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Private Nuisance: An Application to Feedlots in a Rural Area: *Botsch v. Leigh Land Co.*, 195 Neb. 509, 239 N.W.2d 481 (1976)

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Note

Private Nuisance: An Application To Feedlots in a Rural Area

Botsch v. Leigh Land Co., 195 Neb. 509, 239 N.W.2d 481 (1976).

I. INTRODUCTION

In an unusual move, the Nebraska Supreme Court, after holding that a feedlot in a rural area could be a nuisance, granted a request for a rehearing in *Botsch v. Leigh Land Co.*[1] After a hearing by the full court,[2] the former opinion was withdrawn. Though the second opinion does not radically differ from the first,[3] it is indicative of how the Nebraska Supreme Court will apply the law of nuisance to feedlots in rural areas, specifically to rural areas which contain many cattle feeding operations.

Plaintiffs in *Botsch* owned and occupied a farm which included a small livestock enterprise. Directly across the road from plaintiffs' farmstead, defendant Land Company operated a feedlot which had contained from 408 to 3,746 head of cattle. Runoff water and manure drained through the length of the defendants' feedlot and through an adjoining 1,100 head lot into four lagoons maintained by defend-

1. 195 Neb. 509, 239 N.W.2d 481 (1976).
2. The original opinion, reported at 195 Neb. 54, 236 N.W.2d 815 (1975), was by a panel of four of the seven regular Nebraska Supreme Court Judges, and retired District Court Judge Kuns. Judge McCown dissented to the original opinion, and Chief Justice White concurred in his dissent. The same two judges were the only dissenters to the opinion substituted after the rehearing by the full court.
3. In general, the second opinion merely elaborated on the first and set out the facts more explicitly. As defendants had not yet had an opportunity to present their evidence at the time the case was heard by the Supreme Court, the second opinion makes it clear that defendants may be able to rebut plaintiffs' evidence of a nuisance at that time. Language in the original opinion may be read as holding that plaintiffs had conclusively established the existence of a nuisance rather than merely a prima facie case. Irrespective of the intent of the first opinion, the second makes it clear that plaintiffs' evidence was sufficient to establish a prima facie case of nuisance, and nothing more. As to the application of substantive nuisance law to feedlots, however, there is no significant difference between the first and second opinions.

ants. The lagoons were located directly across the road from plaintiffs' home. Plaintiffs complained of offensive odors, dust, and insects originating on the defendants' premises and sought an injunction, arguing that defendants' cattle feeding operation constituted a nuisance. After plaintiff had presented his evidence, the trial court dismissed the action holding that, as a matter of law, a nuisance did not exist. The Nebraska Supreme Court reversed this finding and remanded the case for further proceedings. While the decision in *Botsch* appears to be correct, the reasoning supporting the decision which was articulated in the opinion does little to clarify what has been referred to as the most "impenetrable jungle in the entire law,"[4] the meaning and scope of an action in nuisance.

II. THE PRIVATE NUISANCE-PUBLIC NUISANCE DISTINCTION

The majority in *Botsch* concluded that Nebraska statutes clearly denominated defendants' cattle feeding operation a nuisance:

> The Nebraska statutes make it clear that defendants' operation constitutes a nuisance and the fact that the Department of Environmental Control saw fit to ignore the air and insect pollution features cannot excuse its maintenance. It may be noted that the statutes do not distinguish between rural and urban areas. They prohibit the generation of conditions injurious to the "health, comfort or property of individuals or the public." A rural home and a rural family, within reason, is entitled to the same relative protection as others. The fact that the residence is in a rural area requires an expectation that it will be subjected to normal rural conditions but not to such excessive abuse as to destroy the ability to live in and enjoy the home, or reduce the value of the neighboring property.[5]

Such a conclusion, while not incorrect, indicates that the court failed to distinguish properly between public and private nuisance. A private nuisance is a civil wrong based on a disturbance of rights in land. A public nuisance is a criminal offense consisting of an interference with the rights of the community at large.[6]

Nebraska does have a comprehensive nuisance statute.[7] The statute has been interpreted as making all common law nuisances

4. W. PROSSER, LAW OF TORTS § 86 (4th ed. 1971).
5. 195 Neb. at 516, 239 N.W.2d at 486.
6. *See, e.g.*, Mandell v. Pivnick, 20 Conn. Supp. 99, 125 A.2d 175 (Super. Ct., Hartford County 1956).
7. *See* NEB. REV. STAT. § 28-1016 (Cum. Supp. 1974), which provides in part:

