Sic Utere Tuo Ut Alienum Non Laedas A Basis of the State Police Power

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SIC UTERE TUO UT ALIENUM NON LAEDAS: 
A BASIS OF THE STATE POLICE POWER

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At the basis of the police power, reserved to the states by the Tenth Amendment to the United States Constitution, is the common law maxim enjoining one to use his property in such a way as not to injure that of another. It is the purpose of this paper to study the meaning and scope of this maxim from its origin through its use in American Constitutional Law by the United States Supreme Court in order to show its significance as an instrument for the interpretation of the United States Constitution.

The principle that one should use his own property in such a way that he does not injure that of another is to be found early in the common law. Glanvil, Bracton, Fleta, and Britton devote some space to its discussion, recording the rules of law based upon the principle and the instances in which the common law limited a man’s use of his own property. In several places, the principle is recognized specifically. Bracton, speaking of servitudes, says, “And in the same manner it is sometimes imposed by right, and neither by man’s appointment nor by use, to wit, that no one may do in his own estate anything whereby damage or nuisance may happen to his neighbour.” Britton, apropos of the same subject, says, “Sometimes the soil is subject to a servitude by law, although not by any man’s appointment, or by the establishment of peaceable seisin, as for example, to the obligation that no one shall do anything in his own soil that may be a grievance or annoyance to his neighbours.” The principle is generally implied in the discussion of the specific uses of property which the law had held to be illegal because the results were stamped as injurious to another’s property. “Nuisance” was a common word

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3Fleta, Commentarius Juris Anglicani, b. 4, c. 18.
5Bracton, op. cit. supra note 2, b. 4, c. 37, f. 221; Twiss, op. cit. supra note 2, 477.
6Britton, op. cit. supra note 4, b. 2, c. 23, sec. 5, f. 140b; Nichols, op. cit. supra note 4, 362. See also Fleta, loc. cit. supra note 3.
in the law of this period, and in a great number of instances it decided what a nuisance was.\footnote{The Year Books show the same implication of the principle. There are many complaints that another has been using his property injuriously, as that the defendant has acted to the nuisance, damage or injury of the plaintiff’s tenement or estate. The remedy granted was usually an order that the nuisance be abated and the property restored to its original condition. See, for example, Fulk v. John de Burgate, Pleas in Eyre, 4 King John, 3 Sel. Soc. 95 (1202); Note, Horwood, Y. B. 20 & 21 Edw. I, 418 (1293); Note, Horwood, Y. B. 32 & 33 Edw. I, 330 (1304); Crakehall Case, Y. B. 6 Edw. II, 36 Sel. Soc. 76 (1313).}

Nevertheless, it is clear that the maxim itself was unknown in this early period. It came as a contribution of the later sixteenth and early seventeenth centuries and was merely the application of a Latin expression to the principle itself, which had had centuries of acceptance and use behind it. The Latin form served to give this principle greater authority and presented to the judiciary a convenient expression for it, which probably accounts for the acceptance and general use of the maxim thereafter.

In the thirty-seventh year of Elizabeth, Godfrey, in arguing for the plaintiff in \textit{Edward’s Case},\footnote{Edwards v. Halinder, 2 Leon. 93 (1594).} contended that the defendant was liable for his acts even though he had not intended to injure the plaintiff’s property “for the rule is \textit{sic utere tuo ut alienum non laedas.”}\footnote{\textit{Ibid.}} In this case the plaintiff had leased the cellar of a building and the defendant had leased the first floor. On his floor, the defendant stored goods of less weight than that permitted by his lease, but the floor fell with injury to the plaintiff’s goods in the cellar. The maxim does not appear in the decision, but this is to be expected since the judgment for the plaintiff was given on the pleadings. On writ of error, the Exchequer Chamber\footnote{Pop. 46 (1594).} affirmed the judgment and supported Godfrey’s argument, although it does not mention the maxim. The court held that even if the defendant had not used his floor to the extent permitted in his lease he should not have placed more weight on the floor than it would support so that another person’s property might not be damaged thereby. The idea was that the defendant has used his property, that the plaintiff’s property was injured as a result of this use and that, therefore, the defendant was liable.

