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Law of Private Nuisance in Missouri, The

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I. ELEMENTS OF PRIVATE NUISANCE

A. Definition

A private nuisance¹ is defined in the *Restatement of Torts*² and by the majority of states,³ including Missouri,⁴ as any activity which unreasonably interferes with the use and enjoyment of land. Two conflicting policy

1. The law of private nuisance originated as the assise of nuisance during the twelfth century. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 469 n.2 (5th ed. 1956). Its original purpose was to remedy interferences with land not amounting to trespass. 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 11 (3d ed. 1927). Indeed, if an interference amounted to a trespass it was not actionable under the assise of nuisance. Eventually, the assise gave rise to the action of trespass on the case and later to the modern actions of public and private nuisance. McRae, *The Development of Nuisance in the Early Common Law*, 1 FLA. L. REV. 27 (1948).

2. RESTATEMENT OF TORTS § 822 (1939). There is one important difference between the *Restatement* and Missouri case law. The *Restatement* provides that a private nuisance is actionable only if the defendant's conduct is intentional and unreasonable, or negligent, reckless, or ultrahazardous. Missouri law does not appear to impose such a requirement, and the nature of culpability for the maintenance of a nuisance is more in the nature of strict liability. Beyond this important distinction, both the *Restatement* and Missouri case law define a private nuisance as an unreasonable interference with the use and enjoyment of land. Both apply the same factors to determine which interferences are unreasonable. It also should be observed that the *Restatement* prefers to label this area of the law as "non-trespassory invasions of land" rather than as private nuisance.

3. See W. RODGERS, *HANDBOOK ON ENVIRONMENTAL LAW* § 2.3 (1977); W. PROSSER, *HANDBOOK ON THE LAW OF TORTS* § 89 (4th ed. 1971).

4. *Archib. v. Rollins Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973); *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Rankin v. Charless*, 19 Mo. 490

considerations underlie this definition.⁵ The courts recognize the desirability of permitting landowners latitude in the use of their land and do not wish to impose unnecessary restrictions.⁶ However, the courts also recognize that there is a point at which the landowner's latitude must be restricted so as not to unreasonably interfere with the use and enjoyment of surrounding land.⁷ It should be observed that this definition contemplates the protection of a wide variety of interests in land, including the present use value, the right to enjoy the pleasures and comforts of the land, and the right to maintain the land in the same physical condition.⁸ Therefore, an interference can be unreasonable which produces either actual physical injury to the land or which causes discomfort or annoyance to its occupants.⁹

From time to time, Missouri courts have applied a variety of other definitions to private nuisance. One definition adopted in several older Missouri cases stated that a private nuisance exists if one person "injures or annoys another in the exercise of his legal rights."¹⁰ Another stated that a private nuisance is "anything that worketh hurt, inconvenience or damage

(1854); *Meinecke v. Stallworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947); *Lademan v. Lamb Constr. Co.*, 297 S.W. 184 (St. L. Mo. App. 1927).

5. See generally 5 R. POWELL, REAL PROPERTY §§ 704-707.1 (1977); W. RODGERS, *supra* note 3, §§ 2.1-2.17; D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES, §§ 5.3-.5, 5.7 (1973); W. PROSSER, *supra* note 3, §§ 86-91; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW, §§ 158-62 (1971).

6. *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Rhodes v. A. Moll Grocer Co.*, 231 Mo. App. 751, 95 S.W.2d 837 (St. L. 1936); *Magel v. Gruetli Benev. Soc'y*, 203 Mo. App. 335, 218 S.W. 704 (St. L. 1920); *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

7. *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Meinecke v. Stallworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Mason v. Deitering*, 132 Mo. App. 26, 111 S.W. 862 (St. L. 1908).

8. See RESTATEMENT OF TORTS § 822, comment e (1939).

9. See W. PROSSER, *supra* note 3, § 89.

10. *Paddock v. Somes*, 102 Mo. 226, 14 S.W. 746 (1890); *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951); *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S.W. 646 (K.C. 1904). This definition was espoused in 3 W. BLACKSTONE, COMMENTARIES *215, and is cited in several older treatises including T. COOLEY, TORTS § 398, at 845 (1879), and 20 R.C.L. 380, *Nuisance* § 1 (1918). Its application has not been inconsistent with the traditional definition of private nuisance.

to the lands of another."¹¹ Both definitions are primarily of historical significance today.

Another line of Missouri cases stated that the existence of a private nuisance depends on the "degree of danger existing with the best of care."¹² This phrase first appeared in *Pearson v. Kansas City*¹³ to distinguish negligence and nuisance and to state that negligence is not an element of nuisance. The phrase derives from the 1918 treatise *Ruling Case Law*¹⁴ which defined private nuisance consistently with the traditional definition discussed earlier.¹⁵ The phrase "degree of danger existing with the best of care" was advanced in *Pearson* and in several later cases which had little to do with the law of private nuisance. It is possible that these cases were applying the law of public nuisance, rather than the law of private nuisance.¹⁶ In *Pearson* the defendant did not interfere with the use and enjoyment of plaintiff's land; rather, the plaintiff was injured when she fell down an open elevator shaft located on the defendant's property.¹⁷ Similarly, in *Davis v. Cities Service Oil Co.*¹⁸ the test was applied in a wrongful death case in which the plaintiff's husband was killed when a car fell off a lift at the defendant's service station.

The confusion in *Pearson* and subsequent cases appears to be the result of a misapplication of a different section of *Ruling Case Law*. In *Pearson*, which involved a public nuisance and not a private nuisance, the plaintiff was seeking to avoid the bar of sovereign immunity raised by the defendant city. One section of *Ruling Case Law*, upon which the court relied, states that a city could be liable for a condition which results in an interference with nearby land, but could not be liable for a condition

11. *Paddock v. Somes*, 102 Mo. 226, 14 S.W. 746 (1890); *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (K.C. Mo. App. 1935); *Martin v. City of St. Joseph*, 136 Mo. App. 316, 117 S.W. 94 (K.C. 1909). In *Martin* the court cited 3 BOUVIERS LAW DICTIONARY 2379 (1914) as authority for this definition. Bouvier ultimately relied on Blackstone and his commentaries for authority. 3 W. BLACKSTONE, COMMENTARIES *5, *216. T. COOLEY, *supra* note 10, at 670, indicated that this definition is consistent with the traditional law of private nuisance.

12. *Lentz v. Schuerman Bldg. & Realty Co.*, 359 Mo. 103, 220 S.W. 58 (Mo. En Banc 1949); *Vogrin v. Forum Cafeterias of America*, 308 S.W.2d 617 (Mo. 1957); *Hinds v. City of Hannibal*, 212 S.W.2d 401 (Mo. 1948); *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W.2d 485 (1932); *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *Titone v. Teis Constr. Co.*, 426 S.W.2d 665 (K.C. Mo. App. 1968); *Rodgers v. Kansas City*, 327 S.W.2d 478 (K.C. Mo. App. 1959). See also *Bollinger v. Mungle*, 175 S.W.2d 912 (St. L. Mo. App. 1943).

13. 331 Mo. 885, 55 S.W.2d 485 (1932).

14. 20 R.C.L. 381 (1918).

15. *Id.*

16. See authorities cited notes 20 & 26 *infra*.

17. Plaintiff was denied recovery on a nuisance theory because she pleaded

negligence and not private nuisance.

18. 131 S.W.2d 865 (St. L. Mo. App. 1939).

which results in personal injury.¹⁹ In making this distinction, the court failed to state that the personal injury action would be brought on a public rather than a private nuisance theory,²⁰ while the action concerning interference with land could be brought on *either* a private or a public nuisance theory.

Following *Pearson*, a line of Missouri cases picked up the phrase that the existence of a nuisance depends on the degree of danger existing with the best of care and began applying it in cases which had little or nothing to do with private nuisance law. It was applied in cases which should have been tried on a negligence or public nuisance theory. In *Vogrin v. Forum Cafeterias of America*²¹ the court applied the "degree of danger" test in a case in which the plaintiff slipped and fell on the sidewalk in front of the defendant's cafeteria. In *Bodard v. Culver-Stockton College*²² the phrase was applied in a case in which the plaintiff suffered personal injury while applying lime to the defendant's football field. In *Hinds v. City of Hannibal*²³ it was applied in a case in which the plaintiff was assaulted by a police officer. In *Brown v. City of Craig*²⁴ the plaintiff's husband was killed when the city jail in which he was incarcerated burned down. None of these cases involved an interference by the defendant with the use and enjoyment of the plaintiff's land; application of nuisance principles appears to have been inappropriate.²⁵

The "degree of danger" cases are not explainable on traditional private nuisance theory and, as noted earlier, it is quite possible that they represent application of the law of public nuisance rather than the law of private nuisance.²⁶ More recent Missouri cases clearly indicate that Missouri follows the traditional definition that a private nuisance exists

19. 19 R.C.L. § 401 states:

When a piece of real estate belonging to a municipal corporation is allowed to fall into such condition as to constitute a nuisance to adjoining property, the corporation is held liable to the same extent as a private owner, but the exemption of municipal corporations from liability for personal injury in connection with the conduct of public and governmental functions has been held to extend to injuries arising from the unsafe and defective condition of public buildings and other public places. . . .

20. See Annot., 75 A.L.R. 1196 (1931).

21. 308 S.W.2d 617 (Mo. 1957).

22. 471 S.W.2d 253 (Mo. 1971).

23. 212 S.W.2d 401 (Mo. 1948).

24. 350 Mo. 836, 168 S.W.2d 1080 (1943).

25. It is interesting to note that in these cases it was held that no nuisance existed. However, the courts did not base their decisions on traditional nuisance principles, but rather on the principle that there was not a sufficient degree of danger.

26. See *Rodgers v. Kansas City*, 327 S.W.2d 478 (K.C. Mo. App. 1959), which proposed a requirement of special injury. Special injury is generally required in a public but not in a private nuisance action.

when one person unreasonably interferes with the use and enjoyment of another person's land.²⁷ To the extent that *Pearson* and the other cases may be inconsistent therewith, they are probably not good law.²⁸

B. *Factual Patterns*

A variety of factual patterns have been alleged to constitute a private

27. *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Meinecke v. Stallsworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931); *Lademan v. Lamb Constr. Co.*, 297 S.W. 184 (St. L. Mo. App. 1927); *Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S.W. 646 (K.C. 1904).

28. It should be mentioned that several other Missouri cases have indicated that one who harbors a vicious dog could be liable for maintaining a nuisance. *Clinkenbeard v. Reinert*, 284 Mo. 569, 225 S.W. 667 (En Banc 1920); *Gardner v. Anderson*, 417 S.W.2d 130 (K.C. Mo. App. 1967); *Patterson v. Rosenwald*, 222 Mo. App. 973, 6 S.W.2d 664 (K.C. 1928). As with the "degree of danger cases," these cases are probably applying a public rather than a private nuisance theory. It would be unlikely, although not impossible, for a vicious dog or a dog bite to involve an interest in land. *Clinkenbeard*, one of the early dog bite cases, did not expressly state that one who maintains a dog is liable on a public nuisance theory, but it did state that the owner is liable on a nuisance theory because he has violated a duty which he owes to the public by maintaining an animal which is a menace to the public. *See also* *Wright v. Wright*, 674 S.W.2d 137 (Mo. App., D.K.C. 1974). The language used would suggest a public rather than a private nuisance basis for the decision.

nuisance. Such intrusions as noise,²⁹ odor,³⁰ fumes,³¹ and light³² are a frequent source of nuisance litigation. However, the list of activities which could result in a private nuisance is virtually limitless and includes raceways,³³ slaughterhouses,³⁴ coal mines,³⁵ industrial plants,³⁶ record stores,³⁷

29. *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973); *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Leonard v. Gagliano*, 459 S.W.2d 732 (K.C. Mo. App. 1970); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *Clinic & Hosp., Inc. v. McConnell*, 236 S.W.2d 384 (K.C. Mo. App. 1951); *Biggs v. Griffith*, 231 S.W.2d 875 (Spr. Mo. App. 1950); *Magel v. Gruetli Benev. Soc'y*, 203 Mo. App. 335, 218 S.W. 704 (St. L. 1920); *McNulty v. Miller*, 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912); *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S.W. 1005 (K.C. 1905); *Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892).

30. *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928); *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Flanigan v. City of Springfield*, 360 S.W.2d 700 (Mo. 1962); *Lee v. Rolla Speedway, Inc.*, 539 S.W.2d 627 (Spr. Mo. App. 1976); *Hunt v. Easely*, 495 S.W.2d 703 (Mo. App., D. St. L. 1973); *Meinecke v. Stallsworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); *Leonard v. Gagliano*, 459 S.W.2d 732 (K.C. Mo. App. 1970); *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Kelly v. National Lead Co.*, 240 Mo. App. 47, 210 S.W.2d 728 (St. L. 1948); *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636, 93 S.W. 289 (St. L. 1906); *Babb v. Curators of State University*, 40 Mo. App. 173 (K.C. 1890).

31. *Lederer v. Carney*, 142 S.W.2d 1085 (St. L. Mo. App. 1940).

32. *Leonard v. Gagliano*, 459 S.W.2d 732 (K.C. Mo. App. 1970); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931).

33. *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973); *Lee v. Rolla Speedway, Inc.*, 539 S.W.2d 627 (Mo. App., D. Spr. 1976).

34. *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *Zugg v. Arnold*, 75 Mo. App. 68 (St. L. 1898).

35. *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Bartlett v. Hume-Sinclair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1961); *Gibson v. Donk*, 7 Mo. App. 37 (St. L. 1879) (coal yard).

36. *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968); *Thompson v. Hodge*, 348 S.W.2d 11 (Spr. Mo. App. 1961); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Kelly v. National Lead Co.*, 240 Mo. App. 47, 210 S.W.2d 728 (St. L. 1948); *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1907); *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636, 93 S.W. 289 (St. L. 1904); *Danker v. Goodwin Mfg. Co.*, 102 Mo. App. 723, 77 S.W. 338 (St. L. 1903).

machine shops,³⁸ mortuaries,³⁹ stove pipes,⁴⁰ parking lots,⁴¹ bowling alleys,⁴² distilleries,⁴³ public address systems,⁴⁴ sewers,⁴⁵ barbecue stands,⁴⁶ bawdyhouses,⁴⁷ dead animals,⁴⁸ sawmills,⁴⁹ firehouses,⁵⁰ mud,⁵¹

38. *Ivie v. McMunigal*, 66 Mo. App. 437 (K.C. 1896).

39. *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1927); *Leffen v. Hurlbut-Glover Mortuary, Inc.*, 363 Mo. 1137, 257 S.W.2d 609 (1953); *Scallet v. Stock*, 363 Mo. 721, 253 S.W.2d 143 (1952); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924).

40. *Whalen v. Keith*, 35 Mo. 87 (1864).

41. *Scallet v. Stock*, 253 S.W.2d 143 (Mo. 1952); *Krummenacher v. Western Auto Supply Co.*, 206 S.W.2d 991 (St. L. Mo. App. 1947), *aff'd in part*, 358 Mo. 757, 217 S.W.2d 473 (En Banc 1949); *Rhodes v. A. Moll Grocer Co.*, 231 Mo. App. 751, 95 S.W.2d 837 (St. L. 1936).

42. *Magel v. Gruetli Benev. Soc'y*, 203 Mo. App. 335, 218 S.W. 704 (St. L. 1920).

43. *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361, 165 S.W. 1142 (K.C. 1914).

44. *Clinic & Hosp., Inc. v. McConnell*, 236 S.W.2d 384 (K.C. Mo. App. 1951); *Biggs v. Griffith*, 241 Mo. App. 223, 231 S.W.2d 875 (Spr. 1950).

45. *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Chappel v. City of Springfield*, 388 S.W.2d 886 (Mo. 1965); *Flanigan v. City of Springfield*, 360 S.W.2d 700 (Mo. 1962); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (En Banc 1939); *Windle v. City of Springfield*, 320 Mo. 459, 8 S.W.2d 61 (1928); *Smith v. City of Sedalia*, 182 Mo. 1, 81 S.W. 165 (1904); *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899); *Hunt v. Easley*, 495 S.W.2d 703 (Mo. App., D. St. L. 1973); *Stewart v. City of Marshfield*, 431 S.W.2d 819 (Spr. Mo. App. 1968); *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951); *Barber v. School Dist. No. 51*, 335 S.W.2d 527 (K.C. Mo. App. 1960); *McCleery v. City of Marshall*, 65 S.W.2d 1042 (K.C. Mo. App. 1933); *Kent v. City of Trenton*, 48 S.W.2d 571 (K.C. Mo. App. 1931); *Skinner v. City of Slater*, 159 Mo. App. 589, 141 S.W. 733 (K.C. 1911); *City of Chillicothe v. Bryan*, 103 Mo. App. 409, 77 S.W. 465 (K.C. 1903); *Foncannon v. Kirksville*, 88 Mo. App. 279 (K.C. 1901); *Scott v. City of Nevada*, 56 Mo. App. 189 (K.C. 1894); *Bab v. Curators of State University*, 40 Mo. App. 173 (K.C. 1890).

46. *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926).

47. *Givens v. Van Studdiford*, 86 Mo. 149 (1885).

48. *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876); *Jarvis v. St. Louis, I.M. & S. Ry.*, 26 Mo. App. 253 (St. L. 1887).

49. *Thompson v. Hodge*, 348 S.W.2d 11 (Spr. Mo. App. 1961).

50. *Van De Vere v. Kansas City*, 107 Mo. 83, 17 S.W. 695 (Mo. 1891). The firehouse under construction in *Van De Vere* was being built for one fire wagon, a span of horses, and five men. Plaintiff objected to the anticipated odor from the horses, and the noise from the bells.

51. *Schmidlaw v. Paul*, 554 S.W.2d 496 (Mo. App., D.K.C. 1977); *Frick v. Kansas City*, 117 Mo. App. 488, 93 S.W. 351 (K.C. 1906).

water leaks,⁵² dams,⁵³ chemical plants,⁵⁴ steam pipes,⁵⁵ poultry, egg, and butter houses,⁵⁶ filling stations,⁵⁷ barking dogs,⁵⁸ spray ponds,⁵⁹ rock quarries,⁶⁰ breweries,⁶¹ cemeteries,⁶² dairies,⁶³ picketing,⁶⁴ stables,⁶⁵ factories,⁶⁶ septic tanks,⁶⁷ furnaces,⁶⁸ steam shovels,⁶⁹ brick kilns,⁷⁰

52. *Schindler v. Standard Oil Co. of Indiana*, 207 Mo. App. 190, 232 S.W. 735 (St. L. 1921).

53. *Payne v. Kansas City, St. J. & C.B.R.R.*, 112 Mo. 6, 20 S.W. 322 (1892); *Pinney v. Berry*, 61 Mo. 359 (1875); *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949); *Roth v. City of St. Joseph*, 164 Mo. App. 26, 147 S.W. 490 (K.C. 1912); *Nickey v. St. Louis, M. & S.E. Ry.*, 135 Mo. App. 661, 116 S.W. 477 (St. L. 1909); *Scheurich v. South-West Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905); *Markt v. Davis*, 46 Mo. App. 272 (K.C. 1891).

54. *Kelly v. National Lead Co.*, 240 Mo. App. 47, 210 S.W.2d 728 (St. L. 1948).

55. *Stremph v. Loethen*, 203 S.W. 238 (K.C. 1918).

56. *McCracken v. Swift & Co.*, 265 S.W. 91 (St. L. Mo. App. 1947).

57. *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931).

58. *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968).

59. *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (K.C. Mo. App. 1935).

60. *Lademan v. Lamb Constr. Co.*, 297 S.W. 184 (St. L. Mo. App. 1927); *Northcutt v. Springfield Crushed Stone Co.*, 178 Mo. App. 389, 162 S.W. 747 (Spr. 1914); *Krebs v. Bambrick Bros. Constr. Co.*, 144 Mo. App. 649, 129 S.W. 425 (Spr. 1910); *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *Schaub v. Perkinson Bros. Constr. Co.*, 108 Mo. App. 122, 82 S.W. 1094 (St. L. 1904); *Berlin v. Thompson*, 61 Mo. App. 234 (St. L. 1895).

61. *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947); *Beckley v. Skroh*, 19 Mo. App. 75 (K.C. 1885).

62. *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (St. L. Mo. App. 1941); *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (St. L. Mo. App. 1929).

63. *McDonough v. Robbins*, 60 Mo. App. 156 (St. L. 1895).

64. *Hughes v. Motion Picture Machine Operators*, 304 Mo. 221, 263 S.W. 202 (En Banc 1920).

65. *McNulty v. Miller*, 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912).

66. *Danker v. Goodwin Mfg. Co.*, 102 Mo. App. 723, 77 S.W. 338 (St. L. 1903); *Thomas v. Concordia Cannery Co.*, 68 Mo. App. 350 (K.C. 1897).

67. *Johnson v. Independent School Dist.*, 239 Mo. App. 749, 199 S.W.2d 421 (Spr. 1947).

68. *Berlin v. Thompson*, 61 Mo. App. 234 (St. L. 1895).

69. *Jackson v. A.P. Green Fire Brick Co.*, 219 Mo. App. 689, 284 S.W. 826 (St. L. 1926).

70. *Rowell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S.W. 646 (K.C. 1904); *Kirchgraber v. Lloyd*, 59 Mo. App. 59 (St. L. 1894).

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vibration,⁷¹ overhanging tree branches,⁷² easement obstructions,⁷³ blasting,⁷⁴ pollution,⁷⁵ surface water discharges and flooding,⁷⁶ stream

71. *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Chamberlin v. Missouri Elec. & Power Co.*, 158 Mo. 1, 57 S.W. 1021 (1900) (defendant constructed a power house with engines which it operated night and day; the attendant vibration damaged plaintiff's home).

72. *Tanner v. Wallbrunn*, 77 Mo. App. 262 (K.C. 1898).

73. *MacCormick v. McCoy*, 94 F. Supp. 772 (W.D. Mo. 1950); *Whalen v. Keith*, 35 Mo. 87 (1864); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903); *Hulett v. Missouri, Kan. & Tex. Ry.*, 80 Mo. App. 87 (K.C. 1899).

74. *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Schaefer v. Frazier-Davis Constr. Co.*, 125 S.W.2d 897 (St. L. 1939); *Northcutt v. Springfield Crushed Stone Co.*, 178 Mo. App. 389, 162 S.W. 747 (Spr. 1914); *Krebs v. Bambrick Bros. Constr. Co.*, 144 Mo. App. 649, 129 S.W. 425 (Spr. 1910); *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *Schaub v. Perkinson Bros. Constr. Co.*, 108 Mo. App. 122, 82 S.W. 1094 (St. L. 1904); *Berlin v. Thompson*, 61 Mo. App. 234 (St. L. 1895).