> Whoever shall erect, keep up or continue and maintain any nuisance to the injury of any part of the citizens of this state

crimes.[8] In doing so, however, the common law action in private nuisance was not obliterated or absorbed into the statutory law of public nuisance. The Nebraska statute is primarily concerned with the spread of disease,[9] that is, with public nuisance. A public nuisance may, however, also be a private nuisance.[10] Therefore, even if defendants' feeding activities violated the nuisance statute, plaintiffs could still have a cause of action in private nuisance. Clearly they did, because plaintiffs alleged a substantial interference with *their* use and enjoyment of *their* own property. This is not to say that plaintiffs could not also or alternatively have sued under a public nuisance theory[11] by demonstrating injury different in kind and degree from that suffered by the public at large.[12] Here, a substantial interference with the plaintiffs' use and enjoyment of their land flowed from defendants' feeding activity, the source of any public nuisance as well. This interference probably would be sufficient to confer a private right of action on plaintiffs for any public nuisance caused by defendants' cattle feeding operation.[13] The key is the substantial interference with plain-

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> shall be fined in any sum not exceeding five hundred dollars; and the court shall, moreover, in case of conviction of such offense, order every such nuisance to be abated or removed. The erecting, continuing, using or maintaining of any building, structure or other place for the exercise of any trade, employment, manufacture or other business which, by occasioning noxious exhalations, noisome or offensive smells, becomes injurious and dangerous to the health, comfort or property of individuals or the public . . . , shall be deemed nuisances.

8. State v. DeWolfe, 67 Neb. 321, 93 N.W. 746 (1903).
9. NEB. REV. STAT. § 28-1016 (Cum. Supp. 1974), refers to offensive smells that become "injurious and dangerous to the health, comfort or property *of individuals* or the public" (emphasis added). This statute, however, located in Chapter 28 (Crimes and Punishments), Article 10 (Offenses Against Public Health and Safety), Part (b) (Spread of Disease), is concerned primarily with public health. It thus seems that the law of public nuisance is not directly concerned with the right of an individual to be free from substantial interference with the use and enjoyment of his property, the basis of private nuisance.
10. *See, e.g.*, Tedescki v. Berger, 150 Ala. 649, 43 So. 960 (1907).
11. Several cases indicate that a plaintiff may proceed under either a public or private nuisance theory, or both, where both forms of nuisance result from defendant's actions. *See, e.g.*, Bishop Processing Co. v. Davis, 213 Md. 465, 132 A.2d 445 (1957) (suit to enjoin operation of a processing plant because of excessive odor); Tedescki v. Berger, 150 Ala. 649, 43 So. 960 (1907) (suit to enjoin operation of a brothel).
12. It is well settled that a private party cannot sue for the invasion of a purely public right absent some showing that his injury differed from that of the general public. *See, e.g.*, Schroder v. City of Lincoln, 155 Neb. 599, 52 N.W.2d 808 (1952) (holding that a private party has no right to complain of a bank's installation of a curb teller machine on a city sidewalk).
13. *Cf.* Karpisek v. Cather & Sons Constr., Inc., 174 Neb. 234, 117 N.W.2d

tiffs' use and enjoyment of their own property,[14] which, by definition, is a private nuisance and which is also the special injury necessary to confer a private right of action for public nuisance. Plaintiffs in *Botsch*, however, apparently chose to proceed solely under a private nuisance theory, complaining only of personal injury, and not under a public nuisance theory where they would complain of injury suffered by the public at large in addition to their personal injury. Thus, a discussion of related Nebraska statutes[15] serves only to obfuscate the real issue of whether a cause of action in private nuisance exists. Though a violation of the public nuisance statute may be persuasive in arguing that a private nuisance also occurred, it clearly does not conclusively determine the existence of a private nuisance.[16] Similarly, discussion of whether the Department of Environmental Control should have denominated defendants' activities a nuisance, while of some interest in its own right,[17] is plainly not germane to the particular issue before the court.

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322 (1962) (private party could sue to enjoin operation of an asphalt plant although others in the community also suffered in varying degrees from the dust complained of); Morris v. Borough of Haledon, 24 N.J. Super. 171, 93 A.2d 781 (Super. Ct., App. Div. 1952) (plaintiff allowed to sue for damages from noise and smoke where defendant violated a zoning ordinance).

