Powell on Real Property®: Michael Allan Wolf Desk Edition

A One-Volume Abridgment of the 17-Volume Treatise

GENERAL EDITOR

MICHAEL ALLAN WOLF

Richard E. Nelson Chair in Local Government Law
Levin College of Law, University of Florida

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THE 60TH ANNIVERSARY OF THE TREATISE
Preface by the General Editor

This year marks the sixtieth anniversary of the original publication of Professor Richard R. Powell’s landmark treatise, The Law of Real Property, best known today by its eponymous title, Powell on Real Property. While, since the initial appearance of this ambitious work, judges and legislators have amended, supplemented, reshaped, and replaced many of the doctrines, themes, and leitmotifs that make up American real property law, the usefulness and authoritativeness of Professor Powell’s treatise, which now spans seventeen loose-leaf volumes, has remained an important constant. Case citations to Powell on Real Property run well over the one thousand mark, in state and federal courts of all levels. In fact, “Powell in the Courts” is a quarterly feature in the Main Treatise, in which we discuss selected recent case law relying on the Main Treatise. The Michael Allan Wolf Desk Edition includes the annual survey of “Powell in the Courts” for 2008, which, like the compilations for 2002-2007, is featured in the Main Treatise as well.

Technological advances in the world of law publishing have made Powell on Real Property more accessible than in decades past, when access to a full set of the “hard copy” copy was the only option. Today, for those users so inclined, the Main Treatise is available through Lexis and on compact disc. Nevertheless, many law professionals have expressed their wish for a one-volume version, to serve not only as a quick reference source, but also as a helpful mode of access to the more complete explorations found in the unabridged version. This Desk Edition is designed to serve both of these important functions.

We followed three guiding principles in the process of condensing the Main Treatise into a one-volume Desk Edition:

- First, we have selected those chapters and parts of chapters that address those subject areas that have traditionally been (and continue to be) at the heart of the practice and understanding of American real property law—common law doctrines and statutory variations regarding the creation and operation of present estates, future interests, and concurrent ownership (including challenging areas such as powers of appointment, class gifts, perpetuities, the modern landlord-tenant relationship, and waste); the evolving law of covenants, easements, and other servitudes (traditional and modern varieties); the potential pitfalls of modern real estate transactions (with discussions of important topics such as purchase and sale agreements, mortgages, foreclosure, recording, zoning, and title insurance); and the situations that pit private property owners against other private parties and against the government (such as nuisance, trespass, adverse possession, and eminent domain). Readers will find a complete table of contents at the beginning of this Desk Edition, featuring a wide variety of topics not covered in these pages, including but in no way limited to land use planning and zoning, rails-to-trails conversions, tax matters affecting real estate, and an annual Supreme Court review.

- Second, we have maintained the chapter-by-chapter and section-by-section structure and, with minor editorial changes only, the substance of the Main Treatise. Because we think it is important for those who rely on the Desk Edition to be able to make fuller explorations in the Main Treatise, we chose not to include a rearrangement of topics in the one-volume version. Much of the time, this Desk Edition will provide the reader with enough information on the real property concept at issue. Moreover, the reader who, for example, relies on § 34.10 of this volume for an overview of prescriptive easement law, will know exactly where to go in the Main Treatise for citations, illustrations, and other amplifications.
Preface by the General Editor

- Third, we have eliminated footnotes (string cites as well as substantive notes), which we recognize can be the bane of the lawyer who wants a quick overview before diving more deeply into the subject matter. Once the reader of the Desk Edition identifies the specific area or areas of concern, the Main Treatise, which we continue to update four times each year, will furnish the necessary details, including discussions of leading and illustrative cases and statutes.

Like the Main Treatise from which it derives, this Desk Edition is a work in progress. We invite readers to send us their suggestions for improving upcoming editions, particularly regarding additional sections and features that might be added from the Main Treatise.

It goes without saying that this volume would not have been possible without the wisdom and energy of Professor Powell, in whose large shadow I tread very gingerly. To him and to another legendary figure in the American law of property, Charles Haar, my long-time friend and collaborator (in that order), I have dedicated this book. My tasks as General Editor of the Main Treatise and in shaping this Desk Edition have allowed me the privilege and pleasure of working with two consummate professionals—Nancy Greening and Pat Cannon. I am very grateful for their willingness to share and enhance the vision of their professorial colleague.

Michael Allan Wolf
Gainesville, Florida
wolfm@law.ufl.edu
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About the General Editor

MICHAEL ALLAN WOLF

Michael Allan Wolf is the Richard E. Nelson Chair in Local Government Law at the Levin College of Law, University of Florida. Professor Wolf—who received his B.A. degree from Emory University, his J.D. degree from Georgetown University Law Center, and his A.M. (History) and Ph.D. (History of American Civilization) degrees from Harvard University—joined the University of Florida faculty in 2003. He previously taught at the University of Richmond and Oklahoma City University. He teaches and writes in the areas of property, land-use planning, environmental, and constitutional law, and in American history/American studies.

In addition to serving as General Editor of Powell on Real Property® and Powell on Real Property®: Michael Allan Wolf Desk Edition, Professor Wolf is the author of The Zoning of America: Euclid v. Ambler (University Press of Kansas, 2008), co-author (with Charles M. Haar) of Land Use Planning and the Environment: A Casebook (ELI, 2009), and editor of and contributor to Strategies for Environmental Success in an Uncertain Judicial Climate (ELI, 2005). He has also written more than forty articles, essays, and book chapters in law, economic development, planning, and historical journals and books; and his commentaries have been featured in national newspapers and on National Public Radio. A member of the Florida Bar, Professor Wolf has testified several times before Congress; helped draft state legislation; and advised local, state, and federal officials in the area of urban redevelopment.