75. *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939); *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931); *Windle v. City of Springfield*, 320 Mo. 459, 8 S.W.2d 61 (1928); *Smith v. City of Sedalia*, 182 Mo. 1, 81 S.W. 165 (1904); *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899); *Smiths v. McConathy*, 11 Mo. 331 (1848); *Stewart v. City of Marshfield*, 431 S.W.2d 819 (Spr. Mo. App. 1968); *Bartlett v. Hume-Sinclair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1961); *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956); *Divelbiss v. Phillips Petroleum Co.*, 272 S.W.2d 839 (K.C. Mo. App. 1954); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931); *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929); *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (St. L. Mo. App. 1929); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361, 165 S.W. 1142 (K.C. 1914); *Roth v. City of St. Joseph*, 164 Mo. App. 26, 147 S.W. 490 (K.C. 1912); *Skinner v. City of Slater*, 159 Mo. App. 589, 141 S.W. 733 (K.C. 1911); *Haynor v. City of Excelsior Springs Light, Power, Heat & Water Co.*, 129 Mo. App. 691, 108 S.W. 580 (K.C. 1908); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908); *Martinowsky v. City of Hannibal*, 35 Mo. App. 70 (St. L. 1889). *See also Davis, Groundwater Pollution: Case Law Theories for Relief*, 39 MO. L. REV. 117-63 (1974); RESTATEMENT OF TORTS § 832 (1939).

76. *Hawkins v. Burlington N., Inc.*, 514 S.W.2d 593 (En Banc 1974); *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Somerset Villa, Inc. v. City of Lee's Summit*, 436 S.W.2d 658 (Mo. 1968); *Payne v. Kansas City, St. J. & C.B.R.R.*, 112 Mo. 6, 20 S.W. 322 (1892); *Paddock v. Simes*, 102 Mo. 226, 14 S.W. 746 (1890); *Dickson v. Chicago, R.I. & Pac. R.R.*, 71 Mo. 575 (1880); *Wayland v. St. Louis, K.C. & N. Ry.*, 75 Mo. 548 (1882); *Genova v. City of Kansas City*, 497 S.W.2d 555 (Mo. App., D.K.C. 1973); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Proper v. City of Independence*, 328 S.W.2d 55 (K.C. Mo. App. 1959); *Blydenburgh v. Amelung*, 309 S.W.2d 150 (K.C. Mo. App. 1958); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1957); *Divelbiss v. Phillips Petroleum Co.*, 272 S.W.2d 839 (K.C. Mo. App. 1954); *Hayes v. St. Louis & S.F.R.R.*, 177 Mo. App. 201, 162 S.W. 266 (Spr. 1913); *Nickey v. St. Louis, M. & S.F.R.R.*, 135 Mo. App. 661, 116 S.W. 477 (St. L. 1909); *Martin v. City of St. Joseph*, 136 Mo. App. 316, 117 S.W. 94

obstructions,⁷⁷ property access obstructions,⁷⁸ gasoline storage,⁷⁹ stagnant water,⁸⁰ horse breeding,⁸¹ the keeping of cattle,⁸² stockyards,⁸³ and the keeping of pigs.⁸⁴

C. *Distinguished from Other Actions*

1. Public Nuisance

The breadth and flexibility of the law of private nuisance create an overlap with several causes of action. The most obvious connection is with the law of public nuisance which is defined as any activity which is injurious to the health, welfare or morals of society.⁸⁵ Frequently, an activity which constitutes a private nuisance will also constitute a public nuisance.

(K.C. 1909); Gleason v. City of Kirksville, 136 Mo. App. 521, 118 S.W. 120 (K.C. 1909); Graves v. St. Louis, M. & S.E. Ry., 133 Mo. App. 91, 112 S.W. 736 (St. L. 1908); Frick v. Kansas City, 117 Mo. App. 488, 93 S.W. 351 (K.C. 1906); Bunten v. Chicago, R.I. & Pac. Ry., 50 Mo. App. 414 (K.C. 1892); Markt v. Davis, 46 Mo. App. 272 (K.C. 1891); Freudenstein v. Heine, 6 Mo. App. 287 (St. L. 1878).

77. Proper v. City of Independence, 328 S.W.2d 55 (K.C. Mo. App. 1959); Irminger v. Wabash Ry., 203 S.W. 660 (K.C. Mo. App. 1918); Nickey v. St. Louis, M. & S.E. Ry., 135 Mo. App. 661, 116 S.W. 477 (St. L. 1909).

78. Titone v. Teis Constr. Co., 426 S.W.2d 665 (K.C. Mo. App. 1968); Smith v. Kansas City, St. J. & C.B. Ry., 98 Mo. 20, 11 S.W. 259 (1889); Frick v. Kansas City, 117 Mo. App. 488, 93 S.W. 351 (K.C. 1906); Hulett v. Missouri, Kan. & Tex. Ry., 80 Mo. App. 87 (K.C. 1899); McGowan v. Missouri Pac. Ry., 23 Mo. App. 203 (K.C. 1886).

79. City of Spickardsville v. Terry, 274 S.W.2d 21 (K.C. Mo. App. 1954); Harper v. Standard Oil Co., 178 Mo. App. 338 (St. L. 1899) (held not a nuisance to store gasoline near a railroad terminal).

80. Bungenstock v. Nishnabotna Drainage Dist., 163 Mo. 198, 64 S.W. 149 (1901); Leonard v. Gagliano, 459 S.W.2d 732 (K.C. Mo. App. 1970); Roth v. City of St. Joseph, 164 Mo. App. 26, 147 S.W. 490 (K.C. App. 1912); Gleason v. City of Kirksville, 136 Mo. App. 521, 118 S.W. 120 (K.C. 1909); Graves v. St. Louis, M. & S.E. Ry., 133 Mo. App. 91, 112 S.W. 736 (St. L. 1908).

81. Hayden v. Tucker, 37 Mo. 214 (1866); McNulty v. Miller, 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912).

82. Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361, 165 S.W. 1142 (K.C. 1914).

83. Laird v. Chicago & Alton R.R., 78 Mo. App. 273 (St. L. 1899); Bielman v. Chicago, St. P. & K.C. Ry., 50 Mo. App. 141 (K.C. 1892).

84. Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. 1970); Smiths v. McConathy, 11 Mo. 331 (1848); Meinecke v. Stallsworth, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); Schumacher v. Shawhan Distillery Co., 178 Mo. App. 361, 165 S.W. 1142 (K.C. 1914).

85. See State *ex rel.* Renfrow v. Service Cushion Tube Co., 274 S.W. 491 (K.C. Mo. App. 1929). See also W. PROSSER, *supra* note 3, § 88; D. HAGMAN, *supra* note 5, at 289, § 158. The distinction had arisen by the sixteenth century. 7 W. HELDSWORTH, *supra* note 1, at 424.

sance.⁸⁶ In *Fuchs v. Curran Carbonizing & Engineering Co.*,⁸⁷ defendant's coal testing plant, which emitted gas and fumes, was held to constitute both a private and a public nuisance.⁸⁸ Similarly, in *City of Spickardsville v. Terry*,⁸⁹ a gasoline storage tank was alleged to constitute both types of nuisance.

Generally, a private individual does not have standing to bring a public nuisance action. Rather, it can only be brought by the attorney general or local prosecutor. A private individual will nonetheless be entitled to bring a public nuisance action if he can establish that he has suffered injury which is greater, in kind and degree, than that suffered by the public in general.⁹⁰ In *Givens v. Van Studdiford*,⁹¹ plaintiff sought damages for the maintenance of a bawdyhouse. The court held that plaintiff was able to establish the requisite injury by demonstrating that he had suffered loss of rents. Although frequently the requirement of special injury can be satisfied when the offending activity creates a private nuisance, it should be remembered that the private nuisance action can be maintained whether or not a public nuisance action is pursued.

2. Trespass

An activity which constitutes a private nuisance might also result in a trespass.⁹² A trespass is defined as an unauthorized physical intrusion onto the land of another.⁹³ The overlap between private nuisance and trespass is well illustrated by the holding in *Blackford v. Heman Construction Co.*⁹⁴ Defendant's blasting cast rocks and other debris onto plaintiff's property resulting in a trespass. The blasting also created noise, dirt, dust, and vibration which the court found to produce a private nuisance. Plaintiff was therefore entitled to sue on alternate theories.

It is nonetheless important to recognize that the action for private nuisance is independent of and can exist without a trespass. A mortuary constructed in a residential neighborhood does not intrude upon nearby land, and necessarily cannot produce a trespass. Yet it can unreasonably

86. *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899); *Hayden v. Tucker*, 37 Mo. 214 (1866). See also *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *City of Spickardsville v. Terry*, 274 S.W.2d 21 (K.C. Mo. App. 1954); D. HAGMAN, *supra* note 5, § 158.

87. 279 S.W.2d 211 (St. L. Mo. App. 1955).

88. The public nuisance suit was a separate suit filed by the city officials.

89. 274 S.W.2d 21 (K.C. Mo. App. 1954).

90. *Givens v. Van Studdiford*, 86 Mo. 149 (1885); *Cambest v. McComas Hydroelectric Co.*, 212 Mo. App. 325, 245 S.W. 598 (K.C. 1922); *Schoen v. Kansas City*, 65 Mo. App. 134 (K.C. 1896).

91. 86 Mo. 149 (1885).

92. 5 R. POWELL, *supra* note 5, § 704; W. PROSSER, *supra* note 3, § 89. See also *Tanner v. Wallbrunn*, 77 Mo. App. 262 (K.C. 1898).

93. W. PROSSER, *supra* note 3, § 89.

94. 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

interfere with the use and enjoyment of nearby homes by creating a constant reminder of death. Hence, it could result in a private nuisance.⁹⁵

There is a potential conflict between private nuisance and trespass theories in surface water discharge cases. Missouri follows the common enemy doctrine in regard to surface water; a landowner has the right to deal with the surface water on his land as he sees fit, regardless of the injury which may occur to others.⁹⁶ Missouri has, however, modified this doctrine with the "due care,"⁹⁷ "collection and discharge,"⁹⁸ and "natural drainway"⁹⁹ modifications.¹⁰⁰ Private nuisance theory may provide a method to circumvent the harshness of the common enemy doctrine. Under nuisance law, a landowner need only demonstrate that the surface water discharge creates an unreasonable interference with the use and enjoyment of his land.¹⁰¹ An important question, therefore, is whether "unreasonableness" will be defined with reference to the common enemy doctrine, subject to modification, or defined with reference only to the traditional factors considered in a private nuisance action.¹⁰² If the latter, it is possible that a different result will be reached than under the common enemy doctrine. In effect, it may be possible to emasculate the common enemy doctrine by litigating surface water discharge cases on private nuisance rather than trespass theory.¹⁰³ In *Hawkins v. Burlington Northern, Inc.*,¹⁰⁴ the court held that the increased discharge of surface water in destructive quantities onto a subservient estate would give rise to an action on both surface water

95. See *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1924). See also *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924).

96. *Hawkins v. Burlington N., Inc.*, 514 S.W.2d 593 (Mo. En Banc 1974); *Miller Land Co. v. Liberty Township*, 510 S.W.2d 473 (Mo. En Banc 1974); *Wells v. State Highway Comm'n*, 503 S.W.2d 689 (Mo. 1973).

97. Under the due care modification, a landowner who improves his land is liable for surface water damage to adjoining land if he acts negligently or without reasonable care. *Abbott v. Kansas City, St. J. & C.B.R.R.*, 83 Mo. 271 (1884).

98. The collection and discharge modification states that a landowner may not collect surface water on his land and discharge it onto his neighbor's land in increased and destructive quantities. *Borgman v. Florissant Dev. Co.*, 515 S.W.2d 189 (Mo. App., D. St. L. 1974).

99. The natural drainway exception states that a landowner may not discharge surface water onto adjoining land, by means of artificial drainways, in such a manner as to increase and accelerate the flow of surface water. *Haferkamp v. City of Rock Hill*, 316 S.W.2d 620 (Mo. 1958).

100. See *Bridges, The Application of Surface Water Rules in Urban Areas*, 42 MO. L. REV. 76 (1977).

101. See generally RESTATEMENT OF TORTS § 833 (1939).

102. See text accompanying note 165 *infra*.

103. Professors Harper and James take the position that when the law of private nuisance overlaps with other principles of tort law, then the latter and more specific theory should be applied. 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.23 (1956).

104. 514 S.W.2d 593 (Mo. En Banc 1974).

and nuisance theories. The court left unanswered the question whether a nuisance action would sustain recovery when the discharge was insufficient to invoke liability under the common enemy doctrine. It seemed to infer, however, that private nuisance theory would be defined consistently with the common enemy doctrine.

3. Riparian Rights

The law of private nuisance also can be invoked to protect riparian rights. A riparian is one who owns land which touches upon or is bounded by a stream.¹⁰⁵ By virtue of his status, a riparian has the right to have the stream flow¹⁰⁶ in its natural course both as to volume and purity except as affected by the reasonable use of other riparians.¹⁰⁷ However, an interference which sufficiently affects the volume and purity of a stream might also create an unreasonable interference with the use and enjoyment of land. For instance, a dam¹⁰⁸ or bridge¹⁰⁹ may impede the flow of surface water in a stream and cast it upon adjoining land. Alternatively, a polluted stream may create odors which unreasonably interfere with the enjoyment of riparian land.¹¹⁰ In either instance, the interference may be remediable on either private nuisance or riparian theory. Those whose property does not border a stream are, of course, not able to bring riparian actions and are relegated to the nuisance remedy.¹¹¹

4. Federal Law

It should also be mentioned that there are a variety of state and federal statutes which overlap, and which may preempt, the common law of

105. *Armstrong v. Westroads Dev. Co.*, 380 S.W.2d 529 (St. L. Mo. App. 1964). See also Lauer, *Reflections on Riparianism*, 35 MO. L. REV. 1 (1970).

106. Riparian rights only accrue as to streams which flow in a particular direction and have a definite channel, with banks and sides, and which usually discharge into some other stream or body of water. *Dudley Special Road Dist. v. Harrison*, 517 S.W.2d 170 (Mo. App., D. Spr. 1974). It need not flow continually, but must amount to more than mere surface drainage. *Id.*

107. *Bollinger v. Henry*, 375 S.W.2d 161 (Mo. 1963).

108. See *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949); *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905).

109. See *Payne v. Kansas City, St. J. & C.B.R.R.*, 112 Mo. 6, 20 S.W. 322 (1892); *Pinney v. Berry*, 61 Mo. 359 (1875); *Kelso v. C.B.K. Agronomics, Inc.*, 510 S.W.2d 709 (Mo. App., D.K.C. 1974); *Nickey v. St. Louis, M. & S. Ry.*, 135 Mo. App. 661, 116 S.W. 477 (St. L. 1909).

110. See *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939); *Bartlett v. Hume-Sinclair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1961); *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956). Pollution might also constitute a public nuisance. See D. HAGMAN, *supra*

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111. See authorities cited note 75 *supra*.

private nuisance. There is an abundance of legislation relating to pollution: the Federal Water Quality Act of 1965;¹¹² the National Environmental Policy Act of 1969;¹¹³ the 1972 amendments to the Federal Water Pollution Control Act;¹¹⁴ the Missouri Clean Water Act of 1973;¹¹⁵ the Fish and Wildlife Act of 1956;¹¹⁶ and other statutes which are beyond the scope of this comment.¹¹⁷ It is important to be aware of these statutes and their availability as an alternative remedy.

Outside the statutory area, it is important to note the case of *Illinois v. Milwaukee* decided in 1972 by the United States Supreme Court.¹¹⁸ There the Court held that federal common law would govern cases involving pollution of interstate waters and their tributaries. The potential impact of this decision on state law remedies for pollution, particularly private nuisance, is unknown.¹¹⁹ It may well preempt private causes of action for nuisance; private persons may be able to invoke federal common law to protect their property interests in these cases.¹²⁰ In any event, the case may be significant in any action involving pollution of interstate waterways.¹²¹

D. Requirement of an Interest in Land

Consistently with the *Restatement*¹²² and the majority of states,¹²³ a prerequisite to the maintenance of a private nuisance action in Missouri is that the plaintiff hold an interest in land with which the defendant is interfering.¹²⁴ In *Ellis v. Kansas City, St. Joseph & Council Bluffs R.R.*,¹²⁵ the

112. PUB. L. NO. 89-234, 79 Stat. 903.

113. 42 U.S.C. §§ 4321-61.

114. 33 U.S.C.A. §§ 1251-1371.

115. RSMo §§ 204.006-.141 (1969).

116. 16 U.S.C. § 742a.

117. P. DAVIS & J. CUNNINGHAM, MISSOURI STATE LAWS PERTAINING TO WATER AND RELATED LAND RESOURCES (1977).

118. 406 U.S. 91 (1972). See also C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 17, at 68 n.38 (3d ed. 1976).

119. See W. RODGERS, *supra* note 3, § 2.12.

120. *Id.*

121. See Comment, *The Expansion of Federal Common Law and Federal Question Jurisdiction to Interstate Pollution*, 10 HOUS. L. REV. 121 (1972). A good discussion of the impact of the decision is contained in W. RODGERS, *supra* note 3, § 2.12.

122. RESTATEMENT OF TORTS § 823 (1939).

123. W. PROSSER, *supra* note 3, § 89.

124. *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Haynor v. Excelsior Springs Light, Power, Heat & Water Co.*, 129 Mo. App. 961 (K.C. 1908). See also *Newman v. City of Eldorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956); MO. APPROVED INSTR. NO. 22.06. For a historical perspective, see 7 W. HOLDSWORTH, *supra* note 1, at 838-81.

125. *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876).

plaintiff occupied land with her husband who held a periodic tenancy.¹²⁶ Defendant's locomotive struck and killed a horse which was then permitted to lie near the tracks and decompose in close proximity to the plaintiff's home. The resulting odor caused plaintiff to become ill. Subsequently, she brought a private nuisance action against the defendant railroad to recover for her injuries. The court, although noting that plaintiff's husband as a month-to-month tenant was entitled to maintain a private nuisance action for her injuries, held that plaintiff was not entitled to recover on a private nuisance theory because *she* did not hold an interest in the land.¹²⁷

The interest in land requirement is construed rather loosely, and can be satisfied by the ownership of an easement,¹²⁸ periodic tenancy,¹²⁹ or tenancy at will.¹³⁰ In *Fuchs v. Curran Carbonizing & Engineering Co.*,¹³¹ plaintiff was a month-to-month tenant of premises on which he lived and operated a tavern. The court held that plaintiff's interest was sufficient to entitle him to maintain a private nuisance action for his injuries.¹³²

It should be noted, however, that since one is only entitled to bring a private nuisance action if there is an injury to an interest in land,¹³³ recovery should be limited to the extent of injury to that interest.¹³⁴ Accordingly, the holder of a month-to-month tenancy will not be permitted to recover damages for injury to the freehold, although he will be entitled to recover for any injury, inconvenience or discomfort which he may have suffered. Similarly, one who owns mineral rights in land cannot recover for an interference which does not affect such rights.¹³⁵

As stated in *Ellis*, one who holds an interest in land is entitled to recover for injuries, discomfort or inconvenience suffered by his family as a

126. Although private nuisance actions almost invariably arise between neighboring landowners, there appears to be no requirement that defendant own an interest in land. For example, repeated phone calls can constitute a nuisance. *Wiggins v. Moskins Credit Clothing Store*, 137 F. Supp. 764 (E.D.S.C. 1956); *Brillhardt v. Ben Tipp, Inc.*, 48 Wash. 2d 722, 297 P.2d 232 (1956).

127. See W. PROSSER, *supra* note 3, § 89.

128. *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903).

129. *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955). See also W. RODGERS, *supra* note 3, § 2.3.

130. See *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956).

131. 279 S.W.2d 211 (St. L. Mo. App. 1955).

132. The *Restatement* view would protect any possessor of land, even an adverse possessor. See RESTATEMENT OF TORTS § 823, comment b (1939).

133. See RESTATEMENT OF TORTS § 822, comment f (1939).

134. *Id.* See also <http://scholarship.law.missouri.edu/mlr/vol44/iss1/8>

135. *Id.*

result of the nuisance.¹³⁶ In *McCracken v. Swift & Co.*,¹³⁷ plaintiff owned a dwelling house in which he resided with his wife and family. Nearby, the defendant operated a poultry, egg and butter house which created odors, noise and filth and caused discomfort to plaintiff and his family. Although neither plaintiff nor his family suffered actual physical injury as a result of defendant's operation, the court held that plaintiff, as owner of the premises, could recover for their inconvenience and discomfort.¹³⁸

It may be desirable for Missouri courts to expand the interest in land requirement to permit occupants or licensees to recover on a private nuisance theory.¹³⁹ Members of the owner's family can suffer severe discomfort from a nuisance, but they hold no interest in the land and cannot seek redress on a private nuisance theory. For instance, a minor child or elderly parent of the owner may be a permanent resident of the household and yet have no ability to enjoin or recover damages for a private nuisance. For another example, a university professor would be a licensee in the use of his office and therefore have no rights under private nuisance theory. If a loudspeaker from a nearby commercial establishment substantially interfered with the use and enjoyment of his office, he would effectively be without remedy. The alternative of proceeding through university channels to attempt to prompt the university to seek abatement of the nuisance seems impracticable. It would be much more practical to allow the professor to pursue, in his own right, a private nuisance action against the commercial establishment. A resident of a nursing home would also be a mere licensee; if a sewer outside his window were to overflow and create a horrible stench, it would seem entirely reasonable to permit him to bring a private nuisance action either to abate the interference or to seek damages. If the interference affects only his room, then nursing home officials might be extremely reluctant to undertake the expense and burden of litigating the matter. The resident may only be a licensee, but his interest would, upon these circumstances, appear to be sufficient to justify allowing him to maintain the action. It should be noted, however, that licensees should be limited to a suit to enjoin¹⁴⁰ the nuisance or to seek damages for their dis-

136. In *Ellis*, the court stated that the possessor of the house must establish three elements in order to recover: possession of the house; an injurious act by the defendant; and injury resulting therefrom. 63 Mo. at 136.

137. 265 S.W. 91 (St. L. Mo. App. 1924). See also *Smith v. City of Sedalia*, 182 Mo. 1, 81 S.W. 165 (1904).

138. The court in *Ellis* also rejected plaintiff's contention that she survived to her husband's cause of action following his death. 63 Mo. at 136.

139. See *W. RODGERS*, *supra* note 3, § 2.3; 1 *F. HARPER & F. JAMES*, *supra* note 103, § 1.30.

140. However, in *Clarke v. Thatcher*, 9 Mo. App. 436 (1881), the court held that a permanent injunction could not be issued at the request of a month-to-month tenant. The court noted that his tenancy might terminate at any time and it would be inequitable to permit him to obtain a permanent restraint against the defendant. It is questionable whether *Clarke* would be followed today.

comfort or annoyance. They should not be able to recover for a greater interest such as damages to the freehold.¹⁴¹

E. *Categories of Private Nuisance*

1. Introduction

In the majority of states, the courts have divided the law of private nuisance into two categories.¹⁴² The first category embraces those activities which always constitute a private nuisance regardless of the manner in which they are conducted, and hence are a nuisance at law or per se.¹⁴³ The second category encompasses those activities which are not a nuisance in and of themselves, but rather become a nuisance because of the manner in which they are conducted.¹⁴⁴ This latter type of nuisance is referred to as a nuisance in fact. The nuisance per se classification substantially diminishes the plaintiff's burden of proof; he need only establish that the defendant's conduct is classified within one of the categories denominated as a nuisance per se, and the court will presume that the activity is unreasonable.¹⁴⁵ In the nuisance in fact category, on the other hand, the plaintiff must demonstrate that the defendant's conduct does in fact result in an unreasonable interference with the use or enjoyment of land.

