Paradigms' in Francesco Parisi and Charles K Rowley (eds) *The Origins of Law and Economics* (Edward Elgar, 2005) 156, 158. On Posner's adoption of the 'maximum value' principle see James M Buchanan, 'Good Economics – Bad Law' (1974) 60 *Virginia Law Review* 483 (reviewing Richard A Posner, *Economic Analysis of Law* (1972)).



One might give little weight to this point as it relates to Coase's advocacy of bargaining solutions. It may be said without creating confusion that, in a market setting, the Pareto efficient outcome will represent the overall value of production being maximised. But one must give the point enormous weight when one turns, as we have seen Coase turned in TPoSC, away from bargaining solutions to actual decision-making by courts. For, 'In a world in which there are costs of rearranging the rights established by the legal system, the courts ... are, in effect, making a decision on the economic problem and determining how resources are to be employed.'<sup>166</sup> Courts taking this line are not establishing a framework within which economic actors will reach solutions by bargaining, they are prescribing the solutions. This, we take it, is what Coase means by 'directly' when he describes instances in which 'the courts directly influence economic activity.'<sup>167</sup> They of course do so in the belief 'that they [are] affecting the working of the economic system - and in a desirable direction,'<sup>168</sup> and any such belief must involve, however inarticulately, a claim to know how to increase the social value of production in the misleadingly objectivist way criticised by Buchanan, and a further claim to be able to take decisions which realise that value. By immediately abandoning bargaining solutions when transaction costs are positive and moving to the sort of decision-making he describes in the positive law of private nuisance, Coase moved in a most confusing way from the courts establishing a negotiating framework for private parties' solutions to the courts as an agency of the state imposition of solutions.

It is not going too far to say that this confusion in Coase has been the very basis of the Posnerian approach that has dominated the development of law and economics since TPoSC.<sup>169</sup> Posner himself typically confines bargaining solutions to general equilibrium

<sup>166</sup> TPoSC, above n 2, 133.

<sup>167</sup> Ibid 119.

<sup>168</sup> Ibid 107.

<sup>169</sup> The argument of the next two paragraphs condenses that made at proper length and with full referencing in David Campbell, 'Welfare Economics for Capitalists: The Economic Consequences of Judge Posner' (2012) 33

situations in which bargaining would yield Pareto efficient outcomes, for he thinks that the presence of transaction costs prevents theoretical Pareto efficiency, as it indeed does, but also that this makes bargaining solutions of little relevance to real world situations. His characteristic position actually is that ‘as is well known, the Pareto solution is apparent rather than real,’<sup>170</sup> because it requires conditions that ‘can only rarely be fulfilled,’<sup>171</sup> and so we are faced with a general problem of ‘the unavailability of a practical method for eliciting express consent.’<sup>172</sup> The core of Posnerian law and economics is the identification of principles of economic efficiency, notably welfare maximisation, which can guide courts which therefore have to stipulate outcomes as Pareto efficiency realised through bargaining has little application: ‘the Pareto-superiority criterion is inapplicable to most policy questions’<sup>173</sup> as it is very often unable to endorse a ‘move [which] must increase the wealth of society.’<sup>174</sup> As Posner came to realise, this argument is not different in principle from Kaldor-Hicks efficiency, except that the goals of the policy are typically not the ‘left-wing’ ones normally associated with welfare economics but the ‘right-wing’ ones of Posnerian law and economics. Posner has even gone so far to identify Kaldor-Hicks and welfare maximisation in *Economic Analysis of Law*: ‘the . . . concept of efficiency mainly used in this book [is] called the Kaldor-Hicks concept of efficiency, or wealth maximization.’<sup>175</sup>

The question which obviously arises is whether the courts are in any better position to reach objective assessments of overall social welfare (and how to actualise it) than other state

*Cardozo Law Review* 2233. Appreciation of the welfare economic basis of Posner’s treatment of reasoning in court makes his, on the face of it bewildering, recent apparent *volte face* to advocacy of Keynes and Pigou perfectly easy to understand: David Campbell, ‘The End of Posnerian Law and Economics’ (2010) 73 *Modern Law Review* 302 (reviewing Richard A Posner, *A Failure of Capitalism* (2009)).