14. *See* note 22 and accompanying text *infra*.
15. *See* Botsch v. Leigh Land Co., 195 Neb. 509, 512, 239 N.W.2d 481, 484 (1976), wherein the court discussed Nebraska's criminal nuisance statute, NEB. REV. STAT. § 28-1016 (Cum. Supp. 1974), and portions of the Nebraska Environmental Protection Act, specifically NEB. REV. STAT. §§ 81-1501, -1506 (Cum. Supp. 1974).
16. The statutes are of value only as support for the proposition that offensive odors can constitute an interference with use of property that will merit judicial intervention. This proposition is well established, however, in prior case law. *See* note 20 and accompanying text *infra*.
17. The majority opinion reveals that a representative of the Nebraska Department of Environmental Control (DEC) had inspected the feedlot, and had testified that the Department was not concerned with air or insect pollution, and that defendants' feedlots did not pose a water pollution problem. 195 Neb. at 511, 239 N.W.2d at 484. In dicta, the majority indicated that the DEC has a definite responsibility to prevent air and land pollution in addition to water pollution. *Id.* at 512, 239 N.W.2d at 484.

    The Nebraska Environmental Protection Act clearly charges the DEC with a duty to prevent air, land, and water pollution. *See* NEB. REV. STAT. § 81-1504(2), (5)-(7), (9), (13), (16)-(17), (20)-(22), (24)-(25) (Cum. Supp. 1974). Another section of the Act provides that failure to adhere to the air, water, or land quality standards *established by the DEC* shall be considered a public nuisance. *See* NEB. REV. STAT. § 81-1506(1)(b) (Cum. Supp. 1974). Currently, however, the DEC's rules and regulations pertaining to feedlots contain no reference to air pollution. *See* Neb. Dep't of Environmental Con-

III. PRIMA FACIE NUISANCE

A private nuisance exists only if defendant's conduct works a substantial interference with plaintiff's use and enjoyment of his property.[18] The Nebraska Supreme Court has long recognized that the owner of the soil has a strong interest in the purity of the air overlying it.[19] Nevertheless, a certain amount of impurity in the atmosphere is a necessary incident of modern life. As stated by the Nebraska Supreme Court:

> The right to have the air floating over one's premises free from noxious and unnatural impurities is a right as absolute as the right to the soil itself, although there are certain uses of property that necessarily impart more or less impurity to the air which are regarded as lawful when reasonably exercised, and must be submitted to as among the incidents of living in a town or thickly settled districts. . . . A feeding yard is not necessarily a nuisance.[20]

Consequently, a nuisance exists only if the interference with plaintiff's use and enjoyment of his property is substantial, not

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trol, Rules and Regulations Pertaining to Livestock Waste Control (1975). Moreover, Rule 23 provides that compliance with the regulations shall be prima facie evidence that a nuisance does not exist. Rule 2, however, requires a construction permit for a feedlot if, among other things, the feedlot would violate the Environmental Protection Act or constitute a nuisance in the absence of waste controls. Rule 24 provides for civil proceedings or injunctive relief for failure to comply with the rules.

The question posed, then, is whether the DEC can, by ignoring air pollution in its feedlot regulations, avoid finding a violation of the Environmental Protection Act where defendant's conduct would be a public nuisance under the air pollution provisions of Nebraska's criminal nuisance statute, NEB. REV. STAT. § 28-1016 (Cum. Supp. 1974). *See* note 7 *supra*. Alternatively, does, as the majority's dicta seem to suggest, the Environmental Policy Act itself charge the DEC with the duty of enforcement in such circumstances even though there are no directly applicable regulations? One could argue that the basic act requires regulations that would apply to such situations. Especially disconcerting, however, is the possibility, though remote, that the DEC could make it more difficult to establish the existence of a public nuisance due to odors and dust from feedlots, by promulgating rules that would make compliance with regulations that ignore air pollution aspects of feedlot operation prima facie evidence that the feedlot is not a nuisance. Though *Botsch* involved private rather than public nuisance, and was, therefore, an inappropriate vehicle to decide questions relating to the DEC, the Nebraska Supreme Court will undoubtedly be called upon to clarify these matters at some future date.