2. Nuisance Per Se

The nuisance per se category can be further subdivided into those activities which are unlawful, and thus qualify as a nuisance per se irrespective of their location,¹⁴⁶ and those activities which are a nuisance per se only when located in a residential area.¹⁴⁷ The latter category has been

141. See note 134 and accompanying text *supra*.

142. See D. HAGMAN, *supra* note 5, § 158.

143. *Id.* See also W. RODGERS, *supra* note 3, § 2.7.

144. See W. RODGERS, *supra* note 3, § 2.7.

145. See generally *Leffen v. Hurlbut-Glover Mortuary Co.*, 363 Mo. 1137, 257 S.W.2d 609 (1953); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Whipple v. McIntyre*, 69 Mo. App. 397 (St. L. 1897).

146. See *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908).

147. *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1924). See also *Leffen v. Hurlbut-Glover Mortuary Co.*, 363 Mo. 1137, 257 S.W.2d 609 (1953); *Scallet v. Stock*, 363 Mo. 721, 253 S.W.2d 143 (1952); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926); *Whipple v. McIntyre*, 69 Mo. App. 397 (St. L. 1897). But see *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931).

held, in some states, to include the location of a funeral home,¹⁴⁸ a public parking garage,¹⁴⁹ or a service station¹⁵⁰ in a residential area.

Although Missouri courts have recognized the nuisance per se category,¹⁵¹ they have been extremely reluctant to categorize activities therein.¹⁵² Missouri courts have recognized that some activities which are unlawful constitute a nuisance per se,¹⁵³ but they have been slow to recognize the second category of nuisance per se, those activities which become a nuisance per se only when located in a residential area. One notable exception is *Whipple v. McIntyre*,¹⁵⁴ holding that the location of a pigpen in close proximity to a dwelling house is a nuisance per se. In addition, a number of Missouri cases have held, in effect, that certain activities are a nuisance per se when located in a residential area. For example, a funeral parlor located in a residential area is a nuisance without regard to the manner of its operation or the sanitariness thereof.¹⁵⁵

148. *Jack v. Torrant*, 136 Conn. 414, 71 A.2d 705 (1950).

149. *Prendergast v. Walls*, 257 Pa. 547, 101 A. 826 (1917) (several churches in close proximity).

150. *Sprout v. Levinson*, 298 Pa. 400, 148 A. 511 (1930); *Carney v. Penn. Oil Co.*, 291 Pa. 371, 140 A. 133 (1928).

151. *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928). See also *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (St. L. Mo. App. 1941); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931); *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (St. L. Mo. App. 1929); *Lademan v. Lamb Constr. Co.*, 297 S.W. 184 (St. L. Mo. App. 1924).

152. *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (1943) (bakery); *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928) (ice house); *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926) (cemetery); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924) (funeral home); *City of Spickardsville v. Terry*, 274 S.W.2d 21 (K.C. Mo. App. 1954) (gasoline tanks); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951) (loudspeaker); *Biggs v. Griffith*, 231 S.W.2d 875 (Spr. Mo. App. 1950) (public address system); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947) (brewery); *Killian v. Brith Sholom Congregation*, 154 S.W.2d 387 (St. L. Mo. App. 1941) (cemetery); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931) (filling station); *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (St. L. Mo. App. 1929) (cemetery); *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926) (barbecue stand); *Lademan v. Lamb Constr. Co.*, 297 S.W. 184 (St. L. Mo. App. 1927) (rock quarry); *Mason v. Deitering*, 132 Mo. App. 26, 111 S.W. 862 (St. L. 1908) (livery stable); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908) (manufacturing plant).

153. See *Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908).

154. 69 Mo. App. 397 (St. L. 1897).

155. *Leffen v. Hurlbut-Glover Mortuary Co.*, 363 Mo. 1187, 257 S.W.2d 609 (1953); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Street v.*

Those cases which treat as a nuisance per se the location of a funeral home in a residential area have evidenced difficulty in defining "residential area."¹⁵⁶ In *Clutter v. Blankenship*,¹⁵⁷ plaintiffs lived in what was predominately a residential area; within two blocks of their home, there were a filling station and a funeral home. When defendant sought to build a second funeral home in the area, plaintiff sought and obtained an injunction on the basis that the location of a funeral home in a residential area constitutes a nuisance. The court determined that the area was primarily residential and enjoined defendant's construction of a funeral home notwithstanding the location of an existing funeral home in the area.¹⁵⁸ A similar result was reached in *Leffen v. Hurlbut-Glover Mortuary Co.*;¹⁵⁹ the court held that a residential area undergoing transition to a commercial area would be granted the same protections as any other residential area. A more restrictive definition was adopted in *Scallet v. Stock*.¹⁶⁰ In the immediate area surrounding plaintiff's residence, there was a major thoroughfare, sixty feet in width, as well as a restaurant, a bottled goods store, a beauty parlor, an auto agency and five other stores or shops. There were also numerous other single and multiple family dwellings. The court declined to characterize the area as residential, and refused to apply the traditional prohibition against the location of a funeral parlor in a residential area.

In general, it should be noted that most courts take a protective attitude toward property which is used for residential purposes.¹⁶¹ So, as in

Marshall, 316 Mo. 698, 708, 291 S.W. 494, 498 (En Banc 1927). In *Street* the court stated that:

We conclude that the rule must be considered as well settled, that when the prosecution of a business, of itself lawful, in a strictly residential district, impairs the enjoyment of homes in the neighborhood, and infringes upon the well being and comfort of the ordinary, normal individual residing therein, the carrying on of such business, in such locality, becomes a nuisance and may be enjoined.

See also D. HAGMAN, *supra* note 5, § 160 at 291. But see text accompanying notes 313-14 *infra*.

156. The determination can often turn upon how the court defines the geographic area. See *Leffen v. Hurlbut-Glover Mortuary, Inc.*, 363 Mo. 1137, 257 S.W.2d 609 (1953).

157. 346 Mo. 961, 144 S.W.2d 119 (1940).

158. A factor which is employed to determine whether a particular interference is unreasonable is the suitability of the conduct to the surrounding area. Accordingly, if there are several other funeral homes in the area, it is less likely that the plaintiff will suffer severe injury from the location of this funeral home in the area. Since the primary objection to the location of a funeral home in a residential area is that it will create feelings of gloom and morbidness, once those feelings have already been created by the location of one funeral home in the area, it is questionable that injury of that type will result from the operation of one more.

159. 363 Mo. 1137, 257 S.W.2d 609 (1953).

160. 363 Mo. 1137, 257 S.W.2d 609 (1953).

161. See *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1927);

Clutter and *Leffen*, it is probably safe to assume that in a borderline case the courts will characterize an area as residential if available evidence permits. However, as demonstrated by *Scallet*, at some point the number of commercial establishments in an area will force the court to characterize the area as commercial. It should also be noted that, given the tendency of the courts to adopt a protective attitude toward property used for residential purposes, it will often make very little difference in the ultimate outcome of the case whether the location of a funeral home in a residential area is attacked as a nuisance per se or one in fact; either action will succeed.

It is important to note that the nuisance per se characterization can have the same effect as zoning laws.¹⁶² As noted earlier, courts are quite willing to enjoin the operation of a commercial or farming establishment which is located in a residential area. In so doing, the courts do not imply that such activities are socially undesirable.¹⁶³ To the contrary, commercial and farming establishments are fundamental and necessary to society. The courts are indicating that it is impermissible to locate such establishments in a residential area. Hence, if the business is relocated to an area which complies with the court's "zoning" requirements, then it will be considered socially acceptable and no longer a nuisance.¹⁶⁴

3. Nuisance in Fact

a. Generally

In the nuisance in fact classification, the determination must be made whether the defendant's conduct is, in fact, unreasonable. Missouri courts

Biggs v. Griffith, 231 S.W.2d 875 (Spr. Mo. App. 1950); *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926); *McNulty v. Miller*, 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912); *Zugg v. Arnold*, 75 Mo. App. 68 (St. L. 1898). See also *Mason v. Deitering*, 132 Mo. App. 26, 111 S.W. 862 (St. L. 1908); *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636, 93 S.W. 289 (St. L. 1906). But see *Scallet v. Stock*, 253 S.W.2d 143 (Mo. 1952); *City of Spickardville v. Terry*, 274 S.W.2d 21 (K.C. Mo. App. 1954); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947). In *McCracken v. Swift & Co.*, 212 Mo. App. 558, 566, 250 S.W. 953, 955 (Spr. 1923), the court stated:

A man's home is his castle, and he should be as much entitled to protection against foul stench, loud and unusual noises, and the torment of flies which cause physical discomfort and suffering as against the armed invader who would plunder and destroy.

162. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 5 (1973); D. HAGMAN, *supra* note 5, § 158. Indeed, it has been asserted that nuisance law was, in effect, the common law method of zoning. See W. RODGERS, *supra* note 3, § 2.6. See also I. F. HARPER & F. JAMES, *supra* note 103, § 1.24.

163. The relationship of nuisance theory to zoning laws is discussed in Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 CHI. L. REV. 681 (1973).

164. In *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926), the

will weigh and balance a number of factors to aid them in making the determination that a particular activity is being conducted in an unreasonable manner. These factors include the extent and frequency of the injury to the plaintiff's property, the nature of the use to which plaintiff's property is being put, and the effect of the interference upon the enjoyment of life, health, property and the like.¹⁶⁵ Although these factors are often cited by Missouri courts, and although they have a significant impact on the outcome of most private nuisance cases, it is rare that a Missouri court will expressly weigh and balance them or consider their interrelationship.¹⁶⁶ The courts usually reach a result which, although based on these factors, is without express consideration of them.

The factors considered by Missouri courts are similar to the factors adopted by the *Restatement of Torts*,¹⁶⁷ and include the extent of the harm to the plaintiff's property, the social value which the law attaches to the type of use or enjoyment invaded, the suitability of the particular use or enjoyment to the character of the locality, and the difficulty to the person harmed of avoiding the harm.¹⁶⁸ Two Missouri appellate courts have cited and, at least in part,¹⁶⁹ followed the factors expressed in the *Restatement*,¹⁷⁰ and recently, in *Lee v. Rolla Speedway, Inc.*,¹⁷¹ the Missouri Supreme Court followed the *Restatement*. In addition, the *Restatement* is cited by the *Missouri Approved Jury Instructions* as correctly stating private nuisance law in Missouri.¹⁷²

court stated that "[w]hat would be lawful and reasonable in one case or in one locality would be unlawful or unreasonable in another case or locality."

165. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Meinecke v. Stallsworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Kelley v. National Lead Co.*, 240 Mo. App. 47, 210 S.W.2d 728 (St. L. 1948); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931). These factors are generally accepted in other states. See D. HAGMAN, *supra* note 5, § 160; W. RODGERS, *supra* note 3, § 2.3.

166. A good discussion of the balancing test and its application can be found in 1 F. HARPER & F. JAMES, *supra* note 103, § 1.24.

167. RESTATEMENT OF TORTS § 822 (1939).

168. The *Restatement* weighs these factors and imposes liability when the utility of the actor's conduct outweighs the gravity of the harm. *Id.* § 826. Several enumerated factors determine the gravity of the harm. *Id.* § 827. The utility of the actor's conduct is defined in § 828.

169. See text accompanying notes 234-54 *infra* for a fuller explanation including the limits of this statement.

170. *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951).

171. 494 S.W.2d 349 (Mo. 1973).

172. MO. APPROVED INSTR. NO. 22.06 (1969 ed.).

b. Factors Analyzed

The factors which are discussed here do not represent an exhaustive list of those which the courts use in determining whether a nuisance exists. In the author's opinion, however, they are the factors most frequently considered and those which most often and heavily influence the outcome of the lawsuit.

i. Gravity and Character of the Injury

The gravity and character of the interference with the use and enjoyment of the plaintiff's land is the first factor considered in the balancing test. It is well settled that all landowners must submit to those interferences which are the natural and expected inconveniences of everyday life.¹⁷³ The law of private nuisance protects only against interferences which would offend the normal person of ordinary sensibilities and does not recognize insensible and insubstantial discomforts, trifling annoyances, or those interferences which are fanciful or imaginary.¹⁷⁴ An individual peculiarly susceptible to injury cannot complain of that which would not injure an ordinary person.¹⁷⁵ It is generally accepted, for example, that a landowner has the right to mow the grass on his land and that nearby landowners must submit to the annoyance incident thereto.¹⁷⁶ Likewise, it is not unreasonable for one landowner to cook on an outdoor charcoal grill even though a small amount of smoke may drift onto adjoining land.¹⁷⁷

As the gravity and character of the interference with adjoining land increases, the reasonableness of the actor's conduct correspondingly decreases.¹⁷⁸ In *Meinecke v. Stallsworth*¹⁷⁹ the court held that it was not unreasonable for a rural landowner to maintain a pig farm. However, in *Bower v. Hog Builders, Inc.*,¹⁸⁰ the court held that it was unreasonable to maintain 3,860 hogs which emitted 23,000 gallons of liquid waste per day, thereby vastly exceeding the capacity of three sewage lagoons, and causing a severe interference with nearby land. Likewise, under the common enemy doctrine, it is not unreasonable for a landowner to ward off surface

173. *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1927); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955).

174. *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Beckley v. Skroh*, 19 Mo. App. 75 (K.C. 1885). See also *W. RODGERS*, *supra* note 3, § 2.3; RESTATEMENT OF TORTS § 822, comment g (1939).

175. See *Prosser, Nuisance Without Fault*, 20 TEX. L. REV. 399, 416 (1942).

176. Professor Powell suggests that one who uses his land in such a manner as to be peculiarly susceptible to harm is not entitled to recover. 5 R. POWELL, *supra* note 5, § 705.

177. See also *W. PROSSER*, *supra* note 3, § 89.

178. See *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951).

179. 488 S.W.2d 688 (Mo. App. D.K.G. 1972).

180. 461 S.W.2d 784 (Mo. 1970).

water onto an adjoining landowner's property.¹⁸¹ However, in *Hawkins v. Burlington Northern, Inc.*,¹⁸² the court held that it was unreasonable, and therefore a private nuisance, for one landowner to ward off surface water in highly increased and destructive quantities so as to cause serious injury to neighboring property.¹⁸³ In *Blackford v. Heman Brothers Construction Co.*,¹⁸⁴ the court held that it was unreasonable for one to conduct blasting operations on his land so as to virtually deprive surrounding homeowners of the use and enjoyment of their homes.

It has been suggested that courts may draw a distinction between those interferences which cause physical injury or loss and those interferences which merely cause aesthetic injury.¹⁸⁵ In other words, a court will be more likely to protect against sore eyes than against eyesores.¹⁸⁶ Hence, if one landowner erects an unsightly statue in his backyard the courts may be more reluctant to grant relief to an offended neighbor. Indeed, this distinction may have some validity. An interference such as noise or odor can be judged on an objective standard, and the court can reach a sound decision as to whether a reasonable person would consider such an interference unreasonable. However, an activity which may offend good taste is not so clearly unreasonable. Aesthetic values differ significantly from individual to individual, and it is difficult for a court to say that a reasonable person would be offended by the sight of such a statue in close proximity to his home. One man's vulgarity may be another man's lyric. It is difficult to state that an aesthetic interference rises to the level of a significant interference with the use and enjoyment of land. One could of course conceive of situations where the interference could be so substantial as to constitute a private nuisance even though it resulted in no more than aesthetic interference.¹⁸⁷ If in the middle of a pleasant residential area one landowner were to decide to collect old cars and junk and store it in his front yard, a court might well conclude that the interference with the use and enjoyment of surrounding residences was significant enough to constitute a private nuisance, even though the interference were merely aesthetic.

181. See D. HAGMAN, *supra* note 5, § 160. *But see* note 98 and accompanying text *supra* (collection and discharge modification).

182. 514 S.W.2d 593 (Mo. En Banc 1974).

183. In *Freudenstein v. Heine*, 6 Mo. App. 287, 290 (St. L. 1878), the court stated:

But the right of the owner of a city lot to adjust the surface of his ground to suit his convenience is governed by the general principle that a person must not make such an unwarrantable use of his own rights as to seriously obstruct those of his neighbor.

184. 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

185. See 5 R. POWELL, *supra* note 5, § 705.

186. See W. RODGERS, *supra* note 3, § 24.

187. See 5 R. POWELL, *supra* note 5, § 705.

ii. Social Utility of the Conduct

When the interference with the plaintiff's land is less substantial, but more than a mere trifling, the court should consider the second factor in the balancing test, *i. e.*, the relative social utility of each party's conduct.¹⁸⁸ Since different activities are accorded differing values in our society it is appropriate to consider the relative merit of conduct in determining whether it is unreasonably interfering with another.¹⁸⁹ Some activities are accorded very little social worth. The so-called spite nuisance, created solely to interfere with the use and enjoyment of neighboring property, is accorded very little social value¹⁹⁰ and will most likely be classified as a nuisance.¹⁹¹ In *Shellabarger v. Morris*,¹⁹² the court enjoined the defendant from screaming and beating on a variety of objects when done with the intent to annoy the plaintiff.¹⁹³ Similarly, an activity which is unlawful will be accorded very little social merit.¹⁹⁴

It is generally conceded that the use of a residence for residential purposes is an endeavor with extremely high social worth.¹⁹⁵ Courts have been quite receptive to the notion that a man's home is his castle,¹⁹⁶ and have been extremely protective thereof. This protectiveness is reflected in the

188. *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973). *See also* RESTATEMENT OF TORTS § 822 (1939).

189. *See also* W. PROSSER, *supra* note 3, § 89.

190. *See Shellabarger v. Morris*, 115 Mo. App. 566, 91 S.W. 1005 (K.C. 1906).

191. The *Restatement* is in accord. RESTATEMENT OF TORTS § 829 (1939). *See also* 5 R. POWELL, *supra* note 5, § 705.

192. 115 Mo. App. 566, 91 S.W. 1005 (K.C. 1906).

193. A more difficult problem exists, however, when the actor's conduct is only partially motivated by malice. *See* 5 R. POWELL, *supra* note 5, § 705.

194. *See Aufderheide v. Polar Wave Ice & Fuel Co.*, 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908).

195. *See generally* D. HAGMAN, *supra* note 5, § 160.

196. Some courts become extremely zealous in the protection of the home. In *Rhodes v. A. Moll Grocer Co.*, 231 Mo. App. 751, 763, 95 S.W.2d 837, 843 (St. L. 1936), the court recited the following quotations:

The poorest man may in his cottage bid defiance to all the force of the crown. It may be frail, its roof may shake; the storms may enter—the rain may enter—but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement. William Pitt (Earl of Chatam)—Speech on the Excise Bill.

.....

Mid Pleasures and Palaces though we may roam, Be it ever so humble, there's no place like home. John Howard Payne—Home Sweet Home.

In *McCracken v. Swift & Co.*, 212 Mo. App. 558, 566, 250 S.W. 953, 955 (St. L. 1947), the court stated:

A man's home is his castle, and he should be as much entitled to protection against foul stench, loud and unusual noises, and the torment of flies which cause physical discomfort and suffering, as against the armed invader who would plunder and destroy.

willingness of courts to treat certain activities as nuisances per se when located in a residential area, even though such activities are considered perfectly acceptable when located elsewhere.¹⁹⁷ Missouri courts have uniformly characterized a funeral parlor as a nuisance when located in a residential area without regard to its sanitariness or the manner in which it is operated.¹⁹⁸ Correspondingly, in *Deevers v. Lando*,¹⁹⁹ the defendant operated a barbecue stand in close proximity to the plaintiff's home which was located in a residential area. The stand was operated until a very late hour of the night, interfering with plaintiff's nightly rest. The stand also emitted a barbecue odor of which plaintiff complained. As a result, the court enjoined defendant from operating the stand because of its effect on plaintiff's home. A comparable result was reached in *Lee v. Rolla Speedway, Inc.*,²⁰⁰ where the defendants operated a raceway near plaintiff's home.

Even though a residence is not being interfered with, a court will consider the significance of each party's conduct in a private nuisance action. In *Clinic & Hospital, Inc. v. McConnell*,²⁰¹ the defendant operated a record store, complete with outdoor loudspeaker system, which disturbed patients at plaintiff's hospital. There, the court accorded greater social utility to the hospital and enjoined the defendant from operating his outdoor loudspeaker system in such a manner as to interfere with the peace and tranquility of the hospital.

In *Lee v. Rolla Speedway, Inc.*,²⁰² the Missouri Supreme Court followed the definition of social utility adopted by the *Restatement of Torts*.²⁰³ The *Restatement* considers the following factors in determining the social significance of a party's conduct: the social value which the law attaches to the primary purpose of each party's conduct; the suitability of each party's conduct to the surrounding area; and the impracticability of preventing or avoiding the harm.

It is important to emphasize that the term "social utility" is a concept which varies and fluctuates with the social mores and public interests of society. In some measure, the creativity of an attorney and his ability to find new arguments relating to social utility can be of great value. The attorney's ability to link his client's activity with the public interest, and to downplay the relationship of his opponent's activity, is a critical factor. For

197. See text accompanying notes 155-61 *supra*.

198. *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1927); *Tureman v. Ketterlin*, 304 Mo. 221, 263 S.W. 202 (1924). See also *Scallet v. Stock*, 363 Mo. 721, 253 S.W.2d 143 (1952). But see *Leffen v. Hurlbut-Glover Mortuary*, 363 Mo. 1137, 257 S.W.2d 609 (1953).

199. 220 Mo. App. 50, 285 S.W. 746 (Spr. 1926).

200. 539 S.W.2d 627 (Mo. App., D. Spr. 1976).

201. 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951).

202. 494 S.W.2d 349 (Mo. 1973).

203. *RESTATEMENT OF TORTS* § 828, Comment on clause (a) (1939).

example, given the current energy crisis, the social utility of activities seeking to locate or develop energy sources might be greatly enhanced so that a nearby landowner might be required to submit to greater inconvenience and injury before a private nuisance is found to exist.

iii. Suitability of the Conduct to the Surrounding Area

The suitability of a party's conduct to the area in which it is located can significantly affect the outcome in a private nuisance case.²⁰⁴ *Deevers* and *Lee* indicated that a commercial establishment has very little social value when situated in a residential area.²⁰⁵ A comparable result was reached in *Blackford v. Heman Brothers Construction Co.*,²⁰⁶ where the defendant operated a rock quarry, with attendant blasting, in a residential area in the heart of St. Louis. The noise and flying debris incident to the blasting created a substantial interference with neighboring residences. Properly, the court enjoined the operation of the quarry because it was unsuited to the area in which it was located.

An activity will be accorded considerably less social worth when located in an area to which it is unsuited.²⁰⁷ A residence, although conceded high social utility when situated in a residential area, can forfeit that utility when located in an inappropriate area.²⁰⁸ Accordingly, an interference which might be considered highly unreasonable in a residential area might be the normal and expected incident of everyday life in an industrial area,²⁰⁹ and will not provide the basis for a private nuisance action.²¹⁰ In *Leonard v. Gagliano*,²¹¹ plaintiff lived in an area which was

204. *W. RODGERS*, *supra* note 3, § 2.7.

205. *See W. PROSSER*, *supra* note 3, § 89.

206. 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

207. *See Powell v. Brookfield Pressed Brick & Tile Mfg. Co.*, 104 Mo. App. 713, 78 S.W. 646 (K.C. 1904). *See also W. RODGERS*, *supra* note 3, § 2.7.

208. *Leonard v. Gagliano*, 459 S.W.2d 732 (K.C. Mo. App. 1970); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1908). *See also Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892).