<sup>170</sup> Richard A Posner, *The Economics of Justice* (Harvard University Press, 1981) 88.

<sup>171</sup> *Ibid* 54-5.

<sup>172</sup> *Ibid* 96.

<sup>173</sup> *Ibid* 89.

<sup>174</sup> *Ibid* 91.

<sup>175</sup> Richard A Posner, *Economic Analysis of Law* (Wolters Kluwer, 9<sup>th</sup> edn, 2014) 14.

bodies, in particular the legislatures often castigated in Posnerian law and economics.<sup>176</sup> -We do not want to enter into a discussion of this question. It has been our aim merely to show that, following the confusion caused by Coase's own quick abandonment of bargaining solutions in TPoSC, Posnerian law and economics have themselves overwhelmingly not been concerned with bargaining solutions but with objective, state imposed solutions when the Pareto domain is thought to be small to the point of non-existence. As it has principally been developed, law and economics completely reverses what Coase intended to do in TPoSC. Law and economics of this sort do capture the nature of the positive law of private nuisance,<sup>177</sup> but those law and economics, like that law, are not based on bargaining but on alternatives to bargaining. Is there any possibility of a reformed law of nuisance that would give greater scope to bargaining solutions?

### 32 *Nuisance as a Bargaining Solution*

For what it is worth, it is our belief that, in the nineteenth century circumstances - broadly the unprecedented possibilities of improvement brought about by industrialisation; pronounced inequality of wealth, an important part of which was overwhelmingly unequal distribution of the capacity of bring legal action; and, most importantly, the vestigial regulatory capacity of the state - nuisance had to be developed on a give and take basis, even though it therefore was made essentially irrelevant to the determination of the optimal level of pollution, or rather was the basis of a general, largely uncostered permission to pollute. But in light of the

<sup>176</sup> [Ibid 729: 'Judge-made rules are more likely to be efficiency-promoting than those made by legislatures, other than those legislature-made rules that codify common law principles.' As this distinction has been developed by Posner, the common law has predominantly come to mean court stipulation of outcomes in conformity with wealth maximising rules. This is at complete variance with the distinction between 'common law' and 'legislation' predominantly drawn in liberal thought in which the former is conceived, not as the stipulation of outcomes, but as the setting of frameworks for decision-making by the parties themselves.](#)

<sup>177</sup> Ibid 62-65.

subsequent growth of very far-reaching systems of public planning permission and control,<sup>178</sup> private nuisance should now be placed on a *sic utere* basis. By strengthening despotic dominion, this reform would provide those with the requisite interest in property with far greater power to oppose, or charge for, interference than they now normally enjoy, and the public planning system would always offer a possible check on the exercise of that power.<sup>179</sup> And, indeed, a growing consciousness of government failure in respect of the regulation of pollution has led to the exploration of the value of nuisance as ‘the environmental tort.’<sup>180</sup> The expansion of the use of nuisance in this way could have a very positive effect on the ability of the private citizen to directly participate in the determination of the level of interference and thereby on the relationship of the private and public systems of regulation of pollution and other competing uses. We do not pretend to have done more than mount a *prima facie* case for this immense reform; perhaps not even that.<sup>181</sup> We put it forward to indicate what we believe is latent in Coase’s own argument in TPoSC in order to clarify that argument.

<sup>178</sup> After discussing nuisance at common law, *ibid* 126-32, Coase turned to the nineteenth century growth of statutory control of interference in section VII, and returned to the theme in section VIII as part of his explicit criticism of Pigou: *ibid* 135-41. He there raises the now very famous railway sparks example, his treatment of which is, choosing our words carefully, simply dismissed by Simpson, above n 1, 27 (the treatment is longer in Simpson, above n 91, 168-69). Coase’s own response to this criticism, above n 4, 111-13, was largely unavailing, and Simpson’s further contribution, above n 5, 100-101, is highly critical of what Coase said. Nevertheless, Coase was, in our opinion, essentially right about the railways sparks example. It is all very similar to the position over private nuisance which we are examining here, and a full discussion would require a treatment at similar length to that discussion. The core of such a treatment may be found in PS Atiyah, ‘Liability for Railway Nuisance in the English Common Law: A Historical Footnote’ (1980) 23 *Journal of Law and Economics* 191 and AM Linden, ‘Strict Liability, Nuisance and Legislative Authorisation’ (1966) 4 *Osgoode Hall Law Journal* 198.