In \textit{Aldred’s Case} in the eighth year of James I the plaintiff brought an action on the case against the defendant for building a pig-sty on his land close to the plaintiff’s house. Coke, in reporting Chief Justice Wray’s decision that the plaintiff recover, said that if a man has a lime-kiln so near the house of his neighbor that the smoke enters the...
house, or if a glover corrupts the water running to another's house, an
action on the case would lie, "and this stands with the rule of law and
reason, sc. Prohibetur ne quis faciat in suo quod nocere possit alieno;
et sic utere tuo ut alienum non laedas." 12 This seems to be the only time
this maxim was used by Coke. It does not appear in his Institutes,
although he does speak of nuisances and although he does discuss
those uses of one's property which were forbidden by the law as being
injurious to another's property and for which the law gave a remedy.

In one place, 13 the principle is stated as it applied to the construction
of buildings. In that case, he said that the common law prohibited
the erection of any building on a man's land involving some nuisance
or prejudice to any other man "in his house." "Aedificare in tuo
proprio solo non licit, quod alteri noceat," 14 is the Latin expression
which he used in that situation.

In these two cases, the maxim is used familiarly as if it were well
established, well known, frequently used, and not subject to doubt.
It was not the creation of something new but rather the application
of a Latin expression to a principle long established and applied in
the English common law. Moreover, it was characteristic of Coke
to give a Latin name to an old idea and thus to give it the appearance
of authority. 15 It is also to be expected of this period in the develop-
ment of the law, a period whose philosophy held that the essence of
truth was to be found in mathematics—which meant at that time
complete dependence on axioms which were considered as ultimate
and self-demonstrable truths. In the attempt to make of the law a
scientific subject, it was being provided with another maxim—or
axiom. 16 Furthermore, this period of English history shows the exis-
tence of a stable society with rights and duties established and with
the relations between individuals undergoing no great changes.

But the way in which the maxim was used certainly points to some
prior authority for it, and it is probably true that Coke was not
creating out of the whole cloth. He undoubtedly had received a hint

12 Id. at 59. 13 Inst. 201.
14 Ibid.
15Corwin, The Supreme Court's Construction of the Self-Incrimination Clause
16See DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW
(1927) 115: "It was believed that the one and only legal rule for every possible
situation could be written off in advance by a proper combination of axiomatic
first principles with the same accuracy as the answers to all the problems in the
Euclidean geometry. Law ceased to be an instrument for working toward cer-
tainty—it became certainty itself." See also Id. 115, n. 15; 125, n. 29. For the
attitude toward maxims see DOCTOR AND STUDENT, Dial. 1, Chap. 8; Co. LITT.
10, 11, 67, 87, 343; LITT. §§120, 385; 2 INST. 210; PLOWD. 27b; 1 BL. COMM. 68.
from Bracton’s De Legibus et Consuetudinibus Angliae. As is well known, this work was the accepted authority in Coke’s day and he was well acquainted with it. Bracton, in turn, was commenting on the Corpus Juris Civilis of the Roman Law and in doing so served to carry over into the common law the statement “Juris praecpta sunt hoc: honeste vivere, alterum non laedere, suum cuique tribuere.” Thus we find that the statement of the Roman Law that one should not harm or injure another was taken over by Bracton, where it was noticed by Coke who combined it with the already accepted principle of the common law that one should use his own property in such a way as not to injure another’s property and who consequently created the maxim sic utere tuo ut alienum non laedas.

This maxim was considered as a fundamental and unquestionable rule of law which was to be accepted and applied by the courts without question. And in fact, it was not criticised or attacked at any time during this early period of its development. This was because the judges thought they were applying a principle of justice which came from the natural or higher law and which was, therefore, a binding rule of the common law. They believed that they were applying a rule of right and of reason. This conception of the nature of the maxim and of the principle for which it stands is shown by the fact
that Bracton\textsuperscript{19} said that the principle was imposed by right (\textit{jure}) and that Britton\textsuperscript{20} placed its origin in the natural law (\textit{drei}). Coke in \textit{Aldred's Case}, laid the maxim down as "a rule of reason" and Blackstone described it as the enforcement of "that excellent rule of gospel-morality, of 'doing to others, as we would they should do unto ourselves.'"\textsuperscript{21} Also, where there was no express indication that the principle was considered as one coming from the natural law, this origin was implied in the unquestioned acceptance and use of it.