How to Use this Desk Edition

With this Desk Edition at hand — to consult at your desk, read on the train, and take with you into meetings or the library — consider highlighting the passages to which you plan to return, and make it your own with notes pasted on the page or inserted in the margins. Because chapters and sections in this Desk Edition retain the same numbering as the 17-volume “Main Treatise” entitled Powell on Real Property® (Michael Allan Wolf ed., LexisNexis® Matthew Bender®), this Desk Edition may be used in conjunction with the more comprehensive treatise in hard copy or on-line. On those occasions when you want to delve deeper into a topic discussed in this Desk Edition, simply refer to the same section of the Main Treatise for the more comprehensive — and footnoted — discussion that Powell on Real Property, with its four annual updates, has famously provided for 60 years.
Chapter 64

Nuisance*

Core Terms: private nuisance, public nuisance, trespass, purprespact, nontrespassory invasion, substantial interference, gravity of harm, use and enjoyment, negligence, abnormally dangerous activities, spite fences, contributory negligence, punitive damages, nuisance per se, nuisance per accidents, permanent nuisance, temporary nuisance, anticipatory nuisance, aesthetic nuisance, coming to the nuisance, prescriptive right, hypersensitive plaintiff, zoning, right-to-farm laws, preemption, federal common-law nuisance, self-help, injunctive relief, balancing the equities, special injuries (damages), alternative energy sources, and regulatory takings

§ 64.01 Private Nuisance: A Real Property Tort Bedeviled by Confusion


The area of nuisance law has long been plagued by confusion. Indeed, no less an authority than the dean of tort law—William L. Prosser—opened his discussion of the topic by noting that ““[t]here is perhaps no more impenetrable jungle in the entire law than that regarding the word ‘nuisance.’” [W. Page Keeton et al., Prosser and Keeton on Torts § 86 (5th ed. 1984) (the quotation can be found in earlier editions written by Prosser alone.)] Fortunately, beginning with the Restatement of Torts [Ch. 40, §§ 822-840] in 1939, and continuing with the Second Restatement of Torts [Ch. 40 §§ 831A-840E] in 1979, and the application of economic principles to the understanding and analysis of law, there have been a number of important contributions to our understanding in this complex area.

Historically, nuisance was one of three common-law classes of injury involving real property. A defendant who ousted a plaintiff from possession was a disseisor; the defendant who invaded plaintiff’s possession was a trespasser; and the defendant who interfered with plaintiff’s use and enjoyment of his property by acts done elsewhere than on plaintiff’s land became subject (as early as the Twelfth Century) to the assize of nuisance.

The same circumstances may create a public nuisance and a private nuisance. A public nuisance, in its origins a criminal proceeding, exists where unlawful or antisocial conduct in some way injures a substantial number of people; a determination of private nuisance, a civil wrong, rests instead upon whether there has been an actionable interference with a person’s interest in the private use and enjoyment of land. As the major thrust of this chapter concerns private nuisance, public nuisance issues will be discussed only to the extent that they concern

* This chapter was revised by Michael Allan Wolf. It was previously revised by Shelby D. Green.
relations between owners of permissible private interests in land.

[2] Courts Are Easily Confounded by the Similarities Between Private Nuisance and Trespass

As discussed elsewhere in this Treatise (see Chapter 64A), trespass involves nonconsensual or unprivileged physical invasions of another’s land. The ancient distinction between trespass and nuisance, based on whether the actor was acting on (direct invasion) or off (indirect invasion) the plaintiff’s land, is not followed by more recent cases. Today, courts in trespass cases are concerned with acts that interfere with a plaintiff’s exclusive possession of real property, and in nuisance cases with acts interfering with a plaintiff’s use and enjoyment of real property.

When viewed in this way, the category of nuisance includes instances of trespass, in that an entry onto the land of another that causes injury affects the plaintiff’s use and enjoyment of land. Thus, in one case the court discussed both trespass and nuisance allegations regarding a defendant race track owner whose powerful lights brightened the screen of a neighboring drive-in theater [Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948)]. Whether a court calls conduct a nuisance or a trespass depends in part on the result which it wishes to obtain. Currently, the trend is to designate “invasions” by light, dust, noise, odors, and concussion as nuisances if they are not accompanied by a more tangible physical intrusion.

[3] “Nuisance” Is a Term Used Much Too Loosely by Lawyers, Judges, and Lay People

Another source of confusion in this area of the law has been loose usage of the term “nuisance” in situations involving no “purpresture” factor (that is, an enclosure by a private party that ought to be open and available to the public at large). The term “nuisance” is used sometimes to denote the facts which are claimed to interfere with plaintiff’s use of her land, other times to denote the harm flowing from defendant’s conduct, and still other times it is properly restricted to the remediable combination of operative facts and resulting harm. This inexactness in the professional use of the term nuisance led the preparers of the Restatement of Torts to suggest an abandonment of the term. According to Dean Prosser, “the word ‘nuisance’ . . . has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.” [Prosser & Keeton on Torts, § 86 (5th ed. 1984).] Lawyers and judges nevertheless are going to continue talking about “nuisances.”

In the hope that this chapter may avoid at least some of the common confusions, the term will be used here with two restrictions on its meaning. The first consists in the exclusion of most situations involving “public nuisances,” except to the extent that they constitute ingredients in the private law of property. The second is to confine the term nuisance to a remediable combination of operative facts and resulting harm.
[4] Dramatic Growth in Federal, State, and Local Environmental Controls Has Led to Even Further Confusion Concerning the Availability and Nature of Nuisance Law

The impressive growth of comprehensive federal environmental laws, beginning in the early 1970s, has muddied the private and public nuisance waters even more. Many of the harms targeted by federal statutes limiting air and water pollution and regulating the manufacture, disposal, and storage of hazardous substances, are the same kinds of harms that landowners have traditionally challenged in private nuisance actions. Complicating the matter even more are the existence of a wide range of state and local environmental controls that complement and supplement federal efforts, and the widespread availability of private causes of action authorized by environmental legislation. As noted below (see § 64.06), federal and state courts have had to wrestle with difficult questions concerning the continued availability of private and public nuisance actions in the wake of this significant legislative and regulatory activity.