209. *See D. HAGMAN*, *supra* note 5, § 160.

210. *Leonard v. Gagliano*, 459 S.W.2d 732 (K.C. Mo. App. 1970); *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931); *Gibson v. Donk*, 7 Mo. App. 37 (St. L. 1879). In *Schott*, the court stated:

Persons who live in cities or towns must necessarily submit, without legal recourse, to the annoyances and discomforts which are incidental to city (or town) life, and to the conduct of those trades and businesses which are properly located and carried on in the neighborhood where they reside, and are more or less necessary for trade and commerce and the comfort and progress of the public at large.

205 S.W.2d at 920. The foregoing Missouri cases are in accord with the rule applied in the majority of states. *See W. PROSSER*, *supra* note 3, § 89.

211. 459 S.W.2d 732 (K.C. Mo. App. 1970).

zoned and used for heavy industry. Trucks rumbled through the area at all hours of the night, and trains clattered by on nearby tracks. Across the street from plaintiff's dwelling, defendant maintained a trucking and trash container service which commenced operation at three-thirty in the morning. Defendant also mounted floodlights on top of his building to protect against burglaries. Plaintiff, alleging that defendant's floodlights and early hours of operation seriously interfered with his sleep, sought an injunction to compel the defendant to operate his business in a reasonable manner. The court denied plaintiff relief noting that one who resides in an industrial area must submit to the noise and inconvenience incident thereto. As a result, plaintiff deprived himself of the protection which would normally be accorded to a residence by situating himself in an inappropriate area.

The suitability of the defendant's conduct to the surrounding area was also important in *Killian v. Brith Sholom Congregation*.²¹² In *Killian*, the defendant sought to locate a cemetery in an area near plaintiff's residence. There were other cemeteries in the surrounding area, and the court emphasized the fact that plaintiff was aware of their existence when he purchased his home. Accordingly, the court held that the cemetery would not be unsuited to the surrounding area, and denied the injunction.

A parallel result was reached in *Meinecke v. Stallsworth*,²¹³ wherein defendant operated a pig farm in an area well suited to pig farming. Although a number of landowners in the area kept pigs, and indeed plaintiff maintained cattle on his own land, plaintiff alleged that defendant's pigs created offensive odors, noise, and generally gave rise to a rat-infested condition. The court denied plaintiff's request for an injunction, noting that defendant's conduct was well suited to the surrounding area and that the interference with plaintiff's land was not substantial enough to justify the issuance of an injunction.

As indicated earlier, courts can experience great difficulty in determining the character of the surrounding area. Although many areas can be described as strictly residential or commercial, a large number of areas are a mixture of commercial and residential. Even among areas which are strictly residential or strictly commercial, there can be tremendous variations. For instance a commercial area might include retail businesses, heavy industry, or a mixture of the two. In the final analysis, an important battleground in any nuisance action will be the ability of the attorney to characterize the area favorably to his client, and to emphasize the compatibility of his client's conduct to the area.

iv. Potential of Either Party to Prevent or Minimize Injury

The *Restatement of Torts* considers in the balancing test the burden to

²¹² 154 S.W.2d 887 (St. L. Mo. App. 1941).
²¹³ 483 S.W.2d 633 (Mo. App., D.K.C. 1972).

the person harmed of avoiding the harm.²¹⁴ Individuals living in society should, in certain situations, be required to make a reasonable effort to adjust the use of their land to compensate for the conduct of others.²¹⁵ The *Restatement* suggests, as an example, that one landowner might reasonably be expected to close his windows so as to minimize the interference from noise and smoke drifting over from nearby property.²¹⁶ However, several limitations should be placed on this concept. One who fails to take reasonable steps to minimize interference from defendant's conduct should not ipso facto be precluded from recovery; rather, his failure to take such steps should be a factor to be considered in the balancing test. In addition, this principle should only be applied when the defendant's conduct can be characterized as accidental. When the defendant's conduct amounts to negligence or recklessness, liability should be imposed because of the culpability of his conduct, even though plaintiff could have avoided the injury.

Defendant's ability to avert the harm to plaintiff by using alternate means should also bear on the reasonableness of the defendant's conduct.²¹⁷ Even if defendant's conduct has significant social utility, and even though the gravity and character of the injury to plaintiff are not severe, and even though defendant may be conducting his activity in an appropriate area, his conduct might be deemed unreasonable if he can with minimal effort eliminate the interference with plaintiff's land.²¹⁸ It must be remembered, however, that a private nuisance will not be actionable unless defendant creates a substantial interference with plaintiff's land. So if defendant can eliminate such interference with trifling expense, it would be appropriate to term defendant's conduct as unreasonable if he fails to do so, notwithstanding other factors which might indicate that defendant's conduct was reasonable.

v. Interrelationship of Factors

Ultimately, no single factor in the balancing test will be controlling in every case. Rather, the significance of any one factor will be dictated by the facts of each case and the relationship of the factors therein. *Meinecke* is a good case to illustrate the interplay of the factors in the balancing test. The court emphasized not only that plaintiff's injury was slight, but also that defendant's conduct was well suited to the surrounding area. Accordingly, after balancing the factors, the court held that the interference was not unreasonable.

214. RESTATEMENT OF TORTS § 827, comment g (1939).

215. *Id.*

216. *Id.*

217. *Id.* § 830.

218. See W. PROSSER, *supra* note 3, § 89.

In *Bower v. Hog Builders, Inc.*,²¹⁹ the defendant operated a hog farm in a rural area. The farm created a serious interference with the use and enjoyment of the plaintiff's land by creating odors and polluting lakes and ponds. The court characterized the defendant's conduct as unreasonable apparently because of the substantial injury to plaintiff's land.

F. Basis of Liability

1. Introduction

Missouri law appears to be inconsistent with the majority view on the issue whether a private nuisance action can be maintained without establishing that the defendant either intentionally or negligently interfered with the use and enjoyment of the plaintiff's land.²²⁰ Dean Prosser states that the majority of states require that the defendant must have negligently or intentionally interfered with the plaintiff's land, or have been engaged in ultrahazardous activity.²²¹ This view is in accord with that adopted by the *Restatement of Torts*²²² and other commentators.²²³ The *Restatement* provides that substantial invasions of the use or enjoyment of land will be actionable if plaintiff can establish that defendant's conduct is substantial and unreasonable, or otherwise actionable under the rules governing negligent, reckless or ultrahazardous conduct.²²⁴

It should be noted that it is far from clear that the majority of the states actually do,²²⁵ or should, require intent and/or negligence on the part of

219. 461 S.W.2d 784 (Mo. 1970).

220. See Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399 (1942).

221. W. PROSSER, *supra* note 3, § 87.

222. RESTATEMENT OF TORTS § 822 (1939). The *Restatement* in § 825 defines an invasion as intentional when the actor either: "(a) acts for the purpose of causing it; or (b) knows that it is resulting or is substantially certain to result from his conduct."

223. See 5 R. POWELL, *supra* note 5, § 705.

224. RESTATEMENT OF TORTS § 822 (1939) provides:

The actor is liable in an action for damages for a non-trespassory invasion of another's interest in the private use and enjoyment of land if,

- (a) the other has property rights and privileges in respect to the use or enjoyment interfered with; and
- (b) the invasion is substantial; and
- (c) the actor's conduct is a legal cause of the invasion; and
- (d) the invasion is either
 - (i) intentional and unreasonable; or
 - (ii) unintentional and otherwise actionable under the rules governing liability for negligent, reckless or ultrahazardous conduct.

225. See Davis, *Groundwater Pollution: Case Law Theories for Relief*, 39 MO. L. REV. 117, 134-36 (1974). Another writer has suggested that the majority of courts require that the defendant have acted intentionally, but do not require negligence. See D. HAGMAN, *supra* note 5, § 160. But cf. T. COOLEY, TORTS § 399 (1879) (state of mind irrelevant).

the defendant as a prerequisite to the maintenance of a private nuisance action.²²⁶ Several commentators take the position that certain injuries are too great to be borne without compensation even if the defendant does not act intentionally or negligently, and regardless of whether the activity he engaged in was ultrahazardous.²²⁷ This view has received some acceptance by the tentative drafts of the second *Restatement*.²²⁸ Another writer stated the same idea in a slightly different manner by concluding that one who appropriates another's property for his own purposes should be required to compensate the other therefor, regardless of the culpability of his conduct.²²⁹

Where the action is to enjoin offensive conduct, intent or negligence should not be relevant.²³⁰ An injunction is only issued when plaintiff can demonstrate that there is a sufficient likelihood that defendant's conduct will continue into the future. Almost invariably, plaintiff will have notified defendant of the interference and requested that it be abated. If the defendant continues his activity with knowledge that an appreciable interference with plaintiff's land is being created, intent has been established.²³¹ Even if intent or negligence cannot be established, the court should issue an injunction if defendant's conduct creates an unreasonable interference with plaintiff's land. Conversely, it may be appropriate to require intent or negligence when plaintiff seeks damages, since there are significant policy questions whether defendant should be required to compensate plaintiff for accidental interferences.²³² But when plaintiff seeks to restrain defendant's future conduct, no more should be required than that plaintiff establish that the defendant's conduct is unreasonable.²³³

2. Missouri Law

Several early Missouri cases from the St. Louis Court of Appeals took the position that negligence was a necessary element of a private nuisance

226. 1 F. HARPER & F. JAMES, *supra* note 103, § 1.24.

227. See Davis, *supra* note 225, at 134-36. See also RESTATEMENT (SECOND) OF TORTS, app. A at 132-41 (Tent. Draft No. 16, 1970).

228. There has been an attempt in the second Restatement to acknowledge and reflect this view in proposed § 829A (Tent. Draft No. 18, 1972):

Under the rules stated in §§ 826-828, an intentional invasion of another's interest in the use and enjoyment of land is unreasonable and the actor is subject to liability if the harm resulting from the invasion is substantial and greater than the other should be required to bear without compensation.

229. See W. RODGERS, *supra* note 3, § 2.3.

230. But see RESTATEMENT OF TORTS § 822, comment b (1939).

231. See *id.*, § 825.

232. See text accompanying notes 256-57 *infra*.

233. The *Restatement (Second) of Torts*, however, proposes the requirement that plaintiff establish that defendant's conduct was intentional, negligent, reckless or ultrahazardous before an injunction will issue. See RESTATEMENT (SECOND) OF TORTS § 822 and comments (Tent. Draft No. 17, 1971).

action unless the offending conduct amounted to a nuisance per se.²³⁴ In *Schindler v. Standard Oil Co. of Indiana*,²³⁵ the court stated that a nuisance per se could be enjoined with or without the presence of negligence because the nuisance inhered in the nature of the offending activity. The court went on to note that a nuisance in fact could not be a basis for relief absent a demonstration by the plaintiff that the defendant had been negligent.²³⁶ In *Schindler*,²³⁷ the court held that defendant was not liable for the maintenance of a private nuisance when water from his pipes escaped and damaged plaintiff's property.²³⁸

Two more recent decisions from the Springfield Court of Appeals have held that negligence, intent, and motive are all immaterial in the determination of whether a private nuisance exists.²³⁹ Similarly, in *Haynor v.*

234. *Bollinger v. Mungle*, 175 S.W.2d 912 (St. L. Mo. App. 1943) (dicta); *Davis v. Cities Service Oil Co.*, 131 S.W.2d 865 (St. L. Mo. App. 1939); *Schindler v. Standard Oil Co.*, 207 Mo. App. 190, 232 S.W. 735 (St. L. 1921); *Griffith v. Lewis*, 17 Mo. App. 605 (St. L. 1885). See also *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931). These cases are somewhat confusing. For example, in *Bollinger*, the court cites *Haynor v. Excelsior Springs Light, P., H. & W. Co.*, 129 Mo. App. 691, 108 S.W. 580 (K.C. 1908), which took the position that the nature of liability of one who maintains a nuisance is that of an insurer. In *Davis*, the court cites both *Schindler* and *Pearson v. Kansas City*, 331 Mo. 885, 55 S.W.2d 485 (1932), in support of the proposition that negligence is not required in a nuisance action. However, the court fails to observe that *Schindler* and *Pearson* are contradictory cases, and that the quote which it lifts from *Pearson* is contrary to the proposition for which it is being cited. See also *Griffith v. Lewis*, 17 Mo. App. 605 (St. L. 1885).

235. 207 Mo. App. 190, 232 S.W. 735 (St. L. 1921).

236. The courts in these cases seem to be concerned with avoiding the rule of *Rylands v. Fletcher*. See *Kelley v. National Lead Co.*, 240 Mo. App. 47, 210 S.W.2d 728 (St. L. 1948).

237. In *Schindler*, the court held that the leak in the water pipe did not inhere in the nature of the pipe and, therefore, that the nuisance was the result of defendant's failure to repair. Since the water pipe was not so inherently dangerous as to warrant the imposition of a duty to inspect, defendant could not be negligent until he was notified of the defect and had a reasonable opportunity to repair it. *Chapman v. American Creosoting Co.*, 220 Mo. App. 419, 286 S.W. 837 (Spr. 1926), indicated that the holding in *Schindler* was limited to instances of nuisance created by a hidden condition of which the defendant is unaware. See also Comment, *The Rylands v. Fletcher Doctrine and Its Standing in Missouri*, 18 MO. L. REV. 53 (1953).

238. In *Jackson v. A.P. Green Fire Brick Co.*, 219 Mo. App. 689, 284 S.W. 826 (St. L. 1926), the court made statements which indicated that it was following the holding in *Schindler* and did not require a showing of negligence. The activity, however, was improper operation of a steam shovel which did not appear to meet the nuisance per se test which *Schindler* indicated was required before an action could be maintained without establishing negligence.

239. *White v. Smith*, 440 S.W.2d 497 (Spr. Mo. App. 1969); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951). In *Clark*, the court held that it was not improper for the trial court to strike defendant's jury instruction requiring a finding of intent. In *White*, the court cited *J. JOYCE, LAW OF NUISANCES* § 43, at 76 (1906), which states that negligence, motive and intent should all be

Excelsior Springs Light, Power, Heat & Water Co.,²⁴⁰ the court indicated that one who maintains a private nuisance is liable in the nature of an insurer. In addition, there are cases which say that the negligence of a defendant is immaterial in a private nuisance action.²⁴¹

Recently, in *Hawkins v. Burlington Northern, Inc.*,²⁴² the Missouri Supreme Court faced the issue whether negligence was an element of the cause of action for private nuisance. In *Hawkins*, the defendant railroad had collected surface water and discharged it onto the plaintiff's land in highly increased and destructive quantities. The court held that it is not required, in a private nuisance action, that the plaintiff establish that the defendant's conduct was negligent. Rather, the court indicated that the cause of action for private nuisance is similar to the action for trespass. Presumably, this means that the plaintiff is required to establish intent in a private nuisance action, but not the intent to interfere with the use and enjoyment of the plaintiff's land. Rather, the plaintiff need merely establish that the defendant intentionally did an act which happened to interfere with the plaintiff's land.²⁴³

The area is somewhat clouded by the Missouri Approved Jury Instruction (MAI) on private nuisance.²⁴⁴ In Missouri, it is reversible error for the court to submit a non-MAI jury instruction when there is an applicable

immaterial in a private nuisance action. Joyce does, however, suggest the requirement that the defendant have some indication, even though remote, that an interference with the plaintiff's property will result from his conduct.

240. 129 Mo. App. 691, 108 S.W. 580 (K.C. 1908).

241. *Blydenburgh v. Amelung*, 309 S.W.2d 150 (K.C. Mo. App. 1958); *Divelbiss v. Phillips Petroleum Co.*, 272 S.W.2d 839 (K.C. Mo. App. 1954); *Lederer v. Carney*, 142 S.W.2d 1085 (St. L. Mo. App. 1940); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (K.C. Mo. App. 1935). The foregoing cases have cited *public* nuisance cases as authority for this proposition. *E.g.*, *Roth v. City of St. Joseph*, 164 Mo. App. 26, 147 S.W. 490 (K.C. 1912); *Schnitzer v. Excelsior Powder Mfg. Co.*, 160 S.W. 282 (K.C. Mo. App. 1912). The seminal authority in Missouri for this proposition is the public nuisance case of *Casey v. Hoover*, 114 Mo. App. 47, 89 S.W. 330 (K.C. 1905) (cited by subsequent courts as *Casey v. Wrought Iron Bridge Co.*). The validity of relying on public nuisance cases is somewhat dubious as the considerations are often different.

242. 514 S.W.2d 593 (Mo. En Banc 1974). It is interesting to note that the court in *Hawkins* could have found intent on the part of defendant to interfere with the use and enjoyment of plaintiff's land. The defendant continued to discharge surface water onto the plaintiff's land despite numerous requests from the plaintiff to abate the nuisance. Clearly, the defendant had knowledge that its conduct was substantially certain to interfere with the plaintiff's land. See RESTATEMENT OF TORTS § 825, comment b (1939).

243. *But see* cases cited notes 239-41 *supra*. It is interesting to note that several older Missouri cases held that a successor is not liable for the continuation of a nuisance unless he continues the nuisance with knowledge thereof or has been notified of the nuisance and requested to abate it. *See Rychlicki v. City of St. Louis*, 115 Mo. 662, 22 S.W. 908 (1893); *Pinney v. Berry*, 61 Mo. 359 (1875); *City of St. Joseph v. Martin*, 136 Mo. App. 316, 115 S.W. 94 (K.C. 1909).

244. MO. APPROVED INSTR. NO. 2206 (2d ed. 1969).

MAI instruction.²⁴⁵ This presents no substantial problem in that the private nuisance verdict director itself is consistent with Missouri law, and does not require that the plaintiff establish intent or negligence in order to maintain a private nuisance action.²⁴⁶ The committee comments to the section, however, recite verbatim the *Restatement of Torts* comment which requires that plaintiff establish either that the defendant's conduct was intentional and unreasonable or that the conduct was negligent, reckless, or ultrahazardous. The comment also states that MAI No. 22.06 is only to be used in those instances when the defendant's conduct is intentional, which the committee defines,²⁴⁷ again deferring to the *Restatement*,²⁴⁸ as an act done with the intent to interfere with the plaintiff's land or an act which is substantially certain to interfere therewith.

It should be observed that the mission of MAI is to reflect and embody the substantive case law on a particular subject.²⁴⁹ However, a reference to the committee comments following MAI 22.06,²⁵⁰ and the personal notes of the reporter John Divilbiss,²⁵¹ reveal scant authority for the proposition that Missouri has specifically adopted the *Restatement of Torts* definition

245. MO. R. CIV. P. 70.02(b), (c).

246. MO. APPROVED INSTR. NO. 22.06 (2d ed. 1969) reads:

Your verdict must be for plaintiff if you believe: First, plaintiff used his property as a residence,¹ and

Second, (here describe nuisance . . .) and

Third, (describe the injury . . . [which] substantially impaired the use of plaintiff's property) and

Fourth, such use by the defendant was unreasonable.

1. This should be omitted if not in issue.

Note that the verdict director does not expressly require that the defendant have acted with the intent to interfere with the use and enjoyment of the plaintiff's land. However, the committee's comment states that "the above instruction is intended to be used where the conduct is continued after the actor knows that the invasion of plaintiff's rights is resulting so that subsequent invasions, if found, would be intentional." The committee also states that "[T]he above instruction is intended to cover only those cases where the invasion is intentional and unreasonable."

247. MO. APPROVED INSTR. NO. 22.06, Comment (2d ed. 1969).

248. RESTATEMENT OF TORTS § 825 (1939).

249. MO. APPROVED INSTR. at XXIII (2d ed. 1969).

250. MO. APPROVED INSTR. NO. 22.06, Comment (2d ed. 1969).

251. John S. Divilbiss served as Reporter for MAI from 1962 until his death in 1967. His unpublished notes cite *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951) and *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955) as authority for the proposition that Missouri has adopted the *Restatement*. In *Clinic*, the court cited § 822 of the *Restatement* and listed factors for determining whether a private nuisance exists. The court did not discuss whether intent and/or negligence are required in order to maintain a private nuisance action. A subsequent case, *Lee v. Rolla Speedway, Inc.*, 494 S.W.2d 349 (Mo. 1973), used the *Restatement* balancing test in a private nuisance case and did not mention the requirement of intent and/or negligence.

of nuisance including the requirement of intent and/or negligence. Arguably, since MAI is adopted by the Missouri Supreme Court, then the *Restatement* may now be the law in Missouri, and intent or negligence may be required in a private nuisance action. However, *Hawkins v. Burlington Northern, Inc.*²⁵² was decided nine years after the adoption of MAI and held that negligence is not required in a private nuisance action. *Hawkins* did not discuss the requirement of intent.

An additional problem with MAI 22.06 is that the committee comments state that the verdict director itself is only to be used in cases where the nuisance has been created with the intent to interfere with the use and enjoyment of land. This statement presents a dilemma if private nuisance cases are actionable without intent. The verdict director is appropriate and a correct statement of the law of private nuisance as to those interferences which are intentional as well as to those which are unintentional. If, therefore, counsel submits a not-in-MAI instruction for an unintentional nuisance,²⁵³ he is risking reversible error because he may be incorrectly stating the law of private nuisance. If he uses MAI 22.06, on the other hand, he may have committed reversible error because he has violated a committee comment on the use of MAI.²⁵⁴

3. Policy Considerations

It may be undesirable to require that plaintiff establish that defendant has acted negligently or intentionally before he can recover on a private nuisance theory.²⁵⁵ Clearly, if defendant's conduct is negligent, reckless or ultrahazardous, then irrespective of nuisance law plaintiff is entitled to recover for the injury.²⁵⁶ So, in effect, the *Restatement* analysis states no more than the principles which a court uses to determine liability for an intentional interference with the use and enjoyment of land. The *Restatement* adopts the position that accidental interferences with the use and enjoyment of land are uncompensable, apparently for reasons of public policy. Yet there are injuries which should be compensable on a private nuisance theory even though they result from mere accident. For example, let us presume that a fertilizer plant, due to an unforeseeable accident, discharges chemicals into the atmosphere, thereby destroying a neighboring farmer's cattle herd. The farmer who has lost his entire herd of cattle may have suffered more economic hardship from the disaster than he can reasonably bear. Indeed, the farmer may have lost his entire income for that year even though his debts continue to accrue. The issue is who should be required to bear the loss. Clearly, the farmer has suffered severe

252. 514 S.W.2d 593 (Mo. En Banc 1974).

253. This was done in *Genova v. City of Kansas City*, 497 S.W.2d 553, 558 (Mo. App., D.K.C. 1974), and the issue of its validity was not raised.

254. MO. APPROVED INSTR. at LIII (2d ed. 1969).

255. See text accompanying note 251 *supra*.

256. See RESTATEMENT OF TORTS § 822(d)(ii) (1939).

economic hardship, and, presuming that his cattle farm was located in a suitable area, his loss has been through no fault of his own. It would appear to be more equitable in this circumstance to impose liability on the chemical plant whose conduct, albeit unculpable, resulted in the injury.