Once the maxim was born it was taken up by the courts and applied with gradually increasing frequency. By the time of Blackstone (1756) we find it well known and in full use. In fact, he uses it extensively and mentions it in several places in his \textit{Commentaries}.\textsuperscript{22} Furthermore, he gives in illustration of it many situations which are the same as those to be found in the cases decided for centuries before \textit{Aldred's Case} but which cases do not in fact use the maxim. In other words, according to Blackstone, the maxim forbade certain uses of property which the cases had already declared to be illegal because injurious to the property of another in that period of the common law prior to the origin of the maxim itself.\textsuperscript{23} This supports the conclusion presented above: that the maxim is a mere form of Latin words, a hint of which Coke had received from the civil law though Bracton, applied to a body of law and decided cases which had been in existence for centuries before the birth of the maxim itself—a form of words coined under the influence of the idea that the rules for which the maxim stood were of such a degree of validity that they could not be doubted and consequently partook of the nature of the rules of reason and right, incorporated into the legal system as part of the "'Higher Law.'"

Once established in the common law, primarily on Coke's authority, the maxim operated to protect real property from what the courts thought were injuries resulting from the use by another of his real property. Thus the maxim came to mean "So use your own real property in order that you do not injure the real property of another," and this was the only meaning it had at the common law in this early period when the rights of property were paramount. It did not apply to the law of torts in general or to the law of negligence, with the defense of contributory negligence, and attempts to define it in this broad manner are unsupported by the cases.

The maxim, prior to its adoption by the United States Supreme

\textsuperscript{19}See \textit{supra} note 5. \textsuperscript{20}See \textit{supra} note 6.  
\textsuperscript{21}3 BL. COMM. 218. See also \textit{Doctor and Student}, \textit{supra} note 16. \textsuperscript{22}1BL. COMM. 306; 3 Id. 217. \textsuperscript{23}3 Id. at 216–218.
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Court, was used in the common law to apply to the use by riparian owners of the water flowing by their land, to the use of one's property for purposes which caused a nuisance to adjoining property owners by generating bad odors or smoke, by shutting off ancient lights, and by diverting rain water; and to the use of land in such a way as to deprive adjoining land of its natural support. During the later eighteenth and the nineteenth centuries, the maxim was applied outside the field of real property law, but only in two cases. In Bush v. Steinman the maxim was used where the plaintiff had received a personal injury, and in The King v. Ward where the defendant was charged with blocking the King's highway and consequently with having injured the general rights of the public rather than the real property rights of another person. These two cases are interpreted by the author as showing the tendency of the common law courts to expand the meaning of the maxim in later years and as pointing the way for further expansion by the United States Supreme

2Aldred's Case, 9 Co. 57, 59 (1611); 3 Bl. Comm. 218; 3 Kent, Comm. 439; Story, J., in Tyler v. Wilkinson, 4 Mason, 401, 402 (1829); Broom, Legal Maxims (1845) 163. See also Anonymous, Dyer, 248b (1564); Penruddock's Case, 5 Co. 101a (1598); Luttrell's Case, 4 Co. 84 (1601); Comyn, Digest, Action on the Case for a nuisance (A, C); Bacon, Abridgement, Actions on the Case (A, F); Viner, Abridgement, Actions for Nuisances, (N. b) 12, 13; Leach, J., in Wright v. Howard, 1 Sim. & Stu. 203, 205, (1823). In Acton v. Blundell, 12 M. & W. 324 (1843) in argument, 331-341, the maxim is used, but Tindal, C. J., at p. 348, 349 held the rule as to surface streams did not apply to underground water.

See the maxim Aqua currit et debet currere ut currere solebat, 3 Kent, Comm. 439.

2Wray, C. J., in Bland v. Moseley (1587) cited in Aldred's Case, 9 Co. 57, 58 (1611); Ryppon v. Bowles, Cro. Jac. 373 (1613); Symonds v. Seabourne, Cro. Car. 325 (1634); Cox v. Matthews, 3 Keb. 133 (1684-1685); Anonymous, 1 Vent. 248 (1685); Villers v. Ball, 1 Show. 7 (1690); Rosewell v. Pryor, 1 Ld. Raym. 392 (1699); 2 Bl. Comm. 402, and note by Chitty; 3 Bl. Comm. 216, 217; Read v. Brookman, 3 T. R. 151 (1789); Daniel v. North, 11 East, 372 (1809); Chandler v. Thompson, 3 Camp. N. P. 80 (1811); Cross v. Lewis, 2 B. & C. 686 (1824).