[5] Recent Regulatory Takings Cases Have Given Renewed Importance to the Common Law of Nuisance

In 1992, the United States Supreme Court, in Lucas v. South Carolina Coastal Council [505 U.S. 1003 (1992)], a regulatory takings case involving that state’s Beachfront Management Act, brought renewed attention to the area of nuisance law. Justice Scalia, writing for the majority, noted that governments can escape liability under the Fifth Amendment’s Taking Clause for statutes, regulations, and ordinances that deprive private property owners of all value, only if the use pursued by the landowner would have been restricted under common-law nuisance and related rules. Because the economic implications of regulatory takings judgments might be quite serious for all units of government, attorneys, judges, and commentators have begun to pay closer attention to the nuances of private and public nuisance law, which can serve as a “safety valve” for challenged environmental and land-use restrictions that reduce or even eliminate real property value. (See § 64.09.)

§ 64.02 Private Nuisance Is a Nontrespassory, Substantial and Unreasonable Interference with Another’s Use and Enjoyment of Real Property


As noted previously (see § 64.01[2]), modern courts employ trespass law in disputes involving physical invasions of another’s property. The Second Restatement of Torts § 821D uses the term “nontrespassory invasion” in its definition of private nuisance, which might suggest that a physical intrusion is a necessary element of the tort. Therefore, the definition proposed by this Treatise includes the phrase “nontrespassory interference” in order to include disputes either involving or not involving physical invasion. It is possible, however, for a landowner to suffer a trespass and nuisance at the same time, in that the defendant may interfere both with possession and with the use and enjoyment of the plaintiff’s real property.

[2] To Be Actionable, the “Interference” Must Be Substantial, Not a Mere Inconvenience

Not all activities that disturb one’s use and enjoyment of real property are actionable by
means of private nuisance. The interference must be substantial and the harm significant. Mere or slight inconvenience will not rise to this level.

The Connecticut Supreme Court has detailed four elements that the plaintiff must prove in order to establish a private nuisance action: “(1) the condition complained of had a natural tendency to create danger and inflict injury upon person or property; (2) the danger created was a continuing one; (3) the use of the land was unreasonable or unlawful; (4) the existence of the nuisance was the proximate cause of the plaintiffs’ injuries and damages.” [Filisko v. Bridgeport Hydraulic Co., 176 Conn. 33, 404 A.2d 889, 891 (1978)]


[a] Unreasonableness Determined by Weighing Utility of Defendant’s Conduct Against Gravity of Harm to the Plaintiff

Unreasonableness has a role to play in private nuisance law in that plaintiffs are not expected to tolerate unreasonable interference with use and enjoyment of their real property. This is not the role unreasonableness traditionally plays in negligence law, where finders of fact are asked to consider whether the defendant acted unreasonably as compared with similarly situated actors. Reasonableness in this context requires consideration of (1) the conduct complained of and (2) the consequences of this conduct outside the boundaries of the actor. The conclusion of “unreasonableness” depends then upon liability-inviting conduct of the defendant plus a finding that this conduct violates a protected interest of the neighbor-plaintiff.

In private nuisance cases, in accordance with the popular formula included in the Second Restatement of Torts § 826 courts will often consider both the social value of the defendant’s activity and the conflicting social value of the plaintiff’s use and enjoyment of land. In deciding whether a particular activity is a nuisance, courts must weigh the utility of the defendant’s conduct against the gravity of the harm to the plaintiff.

[b] Assessing the Gravity of the Harm to the Plaintiff

The drafters of the Second Restatement of Torts § 827 reduced “gravity of harm” to five factors:

- the extent (meaning degree and duration) of the harm;
- the character of the harm;
- the social value of the plaintiff’s use or enjoyment;
- the suitability of the use or enjoyment invaded to the character of the locality; and
- the plaintiff’s burden of avoiding the harm.

The social value attached to the plaintiff’s use of the land should also be considered, according to the Restatement formula. Because many uses of land have significant social value, substantial interferences with such uses will, under almost any circumstance, be considered relatively serious. How much social value attaches to any particular use in comparison with other types of uses will depend upon the relationship of that use to the public good. The greater the social value of plaintiff’s use of his land, the more serious will any interference with that use be deemed.
The suitability of the plaintiff’s use to the character of the locality is also considered. If a particular use is well-suited to the character of the locality, an interference with that use will be deemed more serious, and the gravity of harm to the plaintiff greater, than if the use is not suited to the locality.

Finally, the burden on the plaintiff of avoiding the harm caused by the defendant deserves some consideration. While not often decisive on the issue of gravity, this factor embodies the common sense principle that one should make a reasonable effort to accommodate one’s neighbors before complaining that their activity constitutes a nuisance.

[c] Assessing the Defendant’s Conduct

Similar factors are considered in evaluating defendant’s conduct. They include:

- the social value that the law attaches to the primary purpose of the defendant’s conduct;
- the suitability of defendant’s activity to the character of the locality; and
- the impracticability of avoiding or preventing the interference.


The protection that private nuisance law affords to use and enjoyment is much broader than the mere possessory rights protected by trespass. Still, some forms of interference are more likely to result in findings favoring the plaintiff. When the defendant’s conduct has caused physical damage to the plaintiff’s property, or physical injury to the plaintiff, courts are more likely to give relief than when the harm takes a less tangible form. Destroyed crops, trees, foliage, or paint are harder to exaggerate than the relatively subjective discomforts caused by noises, odors, or unsightly objects. In an appropriate case, however, the plaintiff’s harm may consist only of the discomfort caused by loud noises, offensive odors, insects, bright lights, dust and smoke, other obnoxious conduct, or some combination of these factors.