18. *See, e.g.*, Rogers v. Elliott, 146 Mass. 349, 15 N.E. 768 (1888) (ringing of a church bell not a substantial interference despite its serious effect on a hypersensitive individual).
19. Francisco v. Furry, 82 Neb. 754, 118 N.W. 1102 (1908).
20. *Id.* at 756, 118 N.W. at 1103.

trifling.[21] In *Botsch*, the testimony recounted in the majority opinion clearly indicates that the interference alleged there was substantial.[22] Even the trial court, which held that as a matter of law a nuisance did not exist, concluded that "plaintiffs were subjected to intolerable odors and a substantial increase in flies due to defendants' operation."[23]

In reversing the trial court, the majority of the Nebraska Supreme Court necessarily concluded that plaintiffs had stated a prima facie case of nuisance. Judge McCowan, however, supporting the trial court in his dissent, argued that evidence of intolerable odors and a substantial increase in flies was not alone enough to constitute a prima facie case of nuisance absent some showing that the operator of the feedlot acted unreasonably.[24] Although Judge McCown apparently and erroneously equated unreasonable use with a showing that a feedlot could be operated in a manner that would not produce odors and flies to the degree it constituted a nuisance,[25] the issue of whether or not unreasonable use is part of a prima facie case merits some consideration.

Though reasonable use is an element of all private nuisance suits, few cases have considered whether reasonable use is a matter

21. Thus, *occasional* unpleasant odors are not enough to establish a nuisance. Jones v. Adler, 183 Ala. 435, 62 So. 777 (1913) (odors from a sewage purification plant); Thiel v. Cernin, 224 Ark. 854, 276 S.W.2d 677 (1955) (odor from a broiler house); Francisco v. Department of Institutions & Agencies, 13 N.J. Misc. 663, 180 A. 843 (Ch. 1935) (hospital odors from a private nursing home).

22. 195 Neb. at 511, 239 N.W.2d at 484. The opinion relates the facts as follows:

> Dust from feedlots frequently blew across to plaintiffs' premises in considerable volume. Large numbers of flies were attendant on the feeding operations and infected plaintiffs' premises in large numbers. Odors originating in the ponds were very obnoxious and continuously present. One witness described the odor as a stagnant smell and stated he would not live next door to it. Another said the smell was "pretty stout," might make people sick, and that he could not stand it all the time. Another said the odor penetrated clothing and with the flies made it impossible for the plaintiffs to enjoy their lawn. Another said she found the smell "atrocious" and closed her car windows when passing by. Another said that the condition was such that he would not live on the plaintiffs' farm. Another neighbor said that on one occasion the smell was so bad that he and his wife left their home temporarily. Another said the smell was worse than from a dead animal and the flies were bad, so that he would not live on plaintiffs' farm. Another described it as a "dead sour smell" that "almost kills you."

Id.

23. *Id.* at 512, 239 N.W.2d at 484.

24. *Id.* at 517-18, 239 N.W.2d at 487.

25. *See* note 40 and accompanying text *infra*.

to be pleaded and proved by the plaintiff, or a matter of defense. Of those that have considered the question, some hold unreasonableness to be an essential element of plaintiff's case,[26] while others hold that the interference is, prima facie, a nuisance, with the burden of showing reasonable conduct resting on the defendant.[27] Prosser suggests that where a claim rests in negligence, unreasonable conduct should be proved by the plaintiff, but where the interference is intentional, the burden should be on defendant to justify the invasion.[28] The distinction drawn by Prosser seems entirely proper. On the one hand, unreasonable conduct is necessary to show breach of duty in a negligence suit.[29] Conversely, the intentional torts require only that defendant know with substantial certainty that harm will follow his act;[30] no overt reference to reasonableness is required.[31]

If reasonable use of land is a matter of defense where a nuisance is intentional, but unreasonable use of land is an essential element of plaintiff's case where the nuisance is grounded in negligence, an appraisal of the correctness of the *Botsch* decision depends on the nature of the conduct underlying the alleged nuisance. It is first necessary to distinguish between the interests invaded and the nature of the invasion. The former determines whether the interference complained of properly can be called a nuisance.[32] The latter characterizes the acts underlying the nuisance as intentional, negligent or appropriate for strict liability.[33] Because a feedlot operated in a rural area plainly is not subject to strict liability for odor and dust, the question in *Botsch* is whether the invasion complained of was intentional or negligent.