It is here that the maxim comes into conflict with the maxim cuius est solum eius est usque ad coelum.

2Carpenter v. Tilloy, Y. B. 3 Edw. II, 22 Seld. Soc. 12 (1310); Anonymous, Horwood, Y. B. 11 & 12 Edw. III, 468 (1338); Anonymous, Pike, Y. B. 18 Edw. III, 210 (1344); Penruddock's Case, 5 Co. 101 (1598); Reynolds v. Clark, Fort. 212 (1724); 3 Bl. Comm. 216.


Court. Thus that court was furnished with precedent for applying the maxim to new situations in the private law and for extending it to the public law, which the court did by holding that the maxim was at the basis of the police power reserved to the states in the Tenth Amendment.

The common law, however, also restricted the scope of the maxim during this later period, and it was probably this trend which was the strongest in the development of the maxim by the English courts before it was adopted in American Constitutional Law. This restriction was effected in two ways. One was to narrow its applicability to the cases arising before the courts through use of a rule of reason which served to permit the courts to hold that what had previously been held to be injurious uses of property were no longer injurious. The doctrine of reasonableness was injected into the right of use of water by riparian owners,31 into the right of a land owner to make noise and create bad odors which affected his neighbor,32 and into the right to obstruct the ancient lights of the buildings on adjoining property.33 The second way in which the maxim was restricted was by the decline or disappearance of the older uses of property. As a result of changing economic conditions, property was being used in new and different ways, with the result that the cases coming before the courts involved new questions. The older cases no longer being brought before the courts, the maxim was no longer applied to the particular uses of property which had been involved in such cases.

Probably the most important cause for these changes in the mean-

31Wright v. Howard, 1 Sim. & Stu. 190, 203 (1823); Williams v. Morland, 2 B. & C. 910, 915, 916 (1824); Tyler v. Wilkinson, 4 Mason 397, 401, 402 (Circuit Ct. U. S. 1827).

32Brand v. Hammersmith & City Ry. Co., L. R. 2 Q. B. 246, 247 (1867). Here the plaintiff was denied recovery in his suit for damages caused to his dwelling from noise, smoke, and vibration resulting from defendant's operation of its railroad. Erle, C. J., laid down the rule that action lay only where there is an excess of damage beyond what is reasonable. Proximity of people necessarily causes some annoyance and requires forbearance on the part of all. The degree of forbearance "is measured by the sensibility to feelings of delicacy of the tribunal which has to decide the case, and cannot be foreseen till that decision is given. The maxim 'sic utere tuo ut alienum non laedas;' is no help to decision, as it cannot be applied till the decision is made..."

33Back v. Stacy, 2 C. & P. 465, 466 (1826). It is not enough that the plaintiff has less light in fact. Before he has a cause of action "there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable and to prevent the plaintiff from carrying on his accustomed business on the premises as beneficially as he had formerly done.... The jury must distinguish between a partial inconvenience and a real injury to the plaintiff in the enjoyment of the premises."
ing given to the maxim by the common law courts was the developing economic system. Along with urban growth and the onslaught of the commercial and industrial revolutions, property was being used in different ways. New situations began to arise and the older situations began to disappear or, at least, to appear with less frequency in the cases which came before the courts. Furthermore, with the philosophy of laissez-faire which accompanied the new economic system, the courts were inclined to lean toward the maxim that one could use his property as he pleased, and thus to be more reluctant to hold that the effects were injurious. In view of this tendency to restrict the maxim and the reasons accounting for it, it is extremely interesting and significant to note that the United States Supreme Court brought about a great expansion.

This period very clearly brings out the character of the maxim. While the courts treated it as a rule of law, in reality it was not one. The cases clearly indicate that the use of property was injurious because it interfered with the rights of another and thus was forbidden by the law. It was the function of the courts to decide whether the defendant had been using his property injuriously and the maxim was no aid to the decision of that question. To apply the maxim was superfluous because it was not necessary to the decision of the case. Consequently, regardless of the attitude of the courts toward it, it must be considered as a principle or goal toward which the law was striving, and the courts, in the attempt to approximate it, were laying down rules of law which in themselves decided the cases. As the cases held certain new uses of property to be forbidden by the maxim, new rules of law were made and this meant that the interpretation of the maxim likewise was changed.