[5] Private Nuisance Actions Are Available to Plaintiffs Holding Real Property Interests, Not Just Owners

To bring a nuisance action, the plaintiff must have an interest in land, but this can be less than a fee simple absolute. A life estate, tenancy, or easement is a sufficient property interest to support a nuisance claim. There is even authority for the notion that an adverse possessor without title can maintain a private nuisance action.

§ 64.03 Four Varieties of Defendant Conduct Can Result in a Private Nuisance

[1] In Some Cases, Private Nuisance Results from the Defendant’s Intentional Conduct

In some instances, liability for a nuisance is based on the defendant’s intentional conduct. The Second Restatement of Torts § 825 characterizes an intentional invasion as one in which the defendant either “acts for the purpose of causing” the invasion, or “knows that [the invasion] is resulting or is substantially certain to result from [the defendant’s] conduct.”
§ 64.03[2]  

[2]  **In Some Cases, Private Nuisance Results from the Defendant’s Negligent or Reckless Conduct**

Interference with use and enjoyment of property need not be intentional to constitute a private nuisance, for plaintiffs can also prevail against a defendant who is negligent or reckless. The relationship between private nuisance and negligence is a complicated one.

[3]  **In Some Cases Private Nuisance Results from the Defendant Engaging in Abnormally Dangerous Activities**

The third category of potentially liable defendant in a private nuisance action, according to authorities that follow the *Second Restatement of Torts*, § 822(b) is the defendant who engages in abnormally dangerous activities. The plaintiff need not prove intent or negligence in such cases, given the danger of the harm involved.

[4]  **Malicious Conduct: The Special Case of the Spite Fence**

Where the defendant’s conduct is motivated solely by malice, the use is deemed unreasonable because the conduct has no utility recognizable at law. When defendant’s conduct results from mixed motivations, some useful, some malicious, it may not necessarily be found unreasonable. Courts tend to uphold defendant’s actions as reasonable where defendant has, in addition to malice, other reasons for the challenged actions.

The element of malice has had its chief importance in nuisance law with regard to spite fences unsightly fence that is erected out of malice directed toward the defendant’s neighbor, and for no apparent useful purpose, may be characterized as a spite fence. While some dispute the common-law origins of a private nuisance action that depends so strongly on the defendant’s motive, in many jurisdictions statutes penalize this obnoxious, unneighborly behavior.


[a]  **Contributory Negligence Is Not Available As a Defense in Intentional Private Nuisance Cases**

Contributory negligence is not a defense to nuisances created intentionally or recklessly. In the great majority of jurisdictions that recognize comparative negligence, that defense is also unavailable in intentional tort cases, including intentional private nuisances. In private nuisance cases involving a negligent defendant, contributory negligence is a valid defense, as in other negligence situations. The same is true for the plaintiff’s assumption of risk. In states following the *Second Restatement of Torts* § 840B(3) in private nuisance cases based on abnormally dangerous activities, as in other cases involving strict liability, contributory negligence is available as a defense only if plaintiffs have voluntarily and unreasonably subjected themselves to the risk of harm.

[b]  **Punitive Damages Are Recoverable for Intentional Private Nuisances When the Defendant Acts with Malice**

Where a private nuisance has been created by the defendant’s intentional, rather than negligent, conduct, if the defendant acts maliciously, wantonly, or willfully, the court may assess punitive or exemplary damages in addition to any actual damages.
§ 64.04 Private Nuisances Come in Several Varieties, Depending on Their Nature, Severity or Duration

[1] Courts Will Distinguish Between Private Nuisances Per Accidens and Per Se

Private nuisances are often classified as either per accidens (that is, in fact) or per se (that is, at law). A private nuisance per accidens is a nuisance by reason of its location or the manner in which it is constructed, maintained or operated. A private nuisance per se, typically an activity or pursuit made illegal by local or state law, is an act, occupation, or structure that is deemed a nuisance at all times and under all circumstances, regardless of location or surroundings.

[2] Courts Will Distinguish Between Permanent Private Nuisances and Temporary or Continuing Ones

It is not unusual for conduct constituting a nuisance to be recurrent in character. Some courts, rather than requiring plaintiff to sue separately for each injury, label the recurring nuisance “permanent,” allowing at the time of the earliest injury a single cause of action for all prospective damage. There is no unanimity, however, as to what must be found to justify calling a nuisance permanent. Many courts label a nuisance permanent only when (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. Other courts call a nuisance permanent when only the first of these two prerequisites is satisfied. A number of courts reject the whole concept of a permanent nuisance, insofar as it influences the award of prospective damages or the running of the statute of limitations. Courts have also noted the uncertainties that arise from any effort to define a permanent nuisance. Recognition of the doctrine of permanent nuisance promotes the quick settlement of controversies, but some hardship on plaintiffs is caused in cases where the suit is based on recurrent injuries and is brought after the statute of limitations has run with respect to the earliest injury.

[3] Courts May Enjoin Anticipatory (or Prospective) Nuisances in the Event the Plaintiff Demonstrates a High Probability of Harm

In some cases, courts will enjoin conduct that threatens to develop into a private nuisance, without requiring the plaintiff to experience actual harm. To enjoin this anticipatory (or prospective) nuisance, the plaintiff must usually prove that the creation of the private nuisance by the defendant’s activity is, at least, highly probable. Where the existence of a future nuisance is uncertain or has not been proved to be unavoidable, the court may refuse to grant the injunction. Often, courts will not grant an injunction against an anticipatory nuisance based solely on the ground that it is the manner in which the activity will be conducted that constitutes the nuisance; the private nuisance must be found in the essential character of the proposed activity itself. Courts often express this concept by confining anticipatory injunctions to “nuisances per se” or to “nuisances by reason of location.”