The particular, as it were, value added to Brenner’s and McLaren’s histories of nuisance by Morag-Levine, above n 91, is its more extensive discussion of the growth of the statutory regime in parallel with the common law regime, which was significantly different in the UK and the US.

<sup>179</sup> Harris et al, above n 147, 416-513.

<sup>180</sup> Campbell, above n 90 discusses this literature in the context of proposing a nuisance scheme for the introduction of genetically modified crops into the UK.

<sup>181</sup> Amongst the number of much more substantial explorations of this possibility, one has particular relevance to the theoretical issues considered here. Prior to his early contribution to the legal strand of the reinterpretation of the Coase Theorem begun by Schlag (Robert C Ellickson, ‘The Case for and Against ‘Coaseanism’’ (1989) 99 *Yale Law Journal* 611) and to the research which led to his outstanding reflections on the rancher and farmer example (Robert C Ellickson, *Order Without Law* (Harvard University Press, 1991)), Professor Ellickson had undertaken work in this vein: Robert C Ellickson, ‘Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls’ (1973) 40 *University of Chicago Law Review* 681.

The irony of Simpson's article is that the benefit of reading it strongly reinforces our belief that Coase missed a trick by not actually going into the possibilities of Coasean bargaining in TPoSC. Simpson seizes on the fact that 'no deal was done' between Mr Bridgman and Dr Sturges [in order](#) to ridicule the possibility that devising 'mechanisms for reducing transaction costs,' which he calls, 'leaving the outcome to the market,' 'is likely to be the best solution.'<sup>182</sup>

the resolution of the dispute between Mr Bridgman and Dr Sturges was indeed left to the market, in the sense that there was no legal impediment to their reaching an agreement which would have been binding upon them in private law. But though left to the market in this sense, no deal was done.<sup>183</sup>

But, bringing to light previously unknown material from the background of *Sturges v Bridgman*, Simpson showed, in a way that certainly was no part of his intention, that Coasean bargaining actually did take place in the case, even if not in the reported litigation. It was for this reason that Simpson said that 'the case certainly illustrates the reciprocal nature of the problem of social cost.'<sup>184</sup>

In fact Dr Sturges did try negotiation, first complaining personally and then, in the Spring of 1876, through his solicitor. The precise form of these negotiations is unrecorded, but from what Mr Bridgman said in reply we may guess that there was some suggestion that he might arrange to use his mortars at times when the consulting room was not in use ... In his affidavit Mr Bridgman, as if he had read Coase, indeed made the point that the problem was a reciprocal one, and he took the line that it was all the fault of Dr Sturges [by building the consulting room when he, Mr Bridgman, had operated his machinery for many years previously.] In response to Dr Sturges' complaint he had done what he could to confine the use of the mortars to times which did not trouble the doctor ... He could do no more if he was to run his business. So it was that little was achieved in the negotiations, and the dispute came to litigation ... Negotiation will normally precede litigation in nuisance cases of this kind. The story which emerges from the affidavits is a very everyday account of a dispute between neighbours, here both engaged in commercial activity, with an attempt to work out things amicably.<sup>185</sup>

Now, a lawyer today, and no doubt just as much then, would expect precisely this to happen,<sup>186</sup> but Coase could not have been expected to uncover this material, which has been brought to light [only](#) by [the efforts of](#) one of the greatest of modern legal historians.

<sup>182</sup> Simpson, above n 1, 19.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid 29.

<sup>185</sup> Ibid 30-31.

<sup>186</sup> Ibid 19, 31.