The United States Supreme Court has accepted its inheritance with reverence and respect, asserting that the maxim is a fundamental rule of justice and right.34 In no case in which the maxim is used has that court criticised it,35 but in its use many changes have been made in its meaning, thus contributing to the story of its development. While accepting the Latin form, the court gave it new content.

In the field of private law the United States Supreme Court carried further the limited expansion of the maxim as previously begun by the English courts in the case of Bush v. Steinman. Thus, while the

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34Field, J., in Baltimore and Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 331 (1883).
maxim was used in its original meaning in cases of nuisances by smoke and noise and of pollution or diversion of water, it was also expanded in order to apply it to cases of the use of movable property which injured the plaintiff's movable property or his real property, and to the use of movable property in such a way as to cause personal injuries. No longer was the maxim being limited to the use of real property or to injuries to real property.

The trend already begun by King v. Ward was carried still further by Mr. Justice Pitney in Hitchman Coal & Coke Co. v. Mitchell. In this case, the defendants were restrained from securing the promises of the employees of the plaintiff to join a union on the grounds that to do so was an interference with the contract between the employees and the plaintiff which provided that if the employees did join a union their employment would terminate. In the course of his opinion, Mr. Justice Pitney said that while there is a right to form unions and to enlarge the memberships of unions by inviting employees to join, nevertheless that right was not absolute. Like other rights it must be exercised with respect for the rights of others, and the maxim forbade this conflict of rights. He admitted that this maxim literally applied only to property rights but asserted that it should more properly apply to "conflicting rights of every description." The defendants, he held, were injuring the plaintiff and its employees.

In this case, the maxim was used even though the defendants were not using their property, real or personal, and even though the results of their actions, which the court thought were injurious, did not

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37See the maxim, aqua currit et debet currere ut currere solebat, 3 Kent, Comm. 439; Atchison v. Peterson, 20 Wall. 507 (1874); U. S. v. Rio Grande Dam & Irrigation Co., 174 U. S. 690 (1899).
38See also U. S. v. Bostwick, 94 U. S. 53, 66 (1876) where Chief Justice Waite held that the maxim was to be implied in every lease and to be treated as binding on the lessee just as if the maxim were an express part of the contract. This also is an interesting use of the maxim for which there is no precedent.
39The Marianna Flora, 11 Wheat. 1, 42 (1826). Story, J., also wrote the opinion in the Circuit Court, 3 Mason 116, 119 (1822). See also The China, 7 Wall. 53, 68 (1868); The Syracuse, 9 Wall. 672, 676 (1869).
40Dutton v. Strong, 1 Bl. 22, 33, 34 (1861).
42245 U. S. 229 (1917).
affect any real property of the plaintiff. This is indeed an expansion of the maxim to its ultimate limits, and, except for the one case, has no support in the English common law which limited the maxim to the use of property. It is true that Broom contended that the maxim applied in this broader sense and Mr. Justice Pitney relied on Broom. But this construction was solely Broom's own as shown by the fact that the cases he cited do not in this respect make any use of the maxim. In his preface, Broom says that he has preferred those cases where the maxim has been cited or directly stated to apply, but that he has found it "necessary to refer to many other instances in which no such specific reference has been made, but which seem clearly to fall within the principle of the Rule; and wherever this has been done, sufficient authorities have, it is hoped, been appended to enable the reader, without very laborious research, to decide for himself whether the application suggested has been correctly made or not." In other words, he admits that this interpretation of the maxim which is not directly supported by the use made of it by the English courts, is his own. This case shows clearly the changing meaning given to the maxim by the United States Supreme Court.

Citing his own opinion in the Hitchman case as authority, Mr. Justice Pitney used this same interpretation in International News Service v. Associated Press. But the application of the maxim, apart from the general statements of the opinion, is more limited by the holding that news is quasi-property as between the parties. Thus the injunction, restraining, on the basis of the maxim, the International News Service from pirating the news of the Associated Press until the news had lost its commercial value, is not applied to rights which the court thought were other than property rights.

While the Supreme Court of the United States has made this extended use of this common law maxim, these cases do not mark the limit of the court's reliance upon it. Perhaps the greatest American contribution to the development of this maxim is in continuing the extension of it from the private law field into that of the public law. This occurs when the maxim is relied upon in the interpretation and justification of the police power. The court continues the trend of King v. Ward by construing the maxim as protecting the general rights of the public rather than the property rights of the individual.