A dilemma would be created if the requirement of negligence and/or intent were completely abolished in private nuisance actions. Very few commentators would seriously suggest that all unreasonable interferences with the use and enjoyment of land should be actionable without regard to the culpability of the actor. However, it would likewise be unreasonable to absolve the actor of liability for all accidental interferences regardless of the circumstances. Therefore, an appropriate solution might be to consider culpability as one factor in the balancing test rather than following a strict rule that accidental interferences are uncompensable. Hence, in determining whether a defendant had acted unreasonably, so as to create a private nuisance, the court would consider the social utility of each party's conduct, the gravity and character of the injury to the plaintiff's property, the suitability of each party's conduct to the surrounding area, and whether the interference has been intentionally created. Whether the defendant's conduct resulted from negligent, reckless or ultrahazardous conduct would be of little import since, as discussed earlier, such interferences would automatically be actionable on other theories.²⁵⁷ In addition, in determining whether an accidental loss is compensable, the court might consider the relative ability of the parties to bear the loss or to insure against the loss. If the actor is a corporation, the court might also consider whether payment for plaintiff's injuries should be a necessary cost of doing business and should be passed on to customers. All of these considerations contribute to the ultimate decision as to whether plaintiff should suffer the injury without compensation.

If the balancing test were altered to consider the culpability of the actor it would work as follows: if the interference with plaintiff's land were purely accidental, the defendant's conduct would not be presumed unreasonable unless the gravity and character of the injury to plaintiff's property is sufficiently great, or unless there is disproportionate social utility in plaintiff's as opposed to defendant's conduct. The court might choose to impose liability if the defendant's conduct were particularly unsuited to the surrounding area. As the social utility of the defendant's conduct increases, or the gravity and character of the interference decreases, then the court should become more reluctant to impose liability. Rather, in such event, the court might require that the defendant have intentionally interfered with the plaintiff's land before it would impose liability. In any event, the court could determine, based on the circumstances, whether liability should be imposed for purely accidental interferences with the use and enjoyment of land.

Returning to our cattle farm example, the court would begin by noting the severity of the injury to plaintiff. Hence, unless the fertilizer plant had social utility disproportionate to the farm, or unless the farm was particularly unsuited to the area in which it was located, the court would impose liability. It should be observed, however, that liability for accidental interferences would only be imposed when the injury suffered by plaintiff is so great that it should not be borne without compensation. If our plaintiff lost only a few out of several hundred head of cattle, the court should be quite reluctant to impose liability for an accidental interference. This approach, although adopting the traditional reluctance to impose liability for purely accidental interferences, allows recovery when the injury is so severe that undue hardship would be visited upon plaintiff absent recovery.

4. Proposed *Restatement* Section 829A

In the tentative drafts of the *Restatement (Second) of Torts*, there is a proposal to add new section 829A²⁵⁸ which would partially adopt this position. Liability would be imposed for an intentional invasion of another person's land if the harm resulting from the interference is substantial and greater than the other should be required to bear without compensation. Although this section does not incorporate the balancing test, it nonetheless imposes liability when the plaintiff suffers severe injury. There is one pitfall in the *Restatement* analysis. Liability will only be imposed under this new section if it can be established that defendant intentionally interfered with the use and enjoyment of plaintiff's land. The *Restatement* defines intent in section 825 as where one acts for the purpose of causing the result or with knowledge that the result is substantially certain to occur.²⁵⁹ This language would not cover accidental invasions of land, and the cattle farmers in my example would be without compensation.

This section may not, however, produce an appreciable change in the state of private nuisance law as it has previously been defined by the *Restatement*. Section 822 states that an intentional invasion of another person's land is actionable if plaintiff can establish that defendant's conduct is unreasonable. The invasion is said to be unreasonable under section 826 when the gravity of the harm outweighs the utility of the actor's conduct.²⁶⁰ The gravity of the harm is defined in section 827²⁶¹ and the utility of the actor's conduct is defined in section 828.²⁶² These latter sections merely state that, in determining the reasonableness of the invasion, the court should consider the gravity and character of the harm, the social

258. RESTATEMENT (SECOND) OF TORTS § 829A (Tent. Draft No. 18, 1972).

259. RESTATEMENT OF TORTS § 825 (1939).

260. *Id.* § 826.

261. *Id.* § 827.

262. *Id.* § 828.

utility of each party's conduct, and the suitability of each party's conduct to the surrounding area. It would appear that section 829A produces little, if any, change in this analysis. Before section 829A can be invoked, plaintiff must establish that defendant has created a substantial interference with the use and enjoyment of his land. This correlates to the gravity and character of the harm required under section 827. However, in order to invoke section 829A plaintiff must also establish that the injury is greater than he should be required to bear without compensation. Section 829A does not provide any ascertainable standards by which it can be determined that the injury reaches this plateau;²⁶³ indeed, the proposed comments suggest that the social utility of the parties' conduct should be irrelevant in such a determination. It is submitted that the considerations of what the parties do, where they do it, and society's reactions to their conduct will be factors in a nuisance liability determination regardless of what guidelines or tests are espoused. Even if the court purports to follow the test in section 829A, the importance of the traditional factors should not be underestimated.

Indeed, private nuisance law is no more than a hodge-podge of factors which the court weighs and balances to determine if the defendant's conduct is unreasonable. Before a court can reach a realistic determination that an interference is greater than the plaintiff should be required to bear without compensation, it should consider all of the traditional factors as well as several more. First, the court should consider the relative financial ability of the parties to bear the loss. Second, the court should determine whether one party should realistically be expected to insure against the loss. Finally, the court should also consider whether one party is in a position to pass the loss on to the public at large as a cost of his product. Section 829A is vague and fails to expressly take these factors into account. It would appear to be far more desirable to alter the balancing test and consider all of these factors in the initial determination of whether particular activity constitutes a private nuisance.

The illustrations following proposed section 829A are helpful to illustrate the results which would be reached under such an altered balancing test. Without mentioning the requirement of intent, one illustration states that if a factory produces severe vibrations which cause ceilings to fall in plaintiff's home the invasion would be sufficiently great to impose liability.²⁶⁴ A second illustration states that a defendant's conduct is unreasonable when his smelter emits sulphurous fumes which waft over plaintiff's land and cause severe crop damage.²⁶⁵ However, a third illustration states

263. RESTATEMENT (SECOND) OF TORTS § 829A, comments (Tent. Draft No. 18, 1972).

264. *Id.* Illustration 1.

265. *Id.* Illustration 2.

that a chemical factory which occasionally emits unpleasant odors would not be liable under this section.²⁶⁶

The first two *Restatement* illustrations and the cattle example involve innocent defendants who have caused injury through no fault of their own. It might be suggested that imposing liability in such a case would deter the free use of land or entry into business, but in fact such a fear is unfounded. Many other burdens, including extensive regulatory legislation, confront one who begins a commercial enterprise. Conceding the importance of business, public policy still imposes such restrictions. Nuisance liability without intent or negligence should similarly be imposed where circumstances warrant.²⁶⁷ It is unlikely that such a rule would significantly deter commercial ventures, given that past Missouri cases have gone as far as to say that negligence is not required for nuisance²⁶⁸ and even that nuisance may result in strict liability.²⁶⁹

It should be noted that in the vast majority of private nuisance cases the plaintiff will be able to establish that the interference with his land is either intentional or negligent.²⁷⁰ In the frequently occurring case of a continuing nuisance with requests by the plaintiff for the abatement of the nuisance, the continuing action of the defendant with knowledge of plaintiff's injury is sufficient to establish intent.²⁷¹

G. *Additional Considerations*

1. Coming to a Nuisance

a. General Rule

A number of additional factors can alter the application of the balancing test in a private nuisance case. In Missouri,²⁷² as in most states,²⁷³ it is

266. *Id.* Illustration 3.

267. Although it may be obvious, it should be observed that the defenses of contributory negligence and assumption of the risk are not available in a private nuisance action. 1 F. HARPER & F. JAMES, *supra* note 103, § 1.28.

268. See cases cited notes 239-40 *supra*.

269. See cases cited note 241 *supra*.

270. See W. PROSSER, *supra* note 3, § 87.

271. See RESTATEMENT OF TORTS § 825 (1939).

272. *Hayden v. Tucker*, 37 Mo. 214 (1866); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947).

273. *Lawrence v. Eastern Air Lines*, 81 So. 2d 632 (Fla. 1955); *Hall v. Budde*, 293 Ky. 436, 169 S.W.2d 33 (1943); *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948); *Forbes v. City of Durant*, 209 Miss. 246, 46 So. 2d 551 (1950); *Campbell v. Seaman*, 63 N.Y. 568 (1876). See also Note, *Remedies—Enjoining a Nuisance—Damages to the Defendant As a Condition of Granting the Injunction*, 38 MO. L. REV. 135 (1973). A minority of jurisdictions recognize the defense of coming to a nuisance. *Dill v. Excel Packing Co.*, 183 Kan. 513, 331 P.2d 539 (1958); *Patton v. Westwood Country Club Co.*, 18 Ohio App. 2d 137, 247 N.E.2d 761 (1969). See also W. RODGERS, *supra* note 3, § 2.8; 1 F. HARPER & F. JAMES, *supra* note 103, § 1.28; R. POWELL, *supra* note 3, § 706.

not a defense to a nuisance action to allege that the plaintiff came to the nuisance of which he now complains. In *Hayden v. Tucker*,²⁷⁴ defendant built a corral for jacks and stallions. Later that same year, plaintiff erected a residence on his land quite near the corral. Plaintiff then sought to enjoin operation of the corral alleging that it created offensive odors and noises, thereby unreasonably interfering with the use and enjoyment of his home. Defendant argued that the corral predated plaintiff's use and occupation of his land, and that plaintiff should therefore not be permitted to complain of a nuisance when he voluntarily chose to construct his dwelling house beside it with full knowledge of its existence. The court held that the mere fact that plaintiff came to the nuisance would not preclude him from enjoining its operation. In a coming to the nuisance case, the court must reconcile the interests of the defendant, who may have taken care to locate his operation away from potentially offended neighbors, and the plaintiff, who has a land interest unquestionably being infringed.

b. Proposed Solutions

There are several ways a court might resolve these interests. First, most Missouri courts have recognized that the defendant's priority of occupation, although not a defense, should be considered as a factor in the balancing test.²⁷⁵ Accordingly, a court might weigh and balance the defendant's priority of occupation with the other factors in its initial determination of whether the defendant's conduct does, in fact, result in a private nuisance.

A second approach is that taken by the Arizona Supreme Court in *Spur Industries, Inc. v. Del E. Webb Development Co.*²⁷⁶ In *Spur*, the defendant constructed a feedlot fifteen miles from Phoenix, Arizona in 1956. In 1967, the plaintiff began constructing a retirement community in close proximity to the defendant's feedlot; it subsequently brought a private nuisance action against the defendant alleging that the feedlot created an unreasonable interference to the community. The court determined that the feedlot did, in fact, result in a nuisance, but conditioned its issuance of an injunction on the plaintiff's willingness to indemnify the defendant for the costs of moving. In so doing, the court allocated the burden between both parties and avoided thrusting the loss solely on one or the other. Missouri courts have in no discovered instance adopted this approach, but it does appear to represent an acceptable solution to a difficult problem.

274. 37 Mo. 214 (1866).

275. *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955); *Schott v. Appleton Brewery Co.*, 205 S.W.2d 917 (St. L. Mo. App. 1947). See also *Clinic & Hosp., Inc. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931).

276. 108 Ariz. 178, 494 P.2d 700 (1972). See also Note, *supra* note 273.

The defendant in a coming to the nuisance case might also defend on the theory that it has gained a prescriptive right to maintain the nuisance.²⁷⁷ In Missouri, a prescriptive right to maintain a nuisance can be obtained if it is maintained adversely,²⁷⁸ continuously,²⁷⁹ notoriously²⁸⁰ and in the same general character²⁸¹ for the entire statutory period of ten years.²⁸² A prescriptive right cannot be obtained when the nuisance is unlawful,²⁸³ has been maintained permissively,²⁸⁴ or when the interference which flows therefrom is only periodic.²⁸⁵ Accordingly, if the nuisance conduct has been in operation for at least ten years, it may have gained a prescriptive right to be maintained.²⁸⁶

Missouri courts have been reluctant to hold that a particular defendant gained such a prescriptive right.²⁸⁷ In *Skinner v. City of Slater*,²⁸⁸ the defendant constructed a sewer in 1893 which was not put into operation until 1903. The court held that the defendant had not obtained a prescriptive right to pollute a stream merely by constructing the sewer in 1893, even though it had been used by private individuals since construction. In *Schumacher v. Shawhan*,²⁸⁹ the defendant purchased and operated a

277. See *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (Mo. 1899); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Fansler v. City of Sedalia*, 189 Mo. App. 454, 176 S.W. 1102 (K.C. 1915); *Skinner v. City of Slater*, 159 Mo. App. 589, 141 S.W. 733 (K.C. 1911); *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892).

278. *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899); *McIlroy v. Hamilton*, 539 S.W.2d 669 (Mo. App., D. St. L. 1976); *Stremph v. Loethen*, 203 S.W. 238 (K.C. Mo. App. 1918); *Fansler v. City of Sedalia*, 189 Mo. App. 454, 176 S.W. 1102 (K.C. 1915); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1907).

279. *McIlroy v. Hamilton*, 539 S.W.2d 669 (Mo. App., D. St. L. 1976); *Fansler v. City of Sedalia*, 189 Mo. App. 454, 176 S.W. 1102 (K.C. 1915); *Stremph v. Loethen*, 203 S.W. 238 (K.C. Mo. App. 1918); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 96, 106 S.W. 594 (St. L. 1907); *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892).

280. *McIlroy v. Hamilton*, 539 S.W.2d 669 (Mo. App., D. St. L. 1976); *Bradbury Marble Co. v. Laclede Gaslight Co.*, 128 Mo. App. 589, 106 S.W. 594 (St. L. 1907).

281. *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899).

282. *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892).

283. See 5 R. POWELL, *supra* note 5, § 706.

284. *Smith v. City of Sedalia*, 152 Mo. 283, 53 S.W. 907 (1899). See also *City of Chillicothe v. Bryan*, 103 Mo. App. 409, 77 S.W. 465 (K.C. 1903).

285. See cases cited note 7 *supra*. But see *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892).

286. 1 F. HARPER & F. JAMES, *supra* note 103, § 1.30.

287. This tendency is probably consistent with the approach adopted by other states. See 5 R. POWELL, *supra* note 5, § 706.

288. 159 Mo. App. 589, 141 S.W. 733 (K.C. 1911).

289. 93 Mo. App. 573, 67 S.W. 717 (K.C. 1902). See also *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956).

distillery which had been in existence for forty years, during which time it had continuously dumped waste from its stillhouse into a stream. Subsequently, the defendant increased the rate of discharge to the point where the stream became unfit for use. Plaintiff sought an injunction, and defendant asserted the existence of a prescriptive right to pollute the stream based on the fact that his predecessors had dumped waste into the stream for forty years. The court held that the prior rate of pollution was not unreasonable and did not render the stream unfit for use. Accordingly, the court noted that defendant and its predecessors had exercised no more than their riparian right to discharge refuse in reasonable amounts into the stream. The court also held that such right was not sufficient to give them a prescriptive right to subsequently pollute the water so as to render it unfit for use.

2. Anticipated or Threatened Nuisances

a. General Rule

An additional problem exists when a landowner seeks to enjoin a threatened or anticipated nuisance. The court, in making its decision, must rely on mere allegations as to the future impact of the defendant's conduct. For example, one landowner may desire to use land to operate an amusement park while a nearby residential landowner, who fears that the amusement park will deprive him of the enjoyment of his home, may oppose construction of the park. The court must then speculate and decide whether the park will in fact result in a nuisance.

In response to this uncertainty, the traditional rule, followed in Missouri²⁹⁰ and the majority of states,²⁹¹ is that an anticipated nuisance will only be enjoined if the anticipated or threatened injury is certain to occur. Several Missouri cases have applied this rule. In *Aufderheide v. Polar Wave Ice & Fuel Co.*,²⁹² plaintiffs sought to enjoin construction of an icehouse which they claimed would create disagreeable odors. The court applied the traditional rule that a prospective nuisance will be enjoined only if it is "clear, certain, and free from all substantial doubt that the an-

290. *Aufderheide v. Polar Wave Ice & Fuel Co.*, 219 Mo. 337, 4 S.W.2d 776 (En Banc 1928). See also *Appelbaum v. St. Louis County*, 451 S.W.2d 107 (Mo. 1970); *Normandy Consol. School Dist. v. Harral*, 315 Mo. 602, 286 S.W. 86 (1926); *Rankin v. Charless*, 19 Mo. 490 (1854); *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (St. L. Mo. App. 1929); *Holke v. Herman*, 87 Mo. App. 125 (St. L. 1901); *McDonough v. Robbins*, 60 Mo. App. 156 (St. L. 1895). The theory was well stated in *Symmonds*: "[T]he doctrine is almost 'universally upheld,' that injunctions will not be granted to restrain a use of property which it is claimed will create a nuisance unless the use to be restrained is ipso facto a nuisance or the pleader charges must become one. . . ."

291. See D. DOBBS, *supra* note 162, § 5.7. See also H. WOOD, *NUISANCES* § 100 (1883).

292. 319 Mo. 337, 4 S.W.2d 776 (En Banc 1928).

anticipated nuisance certainly and inevitably will result."²⁹³ The court went further to note that an icehouse is not considered a nuisance per se, and could only become a nuisance if operated in an unreasonable manner. The court held that since the icehouse was not yet in operation it would be impossible to determine whether it would be operated in an unreasonable manner. Accordingly, the injunction was denied.²⁹⁴ In *McDonough v. Robbins*,²⁹⁵ plaintiffs sought to enjoin construction of a dairy which, as in *Aufderheide*, it was alleged would generate disagreeable odors. As in *Aufderheide*, the court adhered to the traditional rule, and denied plaintiff's request for an injunction.

The hesitance to enjoin an anticipated nuisance is based on a reluctance to prevent an activity which may or may not be conducted in such a manner as to actually constitute a nuisance. Restrictions on the use of land are traditionally disfavored.²⁹⁶ Additionally, since enjoining an anticipated nuisance is an equitable remedy, it is subject to the general equitable reluctance to act on mere conjecture.

b. Exceptions

The reluctance to enjoin an anticipated nuisance disappears when the offending activity would result in a nuisance per se.²⁹⁷ The threatened injury will necessarily result regardless of the manner of conduct or care involved with the activity, and the injunction is based on more than mere speculation or conjecture. In *Clutter v. Blankenship*,²⁹⁸ it was held that the operation of a funeral home in a residential neighborhood would result in a nuisance without regard to the sanitariness or care with which it was

293. *Id.* at 785.

294. See also *Van de Vere v. Kansas City*, 107 Mo. 83, 17 S.W. 695 (1891). There plaintiff sought to enjoin the defendant city from constructing a fire house near his property. Plaintiff feared that noise from the fire bell and odor from the horses would interfere with the use of his property. The court, as in *Aufderheide*, held that since a fire house was not a nuisance per se it would not be enjoined until such time as it was actually in existence and could be shown to be a nuisance in fact. Given the high social utility of a firehouse, it is unlikely that an injunction would issue in any event. Plaintiff at best would be relegated to an action for money damages.

295. 60 Mo. App. 156 (St. L. 1895).

296. In *Holke v. Herman*, 87 Mo. App. 125, 134 (St. L. 1901), it was stated that:

The uncertainty of future events, the frequency of groundless alarms and the despotism of needlessly preventing a citizen from using his property in the mode he considers most conducive to his interest or pleasure have properly made the courts extremely conservative in granting such relief [against an anticipated nuisance].

297. See *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Holke v. Herman*, 87 Mo. App. 125 (St. L. 1901); *McDonough v. Robbins*, 60 Mo. App. 156 (St. L. 1895). See also D. DOBBS, *supra* note 162, § 5.7; W.

298. 346 Mo. 961, 144 S.W.2d 119 (1940).

operated; the court held that an anticipatory injunction was proper even though the home had not yet commenced operation.

It is nonetheless inaccurate to state that an anticipated nuisance will only be enjoined in those circumstances when the offending activity is classified as a nuisance per se, and not when the offending activity is classified as a nuisance in fact.²⁹⁹ It is also possible for a threatened nuisance in fact to be enjoined. In *Mason v. Deitering*,³⁰⁰ for example, defendant sought to erect a livery stable three stories high, seventy-five feet wide and seventy-six feet long in order to stable sixty to seventy horses. Although the stable was being constructed in violation of a municipal ordinance, the court refused to characterize it as a nuisance per se. Plaintiffs, whose homes were located within thirty to two-hundred feet of the proposed stable, sought and obtained an injunction by demonstrating that the stable would almost certainly interfere with the use and enjoyment of their homes. Even though the interference would have resulted in a nuisance in fact and not a nuisance per se, its construction was enjoined because there was a "reasonable certainty" that a nuisance would ensue.

A court might be more willing to enjoin an anticipated nuisance in fact which is created with the intent to interfere with the use and enjoyment of another's land. For example, in *Holke v. Herman*,³⁰¹ defendant was constructing a pond with the announced intent to spite plaintiff for his refusal to purchase defendant's land. The pond had no fresh water outlet and was constructed in a location such that waste from defendant's livestock would drain into the pond. The court held that defendant's intent should be considered in determining whether the threatened injury would result.

Several Missouri courts have indicated, as has the *Restatement of Torts*,³⁰² that less certainty of injury will be required to enjoin an anticipated nuisance which endangers health or life.³⁰³ When the anticipated injury is to health or life, plaintiff need only demonstrate to reasonable certainty that it will occur,³⁰⁴ rather than demonstrating that it is "clear

299. See D. DOBBS, *supra* note 162, § 5.7.

300. 132 Mo. App. 26, 11 S.W. 862 (St. L. 1908). On similar facts, plaintiffs in *Caskey v. Edwards*, 128 Mo. App. 237, 107 S.W. 37 (K.C. 1908), sought and obtained an injunction prohibiting the issuance of a building permit for a stable on the grounds that it would constitute a nuisance.

301. 87 Mo. App. 125 (St. L. 1901).

302. RESTATEMENT OF TORTS § 933 (1939).

303. *Symmonds v. Novelty Cemetery Ass'n*, 21 S.W.2d 889 (K.C. Mo. App. 1929); *Holke v. Herman*, 87 Mo. App. 125, 142 (St. L. 1901).

304. The "reasonable certainty" test is far from accepted law or uniform in application. It has been applied in two other cases: *Mason v. Deitering*, 132 Mo. App. 26, 111 S.W. 862 (St. L. 1908); *City of Spickardsville v. Terry*, 274 S.W.2d 21 (K.C. Mo. App. 1954). In *Mason* plaintiffs sought to enjoin construction of a stable which did not involve a threat to health or life, and the test was applied. In *Holke v. Herman* the plaintiffs were injured and the court applied the test, but denied the injunction.

and certain" to occur. In *Holke*, the court held that foul and stagnant water would result from construction of the pond and would present a danger to the health of plaintiff's family. Accordingly, the court held that the lesser standard of certainty would be appropriate.

Recently, in *Lee v. Rolla Speedway, Inc.*,³⁰⁵ the Missouri Supreme Court developed a third exception to what it termed the "onerous burden" imposed by *Aufderheide* under the "clear and certain" test. In *Lee*, defendants sought to construct a raceway in close proximity to plaintiffs' homes in an area which the court termed residential. The plaintiffs alleged that the raceway would create noise, dirt, dust, and fumes thereby interfering with their enjoyment of their homes. The court determined that it was certain that the track would produce noise and that the sole issue was whether the level of noise would be so great as to unreasonably interfere with the enjoyment of plaintiffs' homes. The court held that since there was no dispute that the raceway would create some interference with plaintiffs' land, an injunction would be appropriate if plaintiffs could demonstrate to a reasonable certainty that the raceway would result in a nuisance. In essence, the test seems to be that if it is certain that a proposed action will result in an interference with the use of plaintiff's land, an injunction may issue if it is only "reasonably certain" that the level of interference will meet the traditional unreasonable standard.