However, if he had had that material to hand, rather than misleadingly using *Sturges v Bridgman* effectively to claim that successful bargaining took place when it didn't, Coase could have attempted to explain why the bargaining that actually did take place did not succeed, which would have involved a criticism of the shortcomings of the positive law, and of the extent to which it did pose a 'legal impediment to their reaching an agreement.'<sup>187</sup> By claiming too much for bargaining, he did not at all examine the extent of what might justifiably be claimed for it.<sup>188</sup>

One has to ask what has happened to the 'offensive' use of bargaining to resolve problems of competing use? In the end, Simpson's criticism of Coase turns on a rejection of 'economic rationality,' and this rejection ultimately is not focused on 'rationality'<sup>189</sup> but on 'economic.'<sup>190</sup> Simpson rejected the very idea that a market transaction should play a role in resolving disputes over competing uses. We have already quoted Simpson's argument that 'The reason why a market transaction in the sense of a purchase and sale of rights is ... not possible in ... situations [like *Sturges v Bridgman*] is that the parties are not willing to place their rights on the market.' This is an example of a general quality of social life:

Life would be quite intolerable if individuals did not in general respect social limits to the market ... Engaging in market transactions is just one form of human activity, and without such boundaries life would dissolve into unstructured chaos, in which it would be impossible to distinguish [a sale from]<sup>191</sup> going shopping, from going out to dinner, or from going mountain

<sup>187</sup> Ibid 19.

<sup>188</sup> Ellickson, of course, got this right: Robert C Ellickson, 'Of Coase and Cattle: Dispute Resolution Among Neighbours in Shasta County' (1986) 38 *Stanford Law Review* 623, 686: 'Although [my] findings are at odds with the literal features of the Coasean parable, they are fully consistent with Coase's central idea that, regardless of the specific content of the law, people tend to structure their affairs to their mutual advantage'

<sup>189</sup> Simpson, above n 1, 20, 40, attributed a commitment to hyper-rationalist cost-benefit analysis to Coase which Coase certainly did not have, and Simpson's criticism of which, quite against his intention, would be more applicable to Pigou, though we cannot go into this here.

<sup>190</sup> It was his blanket aversion to what he understood to be the 'economic' motivation of action that allowed Simpson both to defend an unnuanced idea of despotic dominion in the article we are discussing and to reject it *tout court* in his lecture on *Bradford v Pickles*: Simpson, above n 145. On Coase's own early contribution to what is now known as 'economic behaviourism' see Matthias Klaes, 'Transaction Costs and Behavioural Economics' in Morris Altman (ed) *Real World Decision Making: An Encyclopaedia of Behavioural Economics* (Praeger, 2015).

<sup>191</sup> We have added 'a sale from' as something seems to be missing in Simpson's sentence, which did not appear in the original journal article.

climbing, or from going fishing with a friend. In the situation which confronted the doctor and the confectioner an offer of money by Dr Sturges to help over any costs involved in moving or insulating the mortars might well have been socially acceptable, and would not, except to a certain type of economist anxious to assimilate all human action to market transactions, be thought of as a sale but rather as a contribution to the cost of action from which he would be the principal beneficiary and from which he otherwise would be unjustly enriched. Anything more than such an offer would surely have bordered on the offensive.<sup>192</sup>

As it happens, Simpson unknowingly scored a hit here as, in the limited comments he made on the nature of economic action, Coase did seem to commit himself to Becker's extreme economic imperialism,<sup>193</sup> from which even Becker himself has now retreated. But does he score a hit on anything in Coase's argument in TPOSC? He undoubtedly is right that as a matter of legal history neither Dr Sturges and Mr Bridgman nor those who heard their case looked on the issues in clear, economic terms. His speculation about what they did think is highly plausible:

No doubt Mr Bridgman thought he had a perfect right to go on using his mortars as he and his father had done in years past, and you do not pay people for a right you believe you already possess ... And no doubt Dr Sturges ... thought he had a right to peace and quiet in his home, so that he could see his patients ... and again you do not offer to pay people money for what is yours already ... In short I doubt if either of the two men questioned for one moment the right of the other to continue to pursue their business on their property.<sup>194</sup>

But to the extent this was the parties' thinking, then their thinking was nonsense. Such thinking would indeed leave them with a clash of what they believed to be [absolute](#), unqualified rights to use, but as those uses were opposed, they could not possibly both have the right to their use. [How was the clash of absolutes resolved, if this is the right word?](#) That [the parties they](#) themselves entered into negotiations prior to the eventual litigation showed that their thinking also involved some unclear perception of the reciprocal nature of the problem. That when these negotiations failed and the parties entered upon litigation, the courts that then heard the matter thought it uncontroversial that Dr Sturges could move to the nuisance is completely inexplicable unless they also had some such perception; and Simpson

<sup>192</sup> Ibid 33.