In a number of cases, the court has sustained ordinances or statutes on the ground that they were valid police measures because they for—

4Id. at 254. See also American Bell Telephone Co. v. U. S., supra note 35, at 563.
4BROOM, LEGAL MAXIMS (1845) Preface, iv.
bade or regulated the use of property in such a way as to prevent what the court thought would be an injury to others. In those cases where the court used the maxim, the police power was held to be the means of giving efficacy to the maxim. In some of these cases property was being used in ways which the common law had forbidden, and in these cases there is a closer reliance on the historical and technical meaning of the maxim. In others, however, the court is giving the maxim a more general, non-historical meaning by determining that it forbids the use of property in any way which would cause what the court considers an injury to the public. While this is a broad extension of the meaning of the maxim, it is merely carrying further the American trend of using the maxim in cases in which the common law never, or very rarely and limitedly, considered it applicable. The maxim undoubtedly aids the decision of the court by calling to its support, usually dogmatically by mere assertion, a Latin phrase of considerable age, generally accepted as irrefutable. It is submitted that the court in these cases is making into a rule of law what might be called the ethical content of the maxim, rather than adhering to the limited legal significance which had been determined by the common law.

Thus in Holyoke Company v. Lyman, a statute of Massachusetts was sustained requiring fishways to be constructed in dams. A riparian owner could not use his property rights over the water in such a way as to injure all other proprietors up and down the stream by preventing the passage of fish. In the Slaughter House Cases, a statute creating a monopoly in slaughtering, which was to be done within a restricted area outside New Orleans, and requiring inspection was sustained. The court agreed that unrestricted slaughtering within the populous sections of the city was injurious to the public and that the legislature could forbid it in such places for the sanitary protection of the community. Private interests were declared by Mr. Justice Miller to be subservient to the general interests of the community and slaughtering could be forbidden on the principle that one should use his property so as not to injure his neighbors. In Munn v. Illinois, Chief Justice Waite viewed the public as having certain rights in those businesses which had legally been declared to be "vested with a public interest," which rights were violated by excessive rates charged by such businesses. Consequently, the legislature could set

45 15 Wall. 500 (1872).
46 94 U. S. 113 (1876).
47 16 Wall. 36 (1872).
48 The dissenting opinions object to the monopolistic features of the statute and not to its police regulations.
rates in the protection of these public rights because no one could use his property in such a way as to injure others. In Richmond, Fredericksburg & Potomac Railroad Co. v. Richmond, it was held that the city under its police power could prohibit the use of locomotives in the streets because of the danger to the public. In Fertilizing Company v. Hyde Park, Mr. Justice Swayne approved the decision of the Supreme Court of Illinois that the transportation of garbage and offal through the town was a nuisance to the public which the town could prohibit by ordinance because the maxim, on which the police power rested, forbade anyone to create a public nuisance. In Crowley v. Christensen an ordinance of San Francisco was sustained requiring a license for the sale of intoxicating liquor and forbidding the sale without a license. One may use his property as he pleases so long as he does not “impair the equal enjoyment by others of their property,” and the retailing of intoxicating liquor is “attended with danger to the community.” In Saint Louis & San Francisco Railroad v. Matthews, the court sustained a statute making railroads in the state, as insurers, responsible for the property of any person injured or destroyed by fire started by its locomotives. In Holden v. Hardy, an Act of the state of Utah which set an eight-hour day for labor in underground mines, smelters and ore reduction works was sustained as a protection of the public. For an employer in such occupations to require longer hours of labor was viewed as injurious to the rights of the community. In Atlantic Coastline Railroad v. Goldsboro, an ordinance of the town regulated the use by the railroad of its right of way through the streets by limiting the speed of cars, setting times of the day for shifting cars from track to track, forbidding the standing of cars in the streets, and requiring the tracks to be lowered and the space between the rails to be filled in. In holding this act to be valid, Mr. Justice Pitney said that, under such circumstances as these where the operation of the railroad was fraught with danger to the public, “the State, in the exercise of its police power, may legitimately extend the application of the principle that underlies the maxim sic utere tuo ut alienum non laedas, so far as may be requisite for the protection of the public.” In Chicago & Alton Railroad v. Tranbarger, the court sustained an Act of Missouri requiring railroads to construct drainage systems to carry off the water which otherwise would have collected, because the statute was a prevention of damage.
which would have been caused by the construction of the road bed, and thus an application of the maxim. The case of *The Prudential Insurance Company v. Cheek*, 69 again shows clearly this extended use of the maxim. An Act of Missouri was sustained requiring an employer to give an employee, upon request when the employment is ended, a letter stating the nature and character of the service rendered, the duration of the service and the truth as to the cause for its termination. Mr. Justice Pitney said that the state Supreme Court sustained the Act as an exercise of the police power, "but in truth it requires no extraordinary aid, being but a regulation of corporations calling for an application of the familiar precept, 'sic utere tuo', etc., in a matter of general public concern." 69