Even if a court refuses to enjoin an anticipated nuisance, it may enjoin its subsequent operation which results in a nuisance.³⁰⁶ In *Lee*, the trial court refused to issue an injunction against defendant's construction of the proposed raceway. During the time between the trial court decision and the subsequent appeals, the raceway was completed and commenced operation. The Missouri Supreme Court, although of the opinion that the raceway should have been enjoined in the first instance, remanded the case for reconsideration by the trial court in light of its actual operation. Ultimately, the trial court determined that the actual operation of the raceway resulted in a nuisance, and enjoined its operation.³⁰⁷

An injunction against an anticipated nuisance in fact will not have the same degree of finality as an injunction against an anticipated nuisance per se. In both instances, the injunction is issued because the nature or scope of the proposed activity is such as will result in an interference with the use and enjoyment of neighboring land. In the former instance the defendant has the power to manipulate the circumstances so as to make the interference more or less reasonable; in the latter case of an injunction against a nuisance per se the defendant has very little power to manipulate the circumstances. Features of nuisance per se such as illegality or location in a residential area are simply not amenable to change by the actor.

305. 494 S.W.2d 349 (Mo. 1973).

306. 339 S.W.2d 627 (Mo. App. 1960).

307. *Id.*

The defendant does have the ability to manipulate the circumstances when an injunction is issued against an anticipated nuisance in fact. He can alter the scope or nature of his proposed activity so that it is no longer reasonably certain to result in a nuisance. If the defendant in *Mason v. Deitering*, for instance, decided to build a one story stable to hold fifteen horses rather than the proposed three story structure to house sixty to seventy horses, it might no longer have appeared to a reasonable certainty that the anticipated nuisance would have resulted. The original injunction, if narrowly worded, may not have prohibited defendant from constructing and operating the smaller stable. Moreover, the defendant might be able to argue that due to the change in circumstances enforcement of the original injunction would be inequitable. Thus, the court might reopen and reconsider the injunction based on defendant's manipulation of the circumstances.

Even though an injunction against an anticipated nuisance in fact may be less final than an injunction against an anticipated nuisance per se, the original plaintiff will still gain an important procedural advantage if the original injunction is reopened. In his original suit, plaintiff had the burden of proving that the defendant's proposed activity would be reasonably certain to result in a nuisance. When the defendant reopens the injunction he will be obligated to prove that the changed circumstances make enforcement of the original injunction inequitable.

Where it is clear that the defendant will be able to easily change the scope or conduct of his proposed activity to render any interference reasonable, the court of equity may refuse to grant an injunction against an anticipated nuisance in the first instance. As in all equity cases, the chancellor is loath to engage in futile acts.

3. Local Zoning Ordinances

a. General Rule

An additional consideration in private nuisance cases is the impact of local zoning ordinances. In the majority of states, permissive zoning does not preclude an activity from being classified as a nuisance,³⁰⁸ but does preclude it from being characterized as a nuisance per se. This majority view is proper because permissive zoning is intended only to authorize an activity to be carried on in a particular area, not to be carried on in an unreasonable manner.³⁰⁹ In a few states, courts will refrain from enjoining an activity which has been permissively zoned but will award damages if its conduct results in a nuisance in fact.³¹⁰

308. *Commerce Oil Refining Corp. v. Miner*, 281 F.2d 465 (1st Cir. 1960); *Sakler v. Huls*, 20 Ohio Op. 2d 283, 183 N.E.2d 152 (1961). See also D. DOBBS, *supra* note 162, § 5.7; D. HAGMAN, *supra* note 5, § 162; W. RODGERS, *supra* note 3, § 2.10; 1 F. HARPER & F. JAMES, *supra* note 103, § 1.28.

309. See D. DOBBS, *supra* note 162, § 5.7.

310. *Id.*

Early Missouri cases were in accord with the traditional rule. In *Sultan v. Parker-Washington Co.*,³¹¹ the court held that a local license to use asphalt in the construction of streets would not authorize the defendant to operate an asphalt plant in an unreasonable manner in close proximity to the plaintiff's home. In *Powell v. Brookfield Pressed Brick & Tile Manufacturing Co.*,³¹² the court held that a local license to operate a brick plant did not authorize it to be conducted in an unreasonable manner.

In *Leffen v. Hurlbut-Glover Mortuary Co.*,³¹³ however, the Missouri Supreme Court sitting in division indicated that the presence of a local zoning ordinance which permits the location of a funeral home in a residential area would preclude enjoining a funeral home in such an area based solely on its location. The court stated that the home could only be enjoined if its operation were, in fact, unreasonable or unsanitary.³¹⁴ This statement appears to be in accord with the traditional rule which states that the existence of a permissive zoning statute will transform a nuisance per se into, at most, a nuisance in fact.

Earlier decisions by the other division of the Missouri Supreme Court, and one decision by the Missouri Supreme Court En Banc, had reached a somewhat different result. In *Scallet v. Stock*,³¹⁵ *Street v. Marshall*,³¹⁶ and *Tureman v. Ketterlin*,³¹⁷ it was held that the presence or absence of a local permissive zoning statute is irrelevant in the determination of whether a private nuisance exists. All three cases reached the conclusion that the presence of a funeral home in a residential area would create feelings of gloom and depression and seriously interfere with the use and enjoyment of neighboring property. All three summarily rejected the defendant's argument that a local permissive zoning statute would preclude the court from enjoining the activity as a nuisance.

The holdings in *Tureman*, *Scallet* and *Street* are preferable to that in *Leffen*. The courts should protect nearby residents on whom a funeral home can have severe psychological impact.³¹⁸ Nonetheless, a permissive

311. 117 Mo. App. 636, 93 S.W. 289 (St. L. 1906).

312. 104 Mo. App. 713, 78 S.W. 646 (K.C. 1904). The issue was also mentioned in *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955).

313. 363 Mo. 1137, 257 S.W.2d 609 (1953) (Division 1).

314. In *Leffen, id.* at 1146, 257 S.W.2d at 614, the court stated:

It may be that, as a result of the enactment of a municipal zoning ordinance, the maintenance and operation of the funeral home at its present location is now lawful and proper. If so, our restraint of a common-law nuisance (resulting, not from the operation but solely from the location of the funeral home) would be improper and futile.

See also *Fuchs v. Curran Carbonizing & Eng'r Co.*, 279 S.W.2d 211 (St. L. Mo. App. 1955).

315. 363 Mo. 721, 253 S.W.2d 143 (1952) (Division 2).

316. 316 Mo. 698, 291 S.W. 494 (En Banc 1927).

317. 304 Mo. 221, 263 S.W. 202 (1924).

318. See cases cited note 155 *supra*.

zoning statute may reflect the true character of an area; a change in permissive zoning ordinances may reflect a change in the character of the area. Accordingly, this factor may alter the balancing test.³¹⁹ In *Scallet*, although the court rejected defendant's contention that the permissive zoning statute precluded enjoining the operation of the home, it eventually held that the area was in reality commercial and not residential. The court refused to enjoin the defendant from opening the home, properly basing its decision on the actual nature of the locality rather than on the presence of an permissive zoning statute.

b. Due Process Limitations

If Missouri should adopt the position that permissive zoning ordinances have the effect of abrogating private nuisance actions, the state or locality which passed the statute or ordinance might be required to compensate affected landowners under the taking clause of the Federal Constitution.³²⁰ In *Richards v. Washington Terminal Co.*,³²¹ the United States Supreme Court held that, under the fifth amendment,³²² a government could not immunize private companies from private nuisance actions without compensating affected landowners if the offending activity was sufficient to amount to a taking of the defendant's property.³²³ In *Richards*, the government had immunized a railroad from suit, and the affected landowner suffered damage from smoke and fumes emitted by defendant's locomotive.³²⁴ In *Sultan v. Parker-Washington Co.*,³²⁵ again dealing with government licenses, the St. Louis Court of Appeals reached a similar result applying Missouri law.³²⁶

The application of *Sultan* and *Richards* to local zoning laws is less clear than in cases of specific immunization from suit. Since the government is unable to grant a license to interfere with public property without compensating injured landowners, it is arguable that the same result cannot be

319. See D. HAGMAN, *supra* note 5, § 162.

320. U.S. CONST. amend. V. See *Payne v. Kansas City, St. J. & C.B.R.R.*, 112 Mo. 6, 20 S.W. 322 (1892). See also D. HAGMAN, *supra* note 5, § 162.

321. 233 U.S. 546 (1914).

322. The requirements of the fifth amendment are imposed on the states via the fourteenth amendment.

323. See also *Kimball v. Thompson*, 70 F. Supp. 803 (D. Neb. 1947), *rev'd*, 165 F.2d 677 (8th Cir. 1948).

324. The court stated "[t]hat while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use." 233 U.S. 546, 553 (1914).

325. 117 Mo. App. 636, 93 S.W. 289 (St. L. Mo. App. 1904).

326. See also *Smith v. City of Sedalia*, 152 Mo. 283, 302, 53 S.W. 907, 912 (1899), where the court stated: "Our Constitution declares that private property shall not be taken or damaged without payment of just compensation. The Legislature, therefore, could not, if it so intended, confer authority on a city to injure private property for the public good without first paying the damage."

accomplished via local zoning laws. Hence, if the offending activity results in a private nuisance and the local zoning ordinance has the effect of abrogating private causes of action for nuisance, it is within reason that an action for compensation of a taking will lie.³²⁷

4. Sovereign Immunity

The taking clause also affects the relationship of private nuisance to sovereign immunity. Traditionally, private nuisance has been an exception to the application of sovereign immunity in Missouri.³²⁸ A governmental entity which unreasonably interferes with the use and enjoyment of surrounding land has been subject to the same liability as a private individual. With the judicial abrogation of sovereign immunity in Missouri in *Jones v. State Highway Commission*,³²⁹ the Missouri Supreme Court indicated that the legislature might preserve or reestablish the immunity. Legislation, when and if enacted, may be so worded as to affect the prior exclusion of nuisance actions from the protection of governmental immunity. If it is so interpreted, an injured plaintiff might still proceed through an inverse condemnation action under the state constitutional taking provision.³³⁰

II. REMEDIES

A. Damages

1. In General

Courts can grant injunctions and/or damages as remedies for private nuisances.³³¹ When a court grants damages, the measure will vary depending upon whether the nuisance is characterized as temporary or

327. For a general discussion, see W. RODGERS, *supra* note 3, § 2.10.

328. *Rodgers v. Kansas City*, 327 S.W.2d 478 (K.C. Mo. App. 1959). *See also* *Pearson v. Kansas City*, 55 S.W.2d 485 (Mo. 1932).

329. 557 S.W.2d 225 (Mo. En Banc 1977).

330. MO. CONST. art. 1, § 26 provides:

That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

See Bohannon v. Camden Bend Drainage Dist., 240 Mo. App. 492, 208 S.W.2d 794 (K.C. 1948).

331. *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Baker v. McDaniel*, 178 Mo. 447, 77 S.W. 531 (1903); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App. D. St. L. 1972); *Barlett v. Hume-Sindair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1961).

permanent. The measure of damages for a permanent nuisance is the depreciation in the market value of the land,³³² while the measure of damages for a temporary nuisance is the depreciation in the rental or use value of the land.³³³ When no rental value is involved, the plaintiff can sue for the actual damages inflicted upon his land.³³⁴

Special damages for the inconvenience and discomfort suffered by the plaintiff³³⁵ and his family³³⁶ are also recoverable in a private nuisance action. In *Schmidt v. Paul*,³³⁷ plaintiffs were awarded damages of \$5,000 because defendant had created a nuisance by allowing mud and surface water to be discharged onto plaintiffs' land. Defendant alleged that the damage award was improper because it included consideration of the element of plaintiffs' inconvenience and discomfort rather than just loss of rental or use value. The court rejected defendant's contention, noting that in a nuisance action the plaintiff may recover damages for inconvenience, physical discomfort, and any actual injuries suffered as a result of the nuisance.

It is also possible to recover damages for loss of rental value and for actual injuries inflicted on the property. In *Krebs v. Bambrick Brothers Construction Co.*,³³⁸ defendant's blasting created excessive noise which prevented plaintiff from renting his premises. The blasting also caused

332. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Downing v. Dinwiddie*, 132 Mo. 92, 33 S.W. 470 (1895); *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972). See also MO. APPROVED INSTR. NO. 9.02 (West Supp. 1978).

333. *Pinney v. Berry*, 61 Mo. 359 (1875); *Smith v. Kansas City, St. J. & C.B.R.R.*, 98 Mo. 20, 11 S.W. 259 (En Banc 1888); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (St. L. Mo. App. 1972); *Foncannon v. City of Kirksville*, 88 Mo. App. 279 (K.C. 1901). See also MO. APPROVED INSTR. NO. 4.01 (1969 ed.).

334. *McKee v. St. Louis, Keokuk & N.W.R.R.*, 49 Mo. App. 174 (St. L. 1892).

335. *McCracken v. Swift & Co.*, 265 S.W. 91 (Mo. 1924); *Schmidt v. Paul*, 554 S.W.2d 496 (Mo. App., D.K.C. 1977); *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929). In *McCracken*, 265 S.W. at 92, the court quoted 4 J. SUTHERLAND, DAMAGES 3890 (4th ed. 1916):

A plaintiff who occupies a home is not limited to the recovery of the diminished rental value of it, but may be compensated for any actual inconvenience and physical discomfort which materially affected the comfortable and healthful enjoyment and occupancy of his home, as well as for any actual injury to his health or property caused by the nuisance.

336. *McCracken v. Swift & Co.*, 265 S.W. 91 (Mo. 1924). See also *Ellis v. Kansas City, St. J. & C.B.R.R.*, 63 Mo. 131 (1876).

337. 554 S.W.2d 496 (Mo. App., D.K.C. 1977). *Schmidt* also demonstrates that one in joint possession of property on which a nuisance is maintained can be held liable for it, even though he has not participated in its erection, if he has

physical injury to plaintiff's land when rocks were hurled onto the property. The court held that plaintiff was entitled to recover for both injuries.

Special damages can also include lost profits. In *Fuchs v. Curran Carbonizing & Engineering Co.*,³³⁹ the defendant operated a coal testing plant near plaintiff's tavern. The plant emitted gases which rendered the tavern uncomfortable and unhealthful, thereby causing plaintiff's inn to suffer a substantial decrease in patronage. The court held that plaintiff was entitled to recover lost profits to the extent that they could be measured with reasonable certainty.

2. Temporary *v.* Permanent Distinction

The distinction between a temporary and a permanent nuisance is important not only because it affects the measure of damages but also because it affects the statute of limitations.³⁴⁰ A temporary nuisance gives rise to a new cause of action for each new injury which occurs to plaintiff's property.³⁴¹ Plaintiff is entitled to bring successive actions, but must include all damages which have accrued at that time.³⁴² When the nuisance is permanent, the statute of limitations begins to run immediately upon the creation of the nuisance and plaintiff must sue to recover all damages, present and prospective, in one action.³⁴³ Even if the nuisance is permanent, the statute of limitations does not begin to run until the plaintiff's land sustains injury or it is obvious that it will sustain injury.³⁴⁴ In *Webb v.*

339. 279 S.W.2d 211 (St. L. Mo. App. 1955).

340. *Powers v. St. Louis, I.M. & S. Ry.*, 158 Mo. 87, 57 S.W. 1090 (1900); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949); *Kent v. City of Trenton*, 48 S.W.2d 571 (K.C. Mo. App. 1931).

341. *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935); *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Bartlett v. Hume-Sinclair Coal Mining Corp.*, 351 S.W.2d 214 (K.C. Mo. App. 1961). *But cf.* *Chappel v. City of Springfield*, 423 S.W.2d 810, 814 (disapproving *Kelly*). In *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892), the court noted that if a temporary nuisance creates a continuing injury to the plaintiff's land, then the statute of limitations for that injury would not begin to run until the injury ceased. For example, if a temporary nuisance caused flooding of the plaintiff's land for sixty-three days, the statute of limitations would not begin to run for that injury until the end of the sixty-three day period when the nuisance ceased.

342. *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935).

343. *See* notes 340-41 *supra*.

344. *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956); *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949); *Bunten v. Chicago, R.I. & Pac. Ry.*, 50 Mo. App. 414 (K.C. 1892). In *Newman*, the defendant constructed a sewer in 1903, but the plaintiff did not suffer injury until 1952. The court held that even if the nuisance were labeled as permanent, the statute of limitations would not begin to run until 1952, when plaintiff bore injury. In *Fansler v. City of Sedalia*, 189 Mo. App. 454, 176 S.W. 1102 (K.C.

Union Electric Co.,³⁴⁵ defendant constructed a major hydro-electrical dam in 1931 approximately 114 miles downstream from plaintiff's property. The dam resulted in a gradual backswell of water which raised the general level of the Osage River. In 1935, heavy rains caused the river to overflow and flood plaintiff's property. When plaintiff filed a private nuisance action in 1945 alleging that he had suffered loss of crops ten years before, the court held that although the dam was created in 1931, no damage was done to plaintiff's land until 1935 and the statute of limitations did not begin to run until that date.

The characterization of a nuisance as temporary or permanent also affects the right of a successor in interest to maintain a private nuisance action.³⁴⁶ If the nuisance is temporary or continuing, a successor will be entitled to maintain a private nuisance action for injuries sustained after he takes possession. If the nuisance is permanent the cause of action accrues to the original owner of the land and his successor has no right to institute an action.³⁴⁷ In *McKee v. St. Louis, Keokuk & Northwestern Ry.*,³⁴⁸ a month-to-month tenant was held to be entitled to maintain a private nuisance action for flood damages which he sustained, even though the nuisance had been created prior to his possession, because it was classified as temporary and continuing rather than permanent.

Although it is clear that the distinction between a temporary and a permanent nuisance is important, there is no litmus paper test by which a court can determine whether a particular activity is temporary or permanent.³⁴⁹ In addition, an analysis of the types of activities which have been classified as temporary or permanent nuisances is of little value. Some Missouri courts have held that a dam,³⁵⁰ a sewer,³⁵¹ and a railroad em-

1915), plaintiff's land was damaged immediately upon creation of the nuisance, but the injury was at that time insubstantial. The court felt that it would be unjust to require a landowner to sue for permanent damages prior to the time at which he could reasonably estimate the measure of his future damages. Accordingly, since the nuisance only occasioned slight injury in the beginning, it was characterized as temporary.

345. 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949).

346. 5 R. POWELL, *supra* note 5, § 706 (suggestion that temporary/permanent distinction should be limited to the issue of damages).

347. *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Hayes v. St. Louis & S.F. Ry.*, 177 Mo. App. 201, 162 S.W. 266 (Spr. 1914). See also *McKee v. St. Louis, Keokuk & N.W.R.R.*, 49 Mo. App. 174 (St. L. 1892).

348. 49 Mo. App. 174 (St. L. 1892).

349. See D. DOBBS, *supra* note 162. Inverse condemnation suits are also possible for private nuisance damage. See Comment, *Inverse Condemnation and Nuisance: Alternative Remedies for Airport Noise Damage*, 24 SYRACUSE L. REV. 793 (1973).

350. *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C.

1979) <http://scholarship.law.missouri.edu/mlr/vol44/iss1/8>

351. *Smith v. City of Sedalia*, 182 Mo. 1, 81 S.W. 165 (1904).

bankment³⁵² constitute permanent nuisances; other Missouri courts have held that a dam,³⁵³ a sewer,³⁵⁴ a pipeline leak,³⁵⁵ stockyards,³⁵⁶ and a negligently operated factory³⁵⁷ constitute temporary or continuing nuisances. One case held that a coal mining operation which caused pollution of a stream and damage to livestock was a temporary nuisance,³⁵⁸ while another held that a hog farm which caused pollution of a stream and offensive odors was a permanent nuisance.³⁵⁹

When a court is in doubt as to whether a nuisance should be labeled as temporary or permanent, it will usually elect to treat the nuisance as temporary and abatable thereby permitting the plaintiff to bring successive actions for each injury.³⁶⁰ There are several justifications for this tendency. First, the courts are reluctant to grant damages for future injury which may not occur.³⁶¹ Secondly, the defendant has a legal obligation to abate the nuisance if possible.³⁶² Finally, the effect of permanent damages is to grant the defendant an easement to interfere with the plaintiff's land, and there is a reluctance to foist this easement on an unwilling plaintiff.³⁶³ In all events, doubt as to whether the injury will continue will result in the classification of a nuisance as temporary rather than permanent.³⁶⁴

352. *Hayes v. St. Louis & S.F. Ry.*, 177 Mo. App. 201, 162 S.W. 266 (Spr. 1914) (except where changed by statute).

353. *Pinney v. Berry*, 61 Mo. 359 (1875); *Markt v. Davis*, 46 Mo. App. 272 (K.C. 1891).

354. *Flanigan v. City of Springfield*, 360 S.W.2d 700 (Mo. 1962); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Hillhouse v. City of Aurora*, 316 S.W.2d 883 (Spr. Mo. App. 1958); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951); *Foncannon v. City of Kirksville*, 88 Mo. App. 279 (K.C. 1901); *Schoen v. Kansas City*, 65 Mo. App. 134 (K.C. 1896).

355. *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (Mo. 1931).

356. *Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892).

357. *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929).

358. *Bartlett v. Hume-Sinclair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1961).

359. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

360. *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

361. *Pinney v. Berry*, 61 Mo. 359 (1875); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Northcutt v. Springfield Crushed Stone Co.*, 178 Mo. App. 389, 162 S.W. 747 (Spr. 1914); *Foncannon v. City of Kirksville*, 88 Mo. App. 279 (K.C. 1901); *Markt v. Davis*, 46 Mo. App. 272 (K.C. 1891). See also *Kelso v. C.B.K. Agronomics, Inc.*, 510 S.W.2d 709 (Mo. App., D.K.C. 1974).

362. *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935); *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

363. See authorities cited note 362 *supra*. See also D. DOBBS, *supra* note 162, *University of Missouri School of Law Scholarship Repository*, 1979

364. *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L.

Missouri courts have developed a number of factors to aid them in determining whether a nuisance is temporary or permanent, including whether it is practical to abate the nuisance,³⁶⁵ whether the source of the nuisance is physically permanent,³⁶⁶ and whether the nuisance has been negligently³⁶⁷ or intentionally created.³⁶⁸ The most important and often cited factor is whether the nuisance is abatable.³⁶⁹ If the nuisance arises from a physically permanent structure,³⁷⁰ it is more likely to be classified as permanent rather than temporary. In *Webb v. Union Electric Co.*,³⁷¹ a major hydro-electrical dam was held to be as permanent as the ingenuity of man could make it and was classified as a permanent and unabatable nuisance rather than a temporary nuisance.

It should be noted that, to some extent, the issue of abatability involves a question of legal permanence.³⁷² No matter how physically permanent a structure may appear to be, it is always within the court's power to order that it be removed. Some commentators have suggested that abatability involves the likelihood that a court will issue an injunction against an activity.³⁷³ Only where there is a compelling reason to deny an injunction is the question of abatability relevant. There are a number of reasons why a court might decline to grant an injunction, including the running of the statute of limitations,³⁷⁴ the fact that plaintiff has requested damages rather than an injunction,³⁷⁵ and general considerations of policy and equity.³⁷⁶

The mere fact that the source of a nuisance is physically permanent does not insure that it will be characterized as permanent and unabatable.