[4] Aesthetic Private Nuisances Are Gaining Increased Recognition in American Courts, Although There Remains Serious Opposition

Historically, private nuisance claims based on aesthetic grounds posed special difficulties for the court, owing to the inherently subjective nature of aesthetic judgments. While over the past few decades, courts, in dictum, and commentators have challenged the traditional

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reluctance to find a nuisance based solely on aesthetic grounds, there remains significant resistance.

§ 64.05 Some Defenses Act to Bar Liability Outright, While Others Are Weighed with Additional and Competing Factors

[1] Private Nuisance Defendants Can Take Advantage of Traditional Equitable Defenses Such as Acquiescence and Estoppel

The defendant can take advantage of the defense of acquiescence by demonstrating that the plaintiff caused the defendant to undertake expenses in reasonable reliance on the plaintiff’s apparent intent not to sue for private nuisance. This situation is analogous to an estoppel, and the acquiescence extends to all acts necessary to the accomplishment of the particular use, but no farther. The defense is only available if the acquiescing plaintiff knew or should have known of the harm that could arise from defendant’s conduct.

[2] The Trend in Modern American Law Is to Consider “Coming to the Nuisance” One Factor in the Defendant’s Favor, Not an Absolute Bar

Often, defendants will offer evidence that the plaintiff “came to the nuisance,” a nuisance version of the old property proverb that “first in time is first in right.” In essence, the defendant asserts that the plaintiff acquired land in the vicinity of the defendant’s property after the defendant had already begun the conduct that plaintiff now claims constitutes a private nuisance.

Historically, dictum in early Nineteenth Century English law favorable to this defense was followed by judicial skepticism. The American experience has been uneven as well, but the generally accepted rule is that “coming to the nuisance,” in itself and without other factors, will not bar the plaintiff’s recovery. The rationale for the prevailing practice rejecting “coming to the nuisance” as an absolute defense is that otherwise those who settled in an area would acquire complete control over the future of adjoining and nearby land, in effect stifling evolutionary development of land uses. In recent cases that have recognized the defense, courts have emphasized the relative hardship on the defendant or the public interest furthered by the defendant’s first-in-time activity.

As discussed below (see § 64.05[6][c]), right-to-farm laws reinvigorate the “coming to the nuisance” defense for preexisting agricultural users.


The statute of limitations defense depends solely upon a measurement of time: how long has the plaintiff delayed in asserting his or her rights? The crucial issue under the statute of limitations defense is determining the time when the cause of action first accrued, for that is when the statute begins to run. In private nuisance cases, no cause of action exists until substantial harm has been done or threatened. Under this approach, it is the plaintiff’s injury, rather than the defendant’s act, that causes the statute of limitations to run. Moreover, a determination concerning whether the private nuisance is determined to be intentional or negligent may affect the length of the statutory period.

A prescriptive right to maintain a private nuisance may be found where an adverse use has existed openly, under claim of right and for a period, usually set by statute, of sufficient duration. In practice, prescription plays a very limited role in the law of nuisance. Courts are reluctant to find that an adverse use creates a right to maintain a nuisance unless the harm flowing from the use is substantial. Such a harmful type of adverse use almost ensures that a plaintiff will seek a remedy before the fairly considerable period required for the acquisition of a prescriptive right can elapse. Further restrictions are found in the prevailing view that prescriptive rights cannot arise from public nuisances or for the private harm incident to a public nuisance. (For more on prescriptive easements generally, see § 34.10.)

[5] Defendants Will Be Protected Against Claims Brought by Hypersensitive Plaintiffs

A hypersensitive plaintiff cannot base a nuisance claim on a special susceptibility to discomfort. The Second Restatement of Torts [§ 821F (comment d)] provides a helpful summary of this issue:

If normal persons living in the community would regard the invasion in question as definitely offensive, seriously annoying or intolerable, then the invasion is significant. If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncracies of the particular plaintiff may make it undurable to him. Rights and privileges as to the use and enjoyment of land are based on the general standards of normal persons in the community and not on the standards of the individuals who happen to be there at the time.

Similarly, a plaintiff’s whose use of land makes it peculiarly susceptible to harm cannot use those unique circumstances to veto conduct by neighbors that constitutes a private nuisance only because of the plaintiff’s particular use.

The “morbid atmosphere” associated with funeral parlors may be sufficient to sustain a neighbor’s objection to the location of such a use in a residential neighborhood, although there are cases to the contrary. Cemeteries, by contrast, are less often found to be private nuisances. In determining what activities constitute a nuisance, courts may take into account fears and other mental reactions that are common to persons in the community, even though those fears and reactions are without scientific foundation or other support in fact.

[6] While Government May Authorize Activities That Would Otherwise Amount to Private Nuisances, Defendants’ Compliance with Zoning Regulations Do Not Provide an Absolute Bar

[a] Legislative Authority Generally

In certain circumstances, legislative authorization can be a successful defense in private nuisance actions, especially when a nuisance per se is alleged. Just as a legislature may declare a particular use or conduct to be a nuisance, a municipal corporation or other proper governmental unit may, within constitutional limits, authorize conduct that otherwise would be a private nuisance or public nuisance, so long as the activity is conducted as the law authorizes. As discussed below, right-to-farm laws afford the protection of legislative authority.
§ 64.05[6][b] Zoning as a Relevant Factor in Private Nuisance Cases

Most courts hold that compliance with a zoning ordinance, while a factor in the defendant’s favor does not provide an absolute defense in a private nuisance action.