The court in these cases, however, was not creating a completely new meaning for the maxim without prior authority. Several of the cases give us some interesting suggestions as to the possible origin of this use and interpretation. In one, Chancellor Kent is mentioned by Mr. Justice Miller. 64 Kent held that the government "may, by general regulations, interdict such uses of property as would create nuisance, and become dangerous to the lives, or health, or peace, or comfort of the citizens... on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." 62 Mr. Justice Swayne cited *Coates v. The Mayor of New York*, 63 in support of his use of the maxim in *Fertilizing Company v. Hyde Park*. 64 In that case the Supreme Court of New York held valid an ordinance of the city forbidding cemeteries in certain sections of the city, saying, "Every right, from an absolute ownership in property, down to a mere easement, is purchased and holden subject to the restriction, that it shall be so exercised as not to injure others." 67 Another authority more frequently cited 67 is Chief Justice Shaw 7 who sustained a statute of Massachusetts fixing a limit in the harbor of Boston beyond which piers, wharves or other permanent structures could not be erected. After explaining that all property rights are subject to reasonable regulations which prevent the exercise of them from being injurious, he gives examples of such uses. The owner is restrained because these uses of his property are contrary to the

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69259 U. S 530 (1922).  
60Id. at 544.  
61Slaughter House Cases, 16 Wall. 36, 62 (1872).  
637 Cow. 585 (N. Y. 1827).  
6497 U. S. 659, 668 (1878).  
657 Cow. 585, 605 (N. Y. 1827).  
maxim. These authorities pointed the way for the United States Supreme Court, and it was but a step for that court to adopt this new interpretation of the maxim to its own purposes.

This use of the maxim in connection with the police power furnishes some very interesting speculation on the attitude of the United States Supreme Court toward that very important concept of Constitutional Law. If the police power is to be interpreted as the power to regulate men and things or the power to protect the public health, safety, morals and the general welfare, it is obvious that the meaning of the maxim, if it is to be used in support of this power at all, must be expanded by interpretation. This is exactly what has happened and because of the nature of the maxim the expansion was very easily brought about.

The court has used the maxim as an instrument for support of the police power. Thus in no case where state Acts were declared invalid as improper exercises of the police power, was the maxim used as a means of so holding; i.e., in no case were such measures held void as being violations of this common law maxim. Also, the court frequently declared that the maxim is at the basis of the police power and that this power of the states exists to give effect to the maxim. In the Slaughter House Cases, for example, the attitude of the court was one of explaining to the defeated parties that slaughter houses in populous sections had long been considered nuisances, that they should not have expected a statute which declared this common law rule to be held unconstitutional, and that they were not really being deprived of any rights because they had no right to commit this public nuisance prior to the enactment of the statute. Thus it would seem, the court thought, that the state Act simply prohibited certain action which the common law maxim already prohibited.

It is submitted, however, that an analysis of these cases and the logical result to which this use of the maxim leads is that the maxim is really, by implication, a leash or limitation on the state police power. In the first place, in those cases in which the maxim is used the court is influenced by its belief that the acts which are being forbidden or regulated are injurious to another person or corporation, or to the public, and the maxim is interpreted as forbidding such injuries. Furthermore, the very fact that the court has frequently stated in the cases discussed above that the maxim is at the basis of

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68See also People v. New York Carbonic Acid Gas Co., 196 N.Y. 421, 436, 440 (1909).