<sup>193</sup> Coase, 'The Firm, the Market and the Law', above n 76, 2-5. For a criticism see Campbell, above n 114, 496-507.

<sup>194</sup> Simpson, above n 1, 32.

does, in fact, admit this. Of course, this perception was very unclear, but Coase never claimed more than this. Though we hope we have made it clear how far Simpson is correct about the legal history, Coase is correct at a far more fundamental level. He does not rest at the level of the parties' self-understanding but shows the limits of that understanding. He also shows the limits of the positive law, and offers us the possibility of rethinking that law so as to make it capable of dealing far more adequately with problems of competing uses.

If we are to utilise Coase's insight, we have to accept the hard facts on which it is based. The problem is a reciprocal one. Giving up a polluting use does have costs. Determination of the best possible policy does require us to respect 'economic' considerations. Brian Simpson was of a generation the instinct of which was to regard self-consciousness of resource constraint as an unworthy concession to 'the market.' A moment's reflection on influential political movements which would set us the goal of preventing pollution, or do not think the natural environment is a fit subject for economic policy, show that [this](#) attitude remains influential.

## VII CONCLUSION

We have tried to show where Coase's argument in TPoSC is deficient, not in its substance, for we have not taken up the points where we do think that argument is deficient in substance, but in its presentation of what we believe is substantially correct and, indeed, of seminal importance: the demonstration of, first, the reciprocal nature of the problem of competing uses and, secondly, that the legal framework within which that problem is handled is of the first importance in determining the optimality, or otherwise, of the result. The deficiencies in Coase's argument that we have identified turn on Coase's first use of actual cases such as *Sturges v Bridgman* in section V being a very misleading illustration of the purely theoretical argument which we now know as the Coase Theorem. Coase's overall aim was to show that



arguments about what would happen at zero transaction costs were irrelevant to determining policy and to argue that economists should stop making such arguments. Recourse to seemingly realistic illustrations drawn from actual cases was bound to cause confusion. But this is in fact of less importance than that, when he returned to those actual cases in section VII, having abandoned the assumption of zero transaction costs, he did not explore the possibilities of what we would now call Coasean bargaining when transaction costs were positive. Instead he considered alternatives to such bargaining: the firm, government and cases decided by courts which stipulated outcomes. But courts making decisions in this way are not providing a framework for the parties to make decisions; they are intervening just as much as a government pursuing prescriptive statutory regulation. There is, in the end, too much state and not nearly enough voluntary exchange in TPoSC, and in the predominant, Posnerian, strain of law and economics.

The influence of the Coase Theorem on the reception of TPoSC shows that article to have been, in one sense, undeniably a failure. It is essential to acknowledge the shortcomings of Coase's presentation of his argument in order to grasp the enormous underlying strength of that argument. Brian Simpson's criticism of Coase is perfectly correct in regard of the legal history of *Sturges v Bridgman*, but as regards the theory of law and economics, this criticism is in all important respects mistaken. That the Coase Theorem is purely a theoretical device is something which it can be said it was, for reasons Simpson does not understand, Coase's main aim to argue. The law of private nuisance does not provide a framework for Coasean bargaining, but this is because it is, not a system of unqualified property rights, but a liability rule generally qualifying those rights in the claimed public interest. Coase, to be sure, was himself confused on all these points, and this confusion coloured the argument of TPoSC and so the reception of that argument. Nevertheless, Coase's position on the theoretical issues which emerge from his discussion of *Sturges v Bridgman* stands as a-the most profound

insight into the nature of those issues in, not merely law and economics, but post-war economics or law *tout court*.

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~~I.~~ Appendix A: The Headings of 'The Problem of Social Cost'

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~~H.I.~~ The reciprocal nature of the problem

~~HH.II.~~ The pricing system with liability for damage

~~IV.III.~~ The pricing system with no liability for damage

~~V.IV.~~ The problem illustrated anew

~~VI.V.~~ The cost of market transactions taken into account

~~VII.VI.~~ The legal delimitation of rights and the economic problem

~~VIII.VII.~~ Pigou's treatment in *The Economics of Welfare*

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~~IX.VIII.~~ The Pigovian tradition