[c] States Have Employed Right-to-Farm Laws to Insulate Agricultural Defendants from Private Nuisance Actions

Legislatures throughout the United States have provided protection for agricultural users in the form of right-to-farm statutes. There are variations (even within the same state); for example, some acts specially shield animal feedlots, while others provide for the designation and protection of a wide range of farming activities. The basic thrust of these laws is to shield existing farm operations from private nuisance actions brought by nonfarm users nearby.

In effect, these laws reinvigorate the “coming to the nuisance defense.”

The protection afforded agricultural interests is not absolute, however, for right-to-farm laws typically provide that the farms and feedlots:

- must have been in operation for a specified period of time;
- must be in compliance with land-use and environmental controls;
- cannot be operated negligently; and
- cannot significantly change their mode or hours of operation.

Even with the protections afforded by right-to-farm laws, some agricultural users have still been held liable for conducting private nuisances.

§ 64.06 The Preemption Puzzle: What Is the Effect of Comprehensive Federal and State Regulatory Controls on Common-Law Private Nuisance?

[1] In Many Instances, Though by No Means All, Courts Have Held That the State Common-Law of Private Nuisance Is Superseded by Federal and State Regulatory Schemes

A private cause of action in nuisance for air pollution was recognized at least as far back as 1611 in William Aldred’s Case. In an industrial society, where pollution is commonplace, many private and government activities can potentially give rise to claims for private nuisance. The basic legal analysis applied to a nuisance created by pollution is the same as that for a nuisance created by any other cause; however, for public policy reasons both courts and legislatures have given special consideration to the relationship between statutory law and common law nuisance as remedies for problems caused by pollution.

Prior to the enactment of comprehensive environmental legislation in the 1970s, private and public nuisance actions were two of the few weapons available to combat pollution of the air, water, and land by government and industry. Legislators, judges, and scholars looked to nuisance law as a guide in the formulation and interpretation of environmental laws, in much the same way that private nuisance actions provided a framework for zoning. In Village of Euclid v. Ambler Realty Co. [272 U.S. 365 (1926)], for example, the landmark Supreme Court case upholding the constitutionality of zoning regulations, Justice Sutherland’s opinion explicitly recognized the role nuisance law should play in shaping the emerging law of zoning:
In solving doubts, the maxim *sic utere tuo ut alienum non laedes* [use your own property in such a manner as not to injure that of another], which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the [police] power.

Once comprehensive environmental legislation was in place, however, a significant potential conflict arose between statutory remedies and common-law private and public nuisance remedies for pollution.

The hallmark of environmental legislation has been a system of comprehensive regulations, often using uniform national standards to determine acceptable levels of emissions from pollution sources. While this approach has been criticized by economists who favor various tax- or fee-based pollution control strategies or incentive programs, it has remained in place because of two distinct advantages: relative ease of administration and certainty. Under a comprehensive regulatory system, both regulators and polluters know how to conduct particular activities or how much pollution must be abated, and compliance may be monitored. If a polluter does not abide by the standards embodied in regulations or a permit, the regulatory remedy is specified by statute.

The availability of private nuisance actions potentially conflicts with these legislative goals of uniformity, ease of administration, and certainty. If compliance with applicable regulatory standards is no defense against a nuisance action brought by someone damaged by pollution, then polluters can never be certain what actions, short of total abatement of pollution or even cessation of all activity, will prevent imposition of liability. This is not only unfair to those who comply with regulations in good faith, but can also deter speedy compliance with pollution laws since polluters may delay compliance to see whether someone might initiate a nuisance action. Therefore, it is not surprising to find several examples of state and federal courts determining that private nuisance actions are eclipsed and foreclosed by comprehensive environmental, transportation, and energy regulation. In other instances, despite the presence of comprehensive statutory and regulatory controls, courts have been more sympathetic to landowners seeking to employ common-law private nuisance to remedy harms to the use and enjoyment of their property.


Private nuisance has historically served to “fill in the gaps” left by other legal theories, providing a remedy to those property owners whose injuries would otherwise be left unredressed. Faced with these competing claims, federal courts have followed an uncertain course, first expanding and then contracting the availability of federal common-law nuisance.

Federal courts have also considered whether other federal pollution statutes—such as the Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), the Safe Drinking Water Act (SDWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)—preempt federal common law nuisance claims. For example, the Second Circuit Court of Appeals has suggested in dictum that the CAA does not preempt all federal common-law nuisance actions for air pollution, basing its view on the fact that the FWCPA regulates every source of water pollution, while the CAA only requires control of those sources of air pollution that threaten ambient air quality standards. The

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SDWA, as well as RCRA and CERCLA, have also been held to preempt federal common law nuisance actions.

[3] The United States Supreme Court Has Left the Door Open to Private Nuisance Remedies for Environmental Harms

Although the United States Supreme Court has frowned on the use of federal common law for interstate water pollution disputes, in the right circumstances, state common law remains an effective theory for recovery. While citizen suits are available against persons and government agencies that violate the FWPCA, section 505(e) of that Act makes clear that common-law remedies are still available: “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).”

The interpretation of this “saving clause” was disputed in a 1987 decision involving pollution from a New York pulp and paper mill that made its way to the shores of Vermont [International Paper Co. v. Ouellette, 479 U.S. 481 (1987)]. While the U.S. Supreme Court held that the FWPCA preempted Vermont nuisance law in these circumstances, the Court left open the possibility of a private nuisance action under New York law.

Other federal environmental laws contain similar saving clauses that, in the right circumstances preserve state statutory and common-law actions.