69For an interesting analysis of the meaning of the maxim see Mahon v. Brown, 13 Wend. 261, 263, 264, 265 (N.Y. 1835).
the police power and that that power of the state legislatures is a means of giving efficacy to the maxim implies that a statute would not be a valid exercise of the police power unless it could be shown that the acts which the statute regulated or prohibited could also be held to be regulated or prohibited by the maxim. The implication is that the police power cannot be extended to any statutory regulation to which the maxim cannot be applied by the court.\footnote{See 2 Cooley, \textit{Constitutional Limitations} (8th ed. by Carrington, 1927) 1241, where this is recognized in a more limited way.}

The police power is broad and in its exercise the rights of the individual or the corporation may be curtailed. Consequently, the court thought that this power ought to be kept within bounds and it felt the need of an instrument whereby it could control this power of the state legislatures. The case of \textit{Munn v. Illinois},\footnote{\textit{Supra} note 49.} shows this well. That case brought about a great expansion of the police power and, while the example of the Sovereignty of the English Parliament influenced the court greatly, yet it was reluctant to recognize an unlimited power in the state legislatures. At this time, the due process clause of the Fourteenth Amendment had not yet been developed as a limitation on the state police power. That the court felt the need of a check, however, and viewed the maxim as satisfying this need, seems clear. Since that time, the due process clause has been developed into an effective constitutional check, and this is the principle reason why the court has never expressly used the maxim in that way. Thus, this common law maxim has served as an instrument for supporting the validity of police measures and for defining the nature and scope of the state police power. At the same time, the very way in which the maxim has been used implies that it is also an instrument of control and, as such, it is one which the court may use with considerable latitude because of its indefiniteness and variability of content.

Thus has the maxim grown and developed.\footnote{Perhaps the most unprecedented and extended use of the maxim is that made by Pinkney in argument for the plaintiff in error in \textit{Cohens v. Virginia}, 6 Wheat. 264, 374 (1820): "Nobody objects to a state enforcing its own penal laws; all that is claimed is, that in executing them, it should not violate laws of the Union, which are paramount. \textit{Sic utere tuo ut alienum non laedas}." The court, however, made no mention of the maxim in its opinion and it has never been used in this way.} Originally applied only to those cases where the defendant had been doing something on his own property which the common law courts held was injurious to the property of others, it was ultimately used by the Supreme Court of the United States in the exercise of its right of review over the police power of the states. Throughout this long period of development, it
appears to be more a principle of legislation than a rule of law. It can hardly be said that there was a rule of law limiting one's use of his own property because of the effect that use would have on the property of another. It was rather a principle of justice or policy under the guise of which the courts, treating it as if it were a rule of law, have enunciated rules of law for application in the cases which have come before them, and, as such, it represents more accurately a guiding principle of legislation. As a guide for the enunciation and application of more detailed rules of law, the courts tried to approximate it in the cases which have come before them. Thus, whenever the courts held certain uses of property to come under the ban of the maxim, they were laying down rules of law for those particular cases, which rules, in many instances, were followed in later cases by virtue of the doctrine of stare decisis. Likewise, the extension of the meaning of the maxim to make it include more than it had included in the past, or the restriction of its content by withdrawing from the scope of its application situations in which it had previously governed, are examples of legislation by the courts. In this connection, it is extremely interesting and significant that the United States Supreme Court turned a maxim, legislative in character, into an instrument with which to limit legislative power while at the same time broadening the scope of its application and creating additional rules of law under the guise of using it as a rule of law in itself.

This interpretation of the character of the maxim, it is submitted, would eliminate that criticism most often directed at it, namely, that it is meaningless because it decides nothing. This criticism would be pertinent if the maxim were considered as a rule of law, but if it is interpreted as being essentially a goal which the law should strive to attain, the criticism loses its significance. These objections, then, do not apply—that the court must first determine what is injurious and whether the actions involved in a particular case before it are of such a character, and that to use the maxim even then is superfluous be-

Terry, Some Leading Principles of Anglo-American Law, (1884) §§ 10, 11. See also 1 Cooley, op. cit. supra note 70, 124: "Those beneficent maxims of the common law which guard person and property have grown and expanded until they mean vastly more to us than they did to our ancestors, and are more minute, particular, and pervading in their protections; and we may confidently look forward in the future to still further modifications in the direction of improvement."


Compare the maxim Damnum absque injuria.
cause the term "injury" has the legal significance of that which the law forbids, so that the case must be decided before the maxim can be brought into it. As a goal for the law, it is not necessary for the maxim to decide anything. The fact that it does not indicates that it is not a rule of law rather than that it is meaningless. The fact that the courts have treated it as if it were a rule of law does not make it one.