~~X.IX.~~ A change of approach

X. The problem to be examined

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APPENDIX B: THE DISCUSSION OF *STURGES v BRIDGMAN* IN 'THE PROBLEM OF SOCIAL COST'

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The following is a reproduction of the main discussion of *Sturges v Bridgman* in section V of

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'The Problem of Social Cost'. \*n signifies the page numbering in the original publication in

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the *The Journal of Law and Economics*. †n signifies the page numbering in the reprinted

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version in *The Firm, the Market and the Law*. †n signifies the footnote accompanying the

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discussion of particular passages of this discussion in this paper:

[\*8, †105, †15] Let us first reconsider the case of *Sturges v Bridgman* which I used as an illustration of the general problem in my article on 'The Federal Communications Commission.' In this case, a confectioner (in Wigmore Street) used two mortars and pestles in connection with his business (one had been in operation in the same position for more than 60 years and the other for more than 26 years). A doctor then came to occupy neighbouring premises (in Wimpole Street). The confectioner's machinery caused the doctor no harm until, eight years after he had first occupied the premises, he built a consulting room at the end of his garden right against the confectioner's kitchen. It was then found that the noise and vibration caused by the confectioner's machinery made it difficult for the doctor to use his new consulting room. "In particular ... the noise prevented him from examining his patients by auscultations for diseases of the chest. He also found it impossible to engage with effect in any occupation which required thought and attention." The doctor therefore brought a legal action to force the confectioner to stop using his machinery. The courts had little difficulty in granting the doctor the injunction he sought. "Individual cases of hardship may occur in the strict carrying out of the principle upon which we found our judgment, but the negation of the principle would lead even more to individual hardship, and would at the same time produce a prejudicial effect upon the development of land for residential purposes."

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The court's decision established that the doctor had the right to prevent the confectioner from using his machinery. But, of course, it would have been possible to modify the arrangements envisaged in the legal ruling by means of a bargain between the parties. [†23] The doctor would have been willing to waive his right and allow the machinery to continue in operation if the confectioner would have paid him a sum of money [†106] which was greater than the loss of income which he would suffer from having to move to a more costly or less convenient location or from having to curtail his activities at this location or, as was suggested as a possibility, from having to build a separate wall which would deaden the noise and vibration. The confectioner would have been willing to do this if the amount he would have to pay the doctor was less than the fall in income he would suffer if he had to change his mode of operation at this location, abandon his operation or move his confectionery business to some other location. [†25] The solution of the problem depends essentially on whether the continued use of the machinery adds more to the confectioner's income than it subtracts from the doctor's. But now consider the situation if the confectioner had won the case. The confectioner would then have had the right to continue operating his noise and vibration-generating machinery without having to pay anything to the doctor. [†24] The boot would have been on the other foot: the doctor would have had to pay the confectioner to induce him to stop using the machinery. If the doctor's income would have fallen more through continuance of the use of this machinery than it added to the income of the confectioner, there would clearly be room for a bargain whereby the doctor paid the confectioner to stop using the machinery. That is to say, the circumstances in which it would not pay the confectioner to continue to use the machinery and to compensate the doctor for the losses that this would bring (if the doctor had the right to prevent the confectioner's using his [\*10] machinery) would be those in which it would be in the interest of the doctor to make a payment to the confectioner which would induce him to discontinue the use of the machinery (if the confectioner had the right to operate the machinery). [†29] The basic conditions are exactly the same in this case as they were in the example of the cattle which destroyed crops. [†28] With costless market

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transactions, the decision of the courts concerning liability for damage would be without effect on the allocation of resources. [†31, †109] It was [†107] of course the view of the judges that they were affecting the working of the economic system and in a desirable direction. Any other decision would have had [†107] “a prejudicial effect upon the development of land for residential purposes,” an argument which was elaborated by examining the example of a forge operating on a barren moor, which was later developed for residual purposes. The judges’ view that they were settling how the land was to be used would be true only in the case in which the costs of carrying out the necessary market transactions exceeded the gain which might be achieved by any rearrangement of rights. And it would be desirable to preserve the areas (Wimpole Street or the moor) for residential or professional use (by giving non-industrial users the right to stop the noise, vibration, smoke, etc., by injunction) only if the value of the additional residential facilities obtained was greater than the value of cakes or iron lost. But of this the judges seem to have been unaware.

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