1972). See also *Ivie v. McMunigal*, 66 Mo. App. 437 (K.C. 1896); *Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892).

365. *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

366. *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949).

367. *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

368. *Id.*

369. *Flanigan v. City of Springfield*, 360 S.W.2d 700 (Mo. 1962); *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

370. *Powers v. St. Louis, I.M. & S. Ry.*, 158 Mo. 87, 57 S.W. 1090 (1900).

371. 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949).

372. See D. DOBBS, *supra* note 162, § 5.4.

373. It has been noted that a two-fold test of permanence is followed in many states: (1) the probability of the nuisance being continued is great; and (2) the circumstances are such that the plaintiff cannot have an injunction for its abatement. 5 R. POWELL, *supra* note 5, § 706. This test, although possibly overly simple, does consider the legal abatability of the activity.

374. See text accompanying notes 340-46 *supra*.

375. If the plaintiff requests damages rather than an injunction the legal abatability of the activity is not in issue.

376. See text accompanying notes 413-17 *infra*.

The prevailing rule in Missouri is that even though the source of a nuisance is physically permanent it should not be categorized as permanent unless the nuisance is inherent in the nature of the physical object.³⁷⁷ Therefore, if the nuisance arises from improper or negligent operation of a permanent structure, the nuisance is considered to be temporary rather than permanent.³⁷⁸ In *Bollinger v. American Asphalt Roof Corp.*,³⁷⁹ defendant operated a roofing plant which polluted the air and water near plaintiff's home and business. The court observed that the nuisance, although arising from the permanent structure of the roofing plant, did not arise inherently from the existence of the plant, but rather from the improper manner in which it was operated. Accordingly, since proper operation of the factory would abate the nuisance, it was labeled as temporary. A similar decision was rendered in *Shelley v. Ozark Pipeline Corp.*,³⁸⁰ where the nuisance was caused by a leak in the defendant's pipeline. The court, as in *Bollinger*, noted that an oil leak was not necessary to the operation of an oil pipeline, and was therefore abatable. These cases can be contrasted to *Webb v. Union Electric Co.*,³⁸¹ in which it was held that a hydro-electric dam which necessarily caused the flooding of plaintiff's property was a permanent nuisance.

An additional point of confusion in Missouri is whether the source or cause of the nuisance must be permanent or whether a permanent nuisance can arise from a temporary source which creates permanent injury.³⁸² Some older Missouri cases held that a permanent nuisance can only exist when the source of the nuisance is permanent.³⁸³ Some indication appears in more recent cases that a permanent nuisance can result

377. *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931); *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929). See also *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956).

378. See *Ivie v. McMunigal*, 66 Mo. App. 437 (K.C. 1896); cases cited note 377 *supra*.

379. 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929).

380. 327 Mo. 238, 37 S.W.2d 518 (1931).

381. 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949).

382. See *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972). Compare *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929) and *Hayes v. St. Louis & S.F. Ry.*, 177 Mo. App. 201, 162 S.W. 266 (Spr. 1913) with *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970) and *Kelso v. C.B.K. Agronomics, Inc.*, 510 S.W.2d 709 (Mo. App., D.K.C. 1974). See also *Bartlett v. Hume-Sinclair Coal Mining Co.*, 351 S.W.2d 214 (K.C. Mo. App. 1960). In *Hayes*, the court stated that permanency is determined by the permanency of the source of the injury. At a later point, the court stated that a permanent nuisance can arise when either the source or the nature of the injury is permanent. After six pages of discussion, the court concludes that the whole discussion is irrelevant because a statute mandated that the railroad embankment in issue be treated as temporary.

383. *Bollinger v. American Asphalt Roof Corp.*, 224 Mo. App. 98, 19 S.W.2d 544 (K.C. 1929).

from a temporary interference which creates permanent injury.³⁸⁴ In dictum, the court in *Kelso v. C.B.K. Agronomics*³⁸⁵ held that the permanent destruction of trees on the plaintiff's property, even if caused by a temporary nuisance, would be classified as a permanent nuisance. In *Bower v. Hog Builders, Inc.*,³⁸⁶ plaintiff sustained injuries due to defendant's improper operation of a hog farm, and the court held that permanent damages were appropriate. Defendant maintained vastly inadequate sewage lagoons resulting in a horrible stench and overflow onto plaintiff's property. The nuisance appeared to be temporary since it was the result of an excess number of hogs and inadequate sewage lagoon facilities. Accordingly, it should have been remediable and not permanent. The court treated the nuisance as permanent, probably based on the severity of the damage to the plaintiff's land.

Even though an activity occasions only periodic interference with the plaintiff's land, the nuisance will be considered permanent if the source of the nuisance is permanent and the nuisance is inherent in its operation.³⁸⁷ Although several older Missouri cases took a contrary position, the principle appears to be well established today. For example, in *Webb* the dam produced a general rise in the Osage River near plaintiff's land, but plaintiff did not suffer actual damage except during occasional periods of heavy rain. The court nonetheless held that the nuisance should be characterized as permanent since it inhered in the nature of a permanent object.

There are a number of additional factors which might influence a court's determination that a nuisance is temporary or permanent. A court might be more inclined to classify a nuisance as permanent when the offending activity is one which is important to the public welfare. A number of cases have, for example, decided the issue of whether a public

384. In *Van Hoozier v. Hannibal & St. J.R.R.*, 70 Mo. 145 (1879), the court stated that the test of permanence is whether the nuisance destroys the entire estate or the beneficial use thereof. The court relied upon H. WOOD, *supra* note 291, § 856. The examples cited by Wood do not, however, support a broad interpretation of this statement. One example is a railroad embankment which imposes a continuous injury upon the land. This factual pattern would support a conclusion that permanency is based on either the source or the nature of the injury. The court in *Van Hoozier* held, however, that a temporary nuisance is created when a permanent structure does only periodic and incomplete damage to the entire estate. This holding would support the general proposition that it is the nature of the injury and not the source which dictates whether a nuisance is temporary or permanent. Other Missouri courts have also applied this test. See *Dickson v. Chicago, R.I. & Pac. R.R.*, 71 Mo. 575 (1880). See also *Babbs v. Curators of State Univ.*, 40 Mo. App. 173 (K.C. 1890); *Givens v. Van Studdiford*, 4 Mo. App. 498 (St. L. 1877).

385. 510 S.W.2d 709 (Mo. App., D.K.C. 1974).

386. 461 S.W.2d 784 (Mo. 1970).

387. *Webb v. Union Electric Co.*, 240 Mo. App. 1101, 223 S.W.2d 13 (K.C. 1949); *Hays v. St. Louis & S.F. Ry.*, 177 Mo. App. 201, 162 S.W. 266 (Spr. 1913) (except where changed by statute).

sewer constitutes a temporary or a permanent nuisance. Where the improper operation of a sewer cannot be abated within the available technology, it has been held to produce a permanent nuisance.³⁸⁸ Many older Missouri cases held that a sewer amounted to a permanent nuisance on this basis.³⁸⁹ More recent cases have, however, recognized that modern scientific processes can abate the odor from a sewer. If the sewer is susceptible to a manner of operation which will not result in a private nuisance, any interference will be treated as temporary rather than permanent.³⁹⁰

Likewise, there are instances when a court will decline to grant plaintiff's request for an injunction in effect treating the nuisance as permanent either because of the comparative adverse impact of the injunction on the defendant,³⁹¹ or because of the impact of the injunction on innocent third parties or the public in general.³⁹² In denying plaintiff's request for an injunction, the court is signifying that the comparative value of the defendant's activity is such that it should be permitted to continue notwithstanding the interference with plaintiff's land. Accordingly, the court grants permanent damages, even though the nuisance may be temporary and abatable, so that the activity can continue into the future unvexed by the threat of future litigation.

When the facts permit, there is some tendency to allow the plaintiff to elect whether the nuisance should be treated as temporary or permanent.³⁹³ Although some Missouri cases have held that it is reversible error to submit a case involving temporary injury with a request for permanent damages,³⁹⁴ if the facts would support either theory of damages the plaintiff may be allowed to elect his theory of recovery.³⁹⁵ Some courts seem to have gone as far as to permit a request for permanent damages when a

388. *Stewart v. City of Marshfield*, 431 S.W.2d 819 (Spr. Mo. App. 1968).

389. *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (En Banc 1939).

390. *Flanigan v. City of Springfield*, 360 S.W.2d 700 (Mo. 1962); *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972); *Hillhouse v. City of Aurora*, 316 S.W.2d 883 (Spr. Mo. App. 1958); *Newman v. City of El Dorado Springs*, 292 S.W.2d 314 (Spr. Mo. App. 1956); *Clark v. City of Springfield*, 241 S.W.2d 100 (Spr. Mo. App. 1951).

391. See authorities cited note 429 *infra*.

392. See cases cited note 425 *infra*.

393. See *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968). See also *D. DOBBS, supra* note 162, § 5.4.

394. *Shelley v. Ozark Pipe Line Corp.*, 327 Mo. 238, 37 S.W.2d 518 (1931). *But see* *Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892).

395. In *Bielman v. Chicago, St. P. & K.C. Ry.*, 50 Mo. App. 151 (K.C. 1892), the court held that stockpens constitute a temporary nuisance. However, plaintiff requested permanent damages which were awarded to him. The defendant did not object, and, on appeal, the court held that the defendant had waived any right to object that permanent damages were awarded for a temporary nuisance. *Original holding was reversed in Scott v. City of Nevada*, 50 Mo. App. 189 (K.C. 1894).

solely temporary injury is in issue. In *Ruppel v. Ralston Purina Co.*³⁹⁶ plaintiff submitted his case on a theory of permanent injury and the defendant appealed, asserting error in that the injury was really temporary. The injuries sustained by plaintiff were as follows: the entire area, including plaintiff's and defendant's land, had become infected with insects; defendant's sewage lagoons gave off odors; and defendant's by-products processing plant also emitted odors. Defendant asserted that the injury was really temporary since the insects could be controlled by the use of insecticides, the odor from the lagoon could be eliminated with sodium nitrate, and the odor from the by-products plant could be eliminated. The court observed that the defendant had attempted without success to alleviate the odors from the by-products plant, and failed to give serious consideration to defendant's arguments that it could eliminate the other interferences. The court held that even though the case might more properly have been submitted for temporary rather than permanent damages, it was not prejudicial error to allow the case to be submitted on a permanent damage theory.

It will seldom be proper for the court to allow the defendant to elect to characterize the nuisance as temporary or permanent.³⁹⁷ Allowing the defendant such an option would be tantamount to granting him the power of eminent domain; he would be able to compel the plaintiff to sell an easement.³⁹⁸ Of course, where the defendant is a governmental entity with the power to condemn an easement, permanent damages may be appropriate.³⁹⁹ A court would eschew the futile act of awarding temporary damages and merely forcing the government to initiate a separate condemnation proceeding.

3. Punitive Damages

In addition to compensatory damages, it is possible in some cases to obtain punitive damages for the maintenance and continuation of a nuisance.⁴⁰⁰ In *Bower v. Hog Builder's, Inc.*,⁴⁰¹ defendant maintained 3,860

396. 423 S.W.2d 752 (Mo. 1968).

397. See *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo. App., D. St. L. 1972).

398. D. DOBBS, *supra* note 162, § 5.4.

399. See *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939). See also D. DOBBS, *supra* note 162, § 5.4.

400. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968); *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (1935); *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974); *Vaughn v. Missouri Power & Light Co.*, 89 S.W.2d 699 (K.C. Mo. App. 1935); *Schumacher v. Shawhan Distillery Co.*, 178 Mo. App. 361, 165 S.W. 1142 (K.C. 1914); *Krebs v. Bambrick Bros. Constr. Co.*, 144 Mo. App. 649, 129 S.W. 425 (Spr. 1910); *Laird v. Chicago & Alton R.R.*, 78 Mo. App. 278 (St. L. 1899).

401. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

hogs which emitted 23,000 gallons of liquid waste per day. Defendant operated three sewage lagoons which proved vastly inadequate to contain the waste. The waste spilled over onto plaintiff's property creating a foul stench. The sheer volume of the waste caused fish to die in plaintiff's lake, and a stream running through plaintiff's land became severely contaminated. Plaintiff's child was unable to invite friends over for recreation because of the stench. Defendant, in spite of plaintiff's protests, refused to abate the nuisance. Subsequently, plaintiff instituted suit and had defendant's operation declared a private nuisance. Plaintiff was awarded \$46,200 compensatory damages, and \$90,000 punitive damages because the defendant had acted with malice in maintaining the nuisance.

Malice, which is required to sustain an award of punitive damages,⁴⁰² is defined in Missouri as "the doing of a wrongful act intentionally without just cause or excuse."⁴⁰³ Intent can be established by showing either that defendant intended to create the nuisance or that it was substantially certain to result from his act. In *Rotert v. Peabody Coal Co.*⁴⁰⁴ malice was established by the fact that defendant continued his blasting operations after learning that the blasting resulted in a serious interference with the use and enjoyment of plaintiff's land. Punitive damages were also awarded in *Vaughn v. Missouri Power & Light Co.*,⁴⁰⁵ where defendant continued to maintain and operate a nuisance for three and one-half years following notification by plaintiff and a request to abate. Similarly, in *Ruppel v. Ralston Purina Co.*,⁴⁰⁶ defendant overloaded to twice their capacity two sewage lagoons which it operated in conjunction with a turkey processing plant. The overloading resulted in a foul stench which seriously interfered with the use and enjoyment of plaintiff's land. Despite plaintiff's numerous protests and requests to abate the nuisance, defendant continued the nuisance. The court found malice and awarded punitive damages because defendant had intentionally created and continued the interference with plaintiff's land without just cause or excuse.

An award of punitive damages must bear some reasonable relationship to the actual damages suffered by plaintiff.⁴⁰⁷ However, a court may properly consider additional factors such as the degree of malice evidenced by defendant, the age, sex, health and character of the injured party, and the

402. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970); *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968); *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974).

403. *Ruppel v. Ralston Purina Co.*, 423 S.W.2d 752 (Mo. 1968); *Brown v. Sloan's Moving & Storage Co.*, 296 S.W.2d 20 (Mo. 1956); *Kelly v. City of Cape Girardeau*, 338 Mo. 103, 89 S.W.2d 41 (Mo. 1935). See also MO. APPROVED INSTR. NO. 16.01 (1969 ed.).

404. 513 S.W.2d 667 (Mo. App., D.K.C. 1974).

405. 89 S.W.2d 699 (K.C. Mo. App. 1935).

406. 423 S.W.2d 752 (Mo. 1968).

407. *Rotert v. Peabody Coal Co.*, 513 S.W.2d 667 (Mo. App., D.K.C. 1974).

affluence of the tortfeasor.⁴⁰⁸ For example, in *Rotert v. Peabody Coal Co.*,⁴⁰⁹ the court found a high degree of malice based on defendant's round the clock blasting operations, continued despite plaintiff's protests. In addition, the court noted that defendant had assets in excess of \$585,000,000, and held that an award of \$32,000 punitive damages was not inappropriate in conjunction with an award of \$31,000 actual damages. In *Bower v. Hog Builders, Inc.*,⁴¹⁰ an award of \$90,000 punitive damages was sustained in conjunction with a \$46,200 award of actual damages.

B. *Self Help*

Although it has received scant attention, the remedy of self-help is also available to one affected by a private nuisance. The privilege of abatement extends generally to entry upon the land of another and the use of reasonable force to terminate the nuisance. Reasonable force does not include conduct which results in infliction of personal injury upon another or conduct which amounts to a breach of the peace.⁴¹¹ One of the few Missouri private nuisance cases to discuss the subject is *Tanner v. Wallbrunn*,⁴¹² in which defendant's tree branches hung over onto plaintiff's property and brushed against a building. The court denied plaintiff's request for an injunction, noting that such remedy should only be invoked in extraordinary circumstances and that plaintiff had an adequate remedy of self-help in that he could trim the overhanging branches. The court indicated that this remedy of self-help would entitle plaintiff only to trim the overhanging branches, and not to cut down the entire tree.

C. *Injunctions*

1. Equitable Limitations

A court might also grant an injunction as a remedy for a private nuisance.⁴¹³ The court could also award the plaintiff damages for injuries suf-

408. *Id.*

409. *Id.*

410. 461 S.W.2d 784 (Mo. 1974).

411. See W. PROSSER, *supra* note 3, § 90.

412. 77 Mo. App. 262, 266 (K.C. 1898).

413. *City of Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 61 F.2d 210 (8th Cir. 1932), *rev'd*, 289 U.S. 334 (1933); *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Clutter v. Blankenship*, 346 Mo. 961, 144 S.W.2d 119 (1940); *Street v. Marshall*, 316 Mo. 698, 291 S.W. 494 (En Banc 1927); *Hunt v. Easley*, 495 S.W.2d 703 (Mo. App., D. St. L. 1973); *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Clinic & Hosp. v. McConnell*, 241 Mo. App. 223, 236 S.W.2d 384 (K.C. 1951); *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926); *Zugg v. Arnold*, 75 Mo. App. 68 (St. L. 1898). The plaintiff has the burden of proving the necessity to join the tortfeasor if the nuisance arises from land, unless his joinder is not necessary to a complete determination of

ferred up until the time of suit.⁴¹⁴ There are, however, several limitations upon the right to an injunction. One of these restrictions is that the issuance of an injunction is a matter within the sound discretion of the chancellor who can refuse to grant the injunction and force plaintiff to accept monetary damages.⁴¹⁵ A second limitation is that an injunction should not be issued on behalf of one who comes to an equity court with unclean hands.⁴¹⁶ In addition, as with all equitable remedies, the injunction should not be invoked when the plaintiff has an adequate remedy at law.⁴¹⁷

A plaintiff in a private nuisance action might demonstrate the inadequacy of his legal remedy in one of several ways. First, plaintiff might establish that, absent injunctive relief, defendant's conduct will continue into the future and that plaintiff will be required to bring a multiplicity of actions to enforce his rights.⁴¹⁸ In *Hughes v. Kansas City Motion Picture-Local No. 170*,⁴¹⁹ the defendant union picketed the plaintiff's motion picture theatre over a labor grievance. Plaintiff successfully asserted the inadequacy of his legal remedy by alleging that, unless an injunction was

the rights of the parties. *Hunt v. Easley*, 495 S.W.2d 703 (Mo. App., D. St. L. 1973).

414. *Pinney v. Berry*, 61 Mo. 359 (1875); *Thompson v. Hodge*, 348 S.W.2d 11 (Spr. Mo. App. 1961); *Frick v. Kansas City*, 117 Mo. App. 488, 93 S.W. 351 (K.C. 1906).

415. *Crutcher v. Taystee Bread Co.*, 174 S.W.2d 801 (Mo. 1943); *Barber v. School Dist. No. 51*, 335 S.W.2d 527 (K.C. Mo. App. 1960). In *Johnson v. Independent School Dist. No. 1*, 239 Mo. App. 749, 199 S.W.2d 421 (Spr. 1947), the court stated: "The issuance or denial of an injunction is a matter that rests in the sound discretion of the chancellor and . . . may be denied even though plaintiff has no adequate remedy at law."

416. *Keller v. Devine*, 550 S.W.2d 634 (Mo. App., D. Spr. 1977).

417. *Hayden v. Tucker*, 37 Mo. 136 (1866); *Schmidt v. Paul*, 554 S.W.2d 496 (Mo. App., D.K.C. 1977); *Mason v. Deitering*, 132 Mo. App. 26, 111 S.W. 862 (St. L. 1908); *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903). The court in *Tanner v. Wallbrunn*, 77 Mo. App. 262 (K.C. 1898), denied plaintiff's request for injunctive relief because the injury to his land was not substantial and plaintiff had the remedy of self-help.

418. *Paddock v. Somes*, 102 Mo. 226, 14 S.W. 746 (1890); *Hayden v. Tucker*, 37 Mo. 136 (1866); *Desberger v. University Heights Realty & Dev. Co.*, 126 Mo. App. 206, 112 S.W. 287 (St. L. 1907); *Shellabarger v. Morris*, 115 Mo. App. 566, 91 S.W. 1005 (K.C. 1906); *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905). The principle behind the exception was well stated in *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 376, 74 S.W. 474 (St. L. 1903): "[S]uccessive actions for damages may be nearly or quite as much annoyance to the person who prosecutes them as the thing to be abated; and the only effective way to deal with these aggressions is to promptly stop them, unless the circumstances solicit measures less harsh."

419. 282 Mo. 304, 221 S.W. 95 (En Banc 1920).

issued, the defendant union would continue picketing plaintiff's theatre, forcing plaintiff to bring a number of actions to enforce his rights.⁴²⁰

There are several situations in which courts have been willing to presume that the defendant's conduct will continue into the future notwithstanding an award of damages. One is where the damages suffered by plaintiff are nominal, and a money award to remedy them is insufficient deterrent to defendant's future conduct. In *Paddock v. Somes*,⁴²¹ surface water was discharged onto the plaintiff's land and caused nominal damages; an injunction was held to be the appropriate remedy.

If defendant's conduct is undertaken solely to spite the plaintiff it is also likely that even repeated damage awards will not cause the nuisance to cease. An injunction was issued on this basis in *Shellabarger v. Morris*.⁴²² Plaintiff and defendant owned adjoining chicken farms and were constantly at odds because chickens from each farm would escape onto the other farm. Due to the strained relations, defendant sought to annoy plaintiff by screaming and beating on a variety of objects including tin pans, fences and iron.

Plaintiff can demonstrate the inadequacy of his legal remedy by showing that monetary damages will not adequately compensate him for the injury which he has suffered or will suffer and that his rights can only be properly protected by the issuance of an injunction.⁴²³ In *McNulty v. Miller*,⁴²⁴ the defendant operated a breeding barn for horses within sight and hearing distance of plaintiff's home. The court issued the injunction noting that the plaintiff suffered extreme disgust and embarrassment for which monetary damages were not adequate compensation.

2. Justifications to Deny

a. Public Interest

Missouri courts have recognized that an injunction should be denied when its issuance would seriously interfere with the public interest.⁴²⁵

420. If the *Hughes* case arose today, it is quite likely that the court would reach a different result. Since the passage of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1970), the right of employees to engage in concerted activities for their mutual aid or protection has been federally protected. As a result, it would appear to violate the supremacy clause of the United States Constitution to use private nuisance theories to enjoin employees from exercising such rights.

421. 102 Mo. 226, 14 S.W. 746 (1890).

422. 115 Mo. App. 566, 91 S.W. 1005 (K.C. 1906).

423. See *Deevers v. Lando*, 220 Mo. App. 50, 285 S.W. 746 (St. L. 1926); *McNulty v. Miller*, 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912).

424. 167 Mo. App. 134, 151 S.W. 208 (K.C. 1912).

425. *Barber v. School Dist. No. 51*, 335 S.W.2d 527 (K.C. Mo. App. 1960); *Johnson v. Independent School Dist. No. 14239 Mo.* App. 749, 199 S.W.2d 421 (Spr. Ct. App. 1947).