§ 64.07 Plaintiffs Who Successfully Establish the Existence of Private Nuisance Have Three Possible Remedies: Self-Help, Injunctive Relief and Damages

[1] The Traditional Remedy of Self-Help Abatement Has Little Relevance Today

A plaintiff who has established the existence of a private nuisance normally has three possible remedies: an action for damages, equitable relief by injunction, and the abatement of the nuisance by self-help. The most frequently sought remedies for an established private nuisance are damages and injunctions. Self-help abatement, although available since the time of the early common law, is used only rarely because it exposes the one seeking to abate the nuisance to possible liability for trespass and property damage. Further, good faith is no defense to such liability. The existence of a private nuisance is often debatable, and property owners who take matters into their own hands, rather than coming to the courts, will not escape liability on the basis that they believed their actions were justified.

[2] Plaintiffs in Private Nuisance Actions Often Seek Injunctions to Correct or Eliminate the Offending Condition

[a] The Usual Basis for Equitable Intervention (Inadequacy of Legal Remedy) Is Normally Present in a Nuisance Action

The plaintiff in a nuisance action often seeks an injunction to correct the offending condition. This may be accomplished by the destruction of the property constituting or causing the interference with the plaintiff’s use, by ending the conduct proved to have been offensive, or by alterations in structures or mode of operation. In each case, the injunction will require no more than is necessary to eliminate the nuisance.

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The usual basis for equitable intervention—the inadequacy of the remedy at law—is normally present in a private nuisance action. The wrongful action is usually recurrent, which would require a multiplicity of suits at law to obtain relief, while equity can give complete relief in a single action. Further, private nuisance involves harm to land, for which money damages are traditionally said to be inadequate.

[b] In Proper Situations, Courts Will Employ Normal Equitable Principles to Deny an Injunction

Injunctive relief will not be available for every nuisance, however. Courts exercise discretion in the use of their equitable powers and will deny an injunction based on such traditional equitable principles as laches.

[c] The Popular Practice of Balancing the Equities Can Also Result in the Denial of an Injunction

The balancing of equities (also known as balancing the injuries, balancing the hardships, and balancing the conveniences) is a second, and very important, equitable basis for refusing an injunction. Under this doctrine, courts will consider the relative benefit and hardship to the parties and the effect on the public interest in considering whether to grant an injunction. It is important to distinguish between the balancing a court undertakes in determining whether a nuisance exists, thus entitling the plaintiff to the award of damages, and the balancing required in deciding whether to issue an injunction. The distinction is noted in the Second Restatement of Torts [§ 821B (comment i)]:

In determining whether to award damages, the court’s task is to decide whether it is unreasonable to engage in the conduct without paying for the harm done. Although a general activity may have great utility it may still be unreasonable to inflict the harm without compensating for it. In an action for injunction the question is whether the activity itself is so unreasonable that it must be stopped. It may be reasonable to continue an important activity if payment is made for the harm it is causing, but unreasonable to continue it without paying.

Originally, the doctrine of balancing the equities in determining whether an injunction to enjoin a nuisance should issue was not universally accepted by the courts. In part this was because of the traditional view that once the existence of a nuisance is established and the plaintiff proves that the damages remedy is inadequate, an injunction should issue. Today, however, the great majority of courts do apply the doctrine.

[d] Even Anticipatory Nuisances May Be Abated By Injunctive Relief

As noted above (see § 64.04[3]), courts may grant injunctive relief in order to abate an anticipatory or prospective nuisance. As with an existing nuisance, courts will exercise their discretion to balance the equities between the parties and consider the public interest before granting an injunction.


When a court in a private nuisance action declines to exercise its discretion to grant the plaintiff equitable relief, damages will necessarily be available, since by definition nuisance is an actionable and remediable wrong to a person having a recognizable interest in land. Damages also provide an alternative form of relief, available generally at the election of the plaintiff, even where equitable relief is available.

The computation of damages in a nuisance action can be quite complex. The plaintiff may
include the harm caused to the interest in the property affected by the nuisance and, normally, may include any injuries flowing from the defendant’s wrongful conduct, such as injuries to the plaintiff’s or the plaintiff’s family’s health or personal inconvenience and discomfort. A few courts have rejected “personal inconvenience and discomfort” as an independent basis for the recovery of damages, for example, on the ground that it is a proper ingredient covered in the recovery based on the harm caused to plaintiff in the use and enjoyment of property, and to allow these items as a separate basis for recovery gives the plaintiff a double award for the same harm. This problem can be avoided by a carefully worded judge’s charge to the jury, pointing out the plaintiff’s right to recover for the decreased utility of his or her property interest and also for personal inconvenience caused by the defendant’s misconduct, but cautioning the jury against use of the personal inconvenience ingredient more than once.

When the harm caused by a nuisance is only temporary and can be abated, the measure of damages normally is the depreciation in the rental or use value of the affected property during the period the nuisance exists, plus any special damages. When the harm is permanent, damages are measured by the decrease in the fair market value of the property attributable to the private nuisance. As noted above (see § 64.03[5][b]), punitive damages are also available in limited instances.

[4] Damages Are Even Available to Property Owners in Public Nuisance Cases, As Long As the Plaintiff Can Demonstrate Special Injuries or Damages

In some public nuisance cases, in which harm to the community-at-large or to the general public has been demonstrated, landowners in the neighborhood of the nuisance may be entitled to relief against conduct of a defendant that injures their private property interests. The ability of a private plaintiff to recover for injuries to his property from a public nuisance is quite limited, however. Except where the public nuisance statute authorizes such a collateral private remedy, only a plaintiff whose injuries or damages are special in kind, as distinguished from special in degree, may sue for his or her own injuries under the public nuisance doctrine.