Several Missouri cases have observed that, assuming that the interference is not otherwise abatable, an injunction will not issue to compel a public sewer to cease operation.⁴²⁶ Likewise, in *Johnson v. Independent School District No. 1*,⁴²⁷ the defendant school district maintained a septic tank in conjunction with a school. The tank could not flow into a drain or sewer, and the contour of the land dictated that any sewage must be discharged onto the plaintiff's land. Plaintiff sought to enjoin the school from using the septic tank on the theory that it was a private nuisance. The court, although recognizing the inadequacy of plaintiff's remedy at law, refused to grant the injunction because the septic tank was necessary to the operation of the school, and the school had no reasonable alternative to draining the tank onto plaintiff's land.⁴²⁸

b. Comparative Convenience Doctrine

Courts in most states will also refuse to enjoin a nuisance if the defendant would as a result suffer injury disproportionate to that suffered by plaintiff.⁴²⁹ This basis for denying an injunction is referred to as balancing the hardships in granting an injunction, or the comparative convenience doctrine.⁴³⁰ A landmark case is *Boomer v. Atlantic Cement Co.*,⁴³¹ a New York case in which defendant was operating a forty-five million dollar cement plant which created dirt, dust, smoke and vibration, thereby interfering with the use and enjoyment of plaintiff's land. The court, although finding the existence of a private nuisance, refused to grant an injunction because of the severe hardship which would be thrust upon defendant. The court balanced the hardships and concluded that the injury to plaintiff's land was insubstantial in comparison to the injury which would be suffered by the defendant if the injunction were issued, and determined that the equities of the case should be resolved against the issuance of an injunction.

There is uncertainty whether Missouri has adopted the comparative convenience doctrine in private nuisance cases. In *Johnson v. Independent School District No. 1*,⁴³² the Springfield Court of Appeals indicated that the comparative convenience doctrine should only be applied when there

426. See *Stewart v. City of Springfield*, 350 Mo. 234, 165 S.W.2d 626 (En Banc 1942); *Riggs v. City of Springfield*, 344 Mo. 420, 126 S.W.2d 1144 (1939).

427. 239 Mo. App. 749, 199 S.W.2d 421 (Spr. Mo. App. 1947).

428. The court observed that "it is generally held that if the injunction would have the effect of greatly inconveniencing the public, it may be refused even, though as against the defendant the complainant would be entitled to its issuance." *Id.* at 755, 199 S.W.2d at 424.

429. See D. DOBBS, *supra* note 162, § 5.7; D. HAGMAN, *supra* note 5, § 161.

430. D. DOBBS, *supra* note 162, § 5.7.

431. 353 N.Y.2d 819, 357 N.E.2d 879, 309 N.Y.S.2d 812 (1970).

432. 239 Mo. App. 749, 199 S.W.2d 421 (Spr. 1947).

is adverse impact on the public in general.⁴³³ Several other Missouri cases have, however, indicated that Missouri courts do balance the hardships involved in granting an injunction.⁴³⁴ In *State v. Excelsior Powder Manufacturing Co.*,⁴³⁵ the court held that Missouri applies the comparative convenience doctrine in private litigation only when the injury suffered by the plaintiff is trivial.⁴³⁶ In *Scheurich v. Southwest Missouri Light Co.*,⁴³⁷ the court balanced the hardships but nonetheless issued the injunction.

Even if a court does not expressly balance the hardships involved in granting an injunction, it will usually consider the hardships at some point in the litigation. The hardships can influence a court in its initial determination of whether a nuisance exists. In *Meinecke v. Stallworth*,⁴³⁸ plaintiff sought to enjoin defendant from keeping pigs. Plaintiff alleged that the pigs created odors and generally interfered with the use and enjoyment of his land. The court, however, noting that the injury to plaintiff was slight, refused to characterize defendant's conduct as a private nuisance and refused to grant what it termed the harsh remedy of an injunction.

c. Experimental Injunctions

As an alternative to balancing the hardships, a number of courts in other jurisdictions have developed the "partial" or "experimental" injunction.⁴³⁹ This device is usually an order to the defendant to alter or mini-

433. The court stated that mere economic hardship to the defendant would be insufficient to invoke the comparative convenience doctrine absent an adverse impact on the health and comfort of society.

434. *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905); *Schaub v. Perkinson Bros. Constr. Co.*, 108 Mo. App. 122, 82 S.W. 1094 (St. L. 1904); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903).

435. 259 Mo. 254, 169 S.W. 267 (1914).

436. A number of Missouri courts appear to be, in effect, balancing the hardships involved in granting an injunction. *See Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *Sultan v. Parker-Washington Co.*, 117 Mo. App. 636 (St. L. 1904). *See also Meinecke v. Stallworth*, 483 S.W.2d 633 (Mo. App., D.K.C. 1972).

437. 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905).

438. 483 S.W.2d 633 (Mo. App., D.K.C. 1972).

439. *See Spur Industries, Inc. v. Del E. Webb Dev. Co.*, 108 Ariz. 178, 494 P.2d 700 (1970); *Green v. Smith*, 231 Ark. 94, 328 S.W.2d 357 (1959); *Anderson v. Souza*, 38 Cal. 2d 825, 243 P.2d 229 (1952); *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907); *Atkinson v. Bernard, Inc.*, 223 Or. 624, 355 P.2d 229 (1960). *See also D. DOBBS, supra note 162, § 5.7 (1973)*. In *Spur Industries* the defendant had been operating a cattle feedlot in a rural area for a number of years when the plaintiff decided to construct a retirement housing development in close proximity to the feedlot. Subsequently, the plaintiff sought to abate use of the feedlot because it unreasonably interfered with enjoyment of the residences in the development. The court decided to allocate the hardships between the parties, ordering the defendant to move his feedlot to a new location, but ordering the plaintiff to pay the costs of the move.

mize the interference with plaintiff's land. For instance, a court might order a manufacturing plant to seriously curtail its nighttime production to reduce interference with nearby homes.⁴⁴⁰ Similarly, the court might order a limit on the types of airplanes which use an airport.⁴⁴¹ In both instances, the court is allocating the burden between the parties. Because of the potential hardship to defendant, the court does not order him to cease his activity entirely. Because of the interference to plaintiff's land, defendant's activity does not continue unrestrained. Although Missouri courts have not expressly adopted the concept of the partial or experimental injunction, the principle has been applied in effect in at least one private nuisance case. In *Greene v. Spinning*⁴⁴² the defendant operated a gas station near plaintiff's home. Plaintiff, claiming that lights from defendant's cars interfered with the use of his home, sought an injunction to compel the defendant to either close or relocate his station. The court allocated the burden between the parties by ordering the defendant to construct a screen between the station and plaintiff's home to shield the interference. The remedy was ordered over plaintiff's strenuous argument that the erection of the screen would itself constitute a private nuisance by blocking plaintiff's home from its view and from cool summer breezes.

It is important to note that when a court refuses to grant plaintiff's request for an injunction, and compels him to take permanent damages in lieu thereof, the court is in effect forcing plaintiff to sell the defendant an easement in his land.⁴⁴³ The court dictates that plaintiff must accept permanent damages or be without a remedy, and allows the defendant to buy a permanent license to continue his activity.

3. Defenses

a. Laches

Plaintiff's request for an injunction in a private nuisance action might also be defeated by the equitable defenses of laches,⁴⁴⁴ estoppel,⁴⁴⁵ acqui-

440. See *Green v. Smith*, 231 Ark. 94, 328 S.W.2d 357 (1959).

441. *Atkinson v. Bernard, Inc.*, 223 Or. 624, 355 P.2d 229 (1960).

442. 48 S.W.2d 51 (K.C. Mo. App. 1931).

443. See D. DOBBS, *supra* note 162, § 5.4. See also *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

444. See *City of Fredericktown v. Osborn*, 429 S.W.2d 17 (St. L. Mo. App. 1968); *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *Desberger v. University Heights Realty & Dev. Co.*, 126 Mo. App. 206, 102 S.W. 1060 (St. L. Mo. App. 1907); *Scheurich v. Southwest Mo. Light Co.*, 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903).

445. See *Greene v. Spinning*, 48 S.W.2d 51 (K.C. Mo. App. 1931); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903); *Schumacher v. Shawhan*, 93 Mo. App. 573, 67 S.W. 717 (K.C. 1902).

escence,⁴⁴⁶ or waiver.⁴⁴⁷ Laches arises when a substantial amount of time has elapsed during which the plaintiff has failed to enforce his right and, due to the delay, prejudice has resulted to a defendant who acted on the assumption that plaintiff did not intend to assert his rights.⁴⁴⁸ Missouri courts have been reluctant to apply the defense of laches to bar equitable relief in a private nuisance action.⁴⁴⁹ This hesitance may stem in part from the lack of availability of injunctive relief against an anticipated nuisance.⁴⁵⁰ Where plaintiff could not have had the anticipated nuisance enjoined at an earlier time, the courts will not readily hold that he slept on his rights by allowing defendant to proceed.

Laches was asserted as a defense in *Blackford v. Heman Construction Co.*⁴⁵¹ when plaintiffs sought to enjoin the defendant from operating a rock quarry near their homes. Although the rock quarry had been in operation for nearly ten years, its operation had only become unreasonable in the last two years. During the first eight years, defendant had invested a substantial amount of money in the quarry. The court rejected the defense of laches, noting that since a rock quarry is not a nuisance per se plaintiffs would have been unable to enjoin its operation until it became unreasonable. Accordingly, since defendant's substantial investment was made at a time when the quarry was being operated in a reasonable manner, and at a time when the quarry did not interfere with the use and enjoyment of the plaintiff's land, the court held that plaintiff had not been guilty of laches.

Laches was applied as a defense in *Scheurich v. Southwest Missouri Light Co.*,⁴⁵² wherein defendant's predecessor in interest constructed a dam which flooded plaintiff's property. Plaintiff delayed for nearly five years before seeking an injunction; in the interim, the dam had been sold to defendant who purchased without notice of plaintiff's claim. The court held that laches would bar plaintiff from seeking an injunction because it would be unjust to permit plaintiff to enforce his rights against an innocent successor. The court did, however, deny defendant's assertion of laches as to a subsequent increase in the height of the dam.

446. See *Blackford v. Heman Constr. Co.*, 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908); *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903); *Schumacher v. Shawhan*, 93 Mo. App. 573, 67 S.W. 717 (K.C. 1902).

447. See *Thomas v. Concordia Cannery Co.*, 68 Mo. App. 350 (K.C. 1897).

448. See *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 376, 74 S.W. 474 (St. L. 1903). See also W. RODGERS, *supra* note 3, § 2.9.

449. See *Desberger v. University Heights Realty & Dev. Co.*, 126 Mo. App. 206, 112 S.W. 287 (St. L. 1907).

450. See parts I(G)(2) & II(C)(2) *supra*.

451. 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

452. 109 Mo. App. 406, 84 S.W. 1003 (St. L. 1905).

b. Acquiescence and Waiver

Acquiescence and waiver are based on the theory that plaintiff has impliedly consented to defendant's maintenance of the nuisance by failing to enforce his rights despite having knowledge of them.⁴⁵³ Acquiescence was asserted and rejected as a defense in *Rhodes v. A. Moll Grocery Co.*,⁴⁵⁴ wherein plaintiff sought to enjoin defendant from operating a parking lot which created a private nuisance. Even though plaintiff had not filed suit, the court held that he had preserved his rights by expressing his objection to the parking lot in several heated arguments with the owner of the grocery and by filing charges against its owner for violation of a municipal ordinance. The key to acquiescence is a tacit expression of approval, and failure to bring a court action is not of itself sufficient.

c. Estoppel

Estoppel arises when plaintiff acts, with full knowledge of his legal rights, in such a manner as to induce the defendant to proceed detrimentally. In *Greene v. Spinning*,⁴⁵⁵ defendant built a service station near plaintiff's house. Plaintiff helped build the station and his wife occasionally worked at the station. Subsequently, defendant's business increased to the point where it substantially interfered with the use and enjoyment of plaintiff's residence and plaintiff sought to enjoin operation of the station as a private nuisance. Defendant argued that plaintiff should be estopped from asserting his rights because he had participated in construction of the station and otherwise acted in such a manner as to cause defendant to rely on the expectation that plaintiff did not intend to enforce his rights. The court disagreed, noting that defendant had not relied since he intended to build the station whether or not plaintiff objected. The court also observed that, at the time of plaintiff's acts, the station was not being operated in an unreasonable manner. Accordingly, the court held that plaintiff's prior conduct could not estop him from objecting when the station was subsequently operated in an unreasonable manner.⁴⁵⁶

4. Scope

Even though a court grants plaintiff's request for an injunction, the injunction should be no broader than is necessary to abate the nuisance. In

453. *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903).

454. 231 Mo. App. 751, 95 S.W. 837 (St. L. 1936).

455. 48 S.W.2d 51 (K.C. Mo. App. 1931).

456. Estoppel was also rejected as a defense in *St. Louis Safe Deposit & Sav. Bank v. Kennett Estate*, 101 Mo. App. 370, 74 S.W. 474 (St. L. 1903). There was no objection by the defendant, who testified that he had not been notified within their legal rights.

City of Fredericktown v. Osborn,⁴⁵⁷ the defendant maintained a dog kennel on her land which interfered with the enjoyment of surrounding homes by creating noise and odor. The court, upon determining that the kennel was a private nuisance, ordered the defendant not to maintain or keep any dogs on her premises. On appeal, the court modified the injunction to permit the defendant to keep one dog on her premises, noting that the original injunction was unduly broad. The injunction, although designed not to unduly restrict the defendant's conduct, may because of the circumstances completely prohibit the defendant from engaging in the offending conduct. In *Blackford v. Heman Construction Co.*,⁴⁵⁸ the defendant rock quarry was enjoined from operating in such a manner as to jar the buildings on plaintiff's lot or to cause them to shake or vibrate. Since the quarry could not be operated without causing such injury, the quarry was effectively enjoined from operation.

III. CONCLUSION

Although the *Restatement*⁴⁵⁹ and the majority of states⁴⁶⁰ define a private nuisance as any activity which unreasonably interferes with the use and enjoyment of land, Missouri courts have over the years applied a variety of definitions. One definition states that a private nuisance is "anything that worketh hurt, inconvenience or damage to the lands of another."⁴⁶¹ Another states that a private nuisance exists when one person "injures or annoys another in the exercise of his legal rights."⁴⁶² These definitions were derived from Blackstone and are primarily of historical significance today. A third definition states that the existence of a private nuisance depends on the "degree of danger existing with the best of care."⁴⁶³ Modern Missouri courts have, however, replaced the foregoing definitions with the "unreasonable interference" definition followed by the majority of states.⁴⁶⁴ In making the determination that a particular interference is unreasonable, courts have followed the classic nuisance per se/nuisance in fact characterization.⁴⁶⁵ In the nuisance per se category, certain interferences may be characterized as unreasonable in and of themselves either because they are illegal⁴⁶⁶ or because they are located in a residential area.⁴⁶⁷ Although no Missouri case has declared an activity a private

457. 429 S.W.2d 17 (St. L. Mo. App. 1968).

458. 132 Mo. App. 157, 112 S.W. 287 (St. L. 1908).

459. See note 2 *supra*.

460. See cases cited note 3 *supra*.

461. See cases cited note 11 *supra*.

462. See cases cited note 10 *supra*.

463. See cases cited note 12 *supra*.

464. See cases cited note 4 *supra*.

465. See text accompanying notes 151 & 165 *supra*.

466. See cases cited note 146 *supra*.

467. See case cited note 147 *supra*.

nuisance because it is illegal, numerous Missouri courts have recognized in dicta that an activity which is illegal can constitute a nuisance per se.⁴⁶⁸ Missouri courts have also been reluctant to characterize an activity as a nuisance per se because of its location, only one case so holding.⁴⁶⁹ However, several Missouri cases dealing with funeral homes located in residential areas have in effect treated them as nuisances per se.⁴⁷⁰

The nuisance in fact classification encompasses those activities which, although not necessarily a nuisance in and of themselves, become a nuisance because of the manner in which they are conducted.⁴⁷¹ This characterization of nuisance is used extensively under modern Missouri nuisance law. The determination that a particular activity results in a nuisance is based upon a variety of factors which the court weighs; included are the social utility of each party's conduct, the suitability of each party's conduct to the surrounding area, and the gravity and character of the injury.⁴⁷²

A number of other factors will also enter into a court's determination that a particular activity does or does not result in a private nuisance. First, Missouri courts are reluctant to enjoin a threatened or anticipated nuisance until such time as it actually commences operation.⁴⁷³ As noted earlier, the law of private nuisance is designed to promote the free use of land so long as such use is consistent with the rights of other landowners. Accordingly, if a proposed activity may or may not result in a nuisance depending on the manner in which it is operated, the courts will withhold injunctive relief until such time as it actually does result in a nuisance.⁴⁷⁴ A necessary corollary, however, is that if the threatened activity would result in a nuisance per se, an injunction will issue since the activity cannot be operated without creating a private nuisance.⁴⁷⁵ Missouri courts have further developed a number of exceptions to the general prohibition against enjoining an anticipated nuisance. A threatened nuisance which is being created with the intent to interfere with the use and enjoyment of plaintiff's land will be enjoined,⁴⁷⁶ as will a threatened nuisance which presents a danger to health or life.⁴⁷⁷ A less frequently applied exception is when the proposed activity will necessarily result in an interference with plaintiff's land, but the court is uncertain whether the interference will be substantial enough to result in a private nuisance.⁴⁷⁸

A second factor which may alter a court's analysis is the existence of a

468. See text accompanying note 153 *supra*.

469. See text accompanying note 154 *supra*.

470. See cases cited note 155 *supra*.

471. See text accompanying notes 142-45 *supra*.

472. See text accompanying note 165 *supra*.

473. See note 270 *supra*.

474. See notes 292-95 and accompanying text *supra*.

475. See cases cited note 297 *supra*.

476. See text accompanying note 301 *supra*.

477. See text accompanying note 303 *supra*.

478. See text accompanying note 305 *supra*.

local zoning ordinance. In Missouri,⁴⁷⁹ as in most states,⁴⁸⁰ a local permissive zoning ordinance will not preclude a court from enjoining an activity as a nuisance even though the ordinance specifically permits the operation of the activity in a particular area. A court might, however, consider the local ordinance as some indication of the true character of the area and hence of the suitability of the defendant's conduct to the area.⁴⁸¹ The local ordinance should not be controlling; if it were possible for a local zoning ordinance to abrogate a plaintiff's right to maintain a private nuisance action, serious federal and state taking clause problems might exist.⁴⁸²

A third factor, defendant's priority of occupation, is generally no defense to a private nuisance action in Missouri,⁴⁸³ although it may be taken into consideration in determining if defendant's conduct is unreasonable.⁴⁸⁴ If defendant has maintained the nuisance over a long period of time it must be considered whether or not he has obtained a prescriptive right to continue it.⁴⁸⁵

In addition to the foregoing factors, there are two prerequisites to the maintenance of a private nuisance action. In Missouri, plaintiff must hold an interest in the land with which defendant is interfering before he is entitled to recover on a private nuisance theory.⁴⁸⁶ A mere occupant is not entitled to recover for a private nuisance which interferes with his enjoyment of the land.⁴⁸⁷ However, Missouri courts construe this interest in land requirement very loosely so that an easement⁴⁸⁸ or periodic tenancy⁴⁸⁹ is a sufficient interest to entitle one to maintain an action.

It is an open question in Missouri as to whether negligence and/or intent are necessary preconditions to the maintenance of a private nuisance action; the majority of modern cases indicate that they are not.⁴⁹⁰ However, the *Missouri Approved Jury Instructions*, relying upon the *Restatement*, indicate that Missouri does require negligence or intent as a necessary basis of liability.⁴⁹¹ Although Missouri law appears to be somewhat confused on this issue, the modern and better view is that neither negligence⁴⁹² nor intent⁴⁹³ should be required as a basis of liability in a private nuisance action.

479. See cases cited notes 311-12, 315-17 *supra*.

480. See text accompanying note 308 *supra*.

481. See text accompanying note 319 *supra*.

482. See cases cited notes 320-27 *supra*.

483. See note 272 and accompanying text *supra*.

484. See cases cited note 275 *supra*.

485. See text accompanying notes 277-89 *supra*.

486. See cases cited note 122 *supra*.

487. See text accompanying note 125 *supra*.

488. See text accompanying note 128 *supra*.

489. See note 129 *supra*.

490. See cases cited notes 239-41 *supra*.

491. See cases cited notes 244-48 *supra*.

492. See cases cited notes 240 & 242 *supra*.

493. See cases cited notes 239 & 241 *supra*.

The remedies for a private nuisance include damages,⁴⁹⁴ self-help⁴⁹⁵ and injunctions.⁴⁹⁶ In granting damages, the measure will vary considerably depending upon whether the nuisance is classified as temporary or permanent. Permanent damages will be based on the amount of depreciation in the value of the land resulting from the nuisance.⁴⁹⁷ Temporary damages, on the other hand, are based on the retail value which plaintiff has lost due to the existence of the nuisance.⁴⁹⁸ However, a variety of other damages can be awarded incident to the compensatory damages,⁴⁹⁹ and in an appropriate case consequential damages can be awarded as well.

The distinction between a temporary and a permanent nuisance is important not only because it affects the measure of damages but also because it affects the statute of limitations⁵⁰⁰ and the right of a successor in interest to bring an action.⁵⁰¹ In the difficult task of classifying a particular activity as temporary or permanent, it is clear that at the least some degree of physical permanence is necessary, but that legal permanence involves more than mere physical permanence.⁵⁰² In determining whether a particular interference is temporary or permanent, the courts will consider a variety of factors including whether the nuisance is physically permanent,⁵⁰³ whether it is practical to abate the nuisance,⁵⁰⁴ and whether the source of the nuisance is innocently, negligently or intentionally created.⁵⁰⁵ In some instances, the court might also consider whether the plaintiff desires temporary or permanent damages.⁵⁰⁶

A court can also issue an injunction against a private nuisance.⁵⁰⁷ The use of an injunction is subject to the general limitations upon the use of equitable remedies,⁵⁰⁸ as well as the equitable defenses of laches,⁵⁰⁹ estoppel,⁵¹⁰ acquiescence⁵¹¹ and waiver.⁵¹² In addition, since an injunction is based on the chancellor's sound discretion,⁵¹³ he is empowered to deny it

494. See part II(A) *supra*.

495. See text accompanying notes 411-12 *supra*.

496. See part II(C) *supra*.

497. See cases cited note 332 *supra*.

498. See cases cited note 333 *supra*.

499. See text accompanying notes 335-39 *supra*.

500. See cases cited note 340 *supra*.

501. See cases cited note 347 *supra*.

502. See text accompanying note 372-76 *supra*.

503. See cases cited note 366 *supra*.

504. See cases cited note 365 *supra*.

505. See cases cited note 367 *supra*.

506. See cases cited note 368 *supra*.

507. See cases cited note 413 *supra*.

508. See text accompanying notes 415-17 *supra*.

509. See cases cited note 444 *supra*.

510. See cases cited note 445 *supra*.

511. See cases cited note 446 *supra*.

512. See cases cited note 447 *supra*.

513. See cases cited note 415 *supra*.

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when there would be an adverse impact on the public or third parties,⁵¹⁴ or if the defendant would suffer unduly.⁵¹⁵

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514. See text accompanying notes 425-28 *supra*.

515. See text accompanying notes 429-38 *supra*.