[5] In Two Landmark Cases, Courts Rejected Traditional Approaches to Private Nuisance Remedies

Two cases from the 1970s demonstrate the creativity courts employ in order to resolve private nuisance disputes between neighbors with competing, discordant land uses. The first, Boomer v. Atlantic Cement Co. [26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970)], was a New York case involving a cement plant whose operations generated dirt, smoke, and vibrations that disturbed nearby landowners. The New York Court of Appeals acknowledged that the rule in that state had been that such a nuisance would be enjoined, notwithstanding any marked disparity in economic consequence between the damage caused by the nuisance and the effect of the injunction. In this case, however, where a permanent injunction would destroy a $45 million investment and cause the loss of 300 jobs, the court found that the public interest required an innovative remedy:

One alternative is to grant the injunction but postpone its effect to a specified future date to give opportunity for technical advances to permit defendant to eliminate the nuisance; another is to grant the injunction conditioned on the payment of permanent damages to plaintiffs which would compensate them for the total economic loss to their property present and future caused by defendant’s operations . . . [T]he court chooses the latter alternative.
This result ensured that the plaintiffs were fully compensated while allowing the plant to continue in operation.

In 1972, the Arizona Supreme Court also combined damages and injunctive relief in a creative fashion. In *Spur Industries v. Del Webb Dev. Co.* [108 Ariz. 178, 494 P.2d 700 (1972)] the court enjoined a large cattle feedlot as a public and private nuisance, as odors and flies interfered with new residential construction nearby who had “come to the nuisance.” However, the court also required the plaintiff developer to indemnify the defendant feedlot operator for its relocation costs:

Spur is required to move not because of any wrongdoing on the part of Spur, but because of a proper and legitimate regard of the courts for the rights and interests of the public.

Del Webb, on the other hand, is entitled to the relief prayed for (a permanent injunction), not because Webb is blameless, but because of the damage to the people who have been encouraged to purchase homes in Sun City. It does not seem harsh to require a developer, who has taken advantage of the lesser land values in a rural area as well as the availability of large tracts of land on which to build and develop a new town or city in the area, to indemnify those who are forced to leave as a result. Having brought people to the nuisance to the foreseeable detriment of Spur, Webb must indemnify Spur for a reasonable amount of the cost of moving or shutting down.

The precedential value of the decision was limited by the court, which noted that the developer had “with foreseeability,” brought residents into an agricultural area and exposed them to legal, though nuisance-like activities.

§ 64.08 In Recent Years, Courts Have Been Struggling with Private Nuisance Problems Posed by Developing Technologies

[1] Plaintiffs and Defendants Using Alternative Energy Sources Pose Special Problems for Neighboring Landowners

An emerging area of nuisance litigation involves the conflicts arising from the use of alternative energy systems. In a notable case from Wisconsin, *Prah v. Maretti* [108 Wis. 2d 223, 321 N.W.2d 182 (1982)], the state supreme court held that shadows cast on a solar collector by a neighboring structure may constitute a private nuisance. This decision contrasts with earlier decisions from other jurisdictions finding no nuisance for the casting of shadows. While the *Prah* court’s recognition of the real property aspect of sunlight as a protected interest has received tentative endorsement by some commentators and jurists, American courts generally remain reluctant to reverse the prevailing American rule that interference with air and light do not generally rise to the level of substantial interference with the use and enjoyment of real property. This hesitation dates back to the early Nineteenth Century, when courts in the new republic rejected the doctrine of ancient lights, the English property law notion that adverse use of air and light over an extended period of time can give rise to a negative prescriptive easement over a neighbor’s property.

Not all users of alternative energy sources have been as successful as the plaintiff in *Prah*. Indeed, in a New Jersey case, the court found that the noise generated by a windmill constituted a private nuisance [*Rose v. Chaikin*, 187 N.J. Super. 210, 453 A.2d 1378 (Ch. Div. 1982)].

§ 64.08[2] Recent Efforts to Characterize Electromagnetic Fields (EMF) as Private Nuisances Have Generally Been Unsuccessful

Concerns about the effects of electromagnetic fields ("EMFs") generated by high-voltage power wires and other electrical equipment and facilities have given rise to numerous claims by neighbors based on perceived risks to human health and on the reduction of real property values. To date, claims based on private nuisance theories (and on related theories of trespass and eminent domain) have been unsuccessful.

§ 64.09 Recent Regulatory Takings Law Has Given New Import to Private and Public Nuisance Principles

The real property constitutional analogue to nuisance law—in terms of almost impenetrable confusion—is the area of regulatory takings. As Professor Charles Haar, the leading land-use commentator so memorably observed, "[t]he attempt to distinguish 'regulation' from 'taking' is the most haunting jurisprudential problem in the field of contemporary land-use law . . . [and] may be the lawyer's equivalent of the physicist's hunt for the quark." [Charles M. Haar & Michael Allan Wolf, Land-Use Planning 875 (4th ed. 1989).] In an effort to clarify this murky area, Associate Justice Antonin Scalia, writing for the majority in Lucas v. South Carolina Coastal Council [505 U.S. 1003 (1992)], noted that, for "regulations that prohibit all economically beneficial use of land," the responsible government could only escape liability in very limited circumstances:

Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Later in the opinion, Justice Scalia, citing relevant sections from private nuisance sections of the Second Restatement of Torts, instructed future private and public litigants that

[t]he "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities . . . the social value of the claimant's activities and their suitability to the locality in question . . . and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike . . . .

The Lucas majority’s invocation and reliance on common-law concepts, illustrated by the quotations above, has inspired a revival of interest in private nuisance law by courts and commentators. Given the dramatic proliferation of regulatory takings challenges to a wide range of land-use and environmental restrictions, government regulators are keenly interested in the private and public nuisance-like attributes of their modern statutory and administrative controls. Not surprisingly, there are strong connections between private nuisance and local land-use planning and zoning, as both are employed to segregate discordant and injurious uses of property, and public nuisance and comprehensive environmental controls, as both find their justification in the protection of the general public from serious harms to health and the general welfare.