The trial court specifically held that there was a failure to prove negligent operation of the feedlot[34] and the majority seemed to

26. Canfield v. Quayle, 170 Misc. 621, 10 N.Y.S.2d 781 (Sup. Ct., Herkimer County 1939); Pawlowicz v. American Locomotive Co., 90 Misc. 450, 154 N.Y.S. 768 (Sup. Ct., Schenectady Trial T. 1915); Vestal v. Gulf Oil Corp., 149 Tex. 487, 235 S.W.2d 440 (1951).
27. Ohio Oil Co. v. Westfall, 43 Ind. App. 661, 88 N.E. 354 (1909); Sexton v. Youngkau, 202 Ky. 256, 259 S.W. 335 (1924).
28. W. PROSSER, *supra* note 4, § 87, at 581 n.6.
29. RESTATEMENT (SECOND) OF TORTS § 282 (1965).
30. *See, e.g.*, Garratt v. Daily, 49 Wash. 2d 499, 304 P.2d 681 (1956).
31. There is, of course, an element of unreasonableness in the intentional torts as well. If a person acts when he is substantially certain that harm will follow, he acts unreasonably. Nevertheless, unreasonableness need not be further established once the requisite intent is shown.
32. *See* note 6 and accompanying text *supra*.
33. Taylor v. City of Cincinnati, 143 Ohio St. 426, 55 N.E.2d 924 (1944); RESTATEMENT OF TORTS, Scope and Introduction to Chapter 40, at 220 (1939).
34. 195 Neb. at 512, 239 N.W.2d at 484.

concede this point.[35] Apparently then, the invasion was intentional, at least in the sense that defendants created and continued the condition causing the nuisance with full knowledge that the plaintiffs would be subjected to flies, dust and odors.[36] Furthermore, even assuming that the original underlying act could have been negligent as would have been the case if the odor and dust problem resulted from improper operation and maintenance of the feedlot, in failing to abate the nuisance once they became aware of it, defendants' acts would clearly become intentional.

Because the interference in *Botsch* was intentional, plaintiffs should not be required to demonstrate that defendants used their property unreasonably to state a prima facie case of nuisance. While the holding in *Botsch* is consistent with this construction of prima facie nuisance, the actual reasoning of the court was not articulated clearly in the opinion. The majority opinion merely states that "[p]rima facie, the existence of the conditions revealed by the record . . . clearly establishes that defendants' feeding activities, as operated, constituted a nuisance."[37] The preferable interpretation of this language is that unreasonable use is not a part of plaintiffs' case. Alternatively, however, the majority may have determined that a showing of unreasonable use was necessary but that plaintiffs' evidence was sufficient to show that defendant was using his property unreasonably.

The definition of unreasonable use is of critical importance if unreasonableness is a necessary part of plaintiffs' case. In his dissent in *Botsch*, Judge McCown apparently equated unreasonableness with a showing that the feedlot could be operated in a manner which would not produce excessive odors and flies.[38] In other words, he equated unreasonable use of defendants' property with a showing of negligence in their operation of the feedlot. If defendants' use was unreasonable only on a showing of negligence, Judge McCown's dissent would be well taken. As recognized by the majority, however, such is not the law.[39] The Restatement of Torts articulates the reasonableness standard as follows:

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35. *See* Botsch v. Leigh Land Co., 195 Neb. 54, 58, 236 N.W.2d 815, 818 (1975) (McCown, J., dissenting).
36. *See* note 30 and accompanying text *supra*.
37. 195 Neb. at 514, 239 N.W.2d at 485.
38. *Id.* at 518, 239 N.W.2d at 487.
39. *Id.* at 512, 239 N.W.2d at 484. The court stated:

> The trial court found that as a matter of law a nuisance did not exist and appears to have based that finding on the theory that plaintiffs had to prove a negligent or improper operation of the feedlot. This conception of the law is erroneous.

Id.

> It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference, and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of "give and take, live and let live," and therefore the law of torts does not attempt to impose liability or shift the loss in every case where one person's conduct has some detrimental effect on another. Liability is imposed only in those cases where the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.[40]

The key is in the final sentence. Unreasonable conduct is conduct that subjects a plaintiff to a risk of harm greater than he should be required to bear under the circumstances. Where there is conflict, a balance must be struck between each person's interest in using his own property as he sees fit. Conduct is unreasonable if the burden placed on plaintiff is disproportionate to the benefit derived by the defendant. Reasonableness of use depends on each party's respective burden, not on the character of the underlying conduct. As the majority correctly stated, the "exercise of due care by the owner of a business in its operation is not a defense to an action to enjoin its operation as a nuisance."[41]

Despite the majority's seeming insistence that proof of negligent or improper conduct is not necessary for a finding of prima facie nuisance, the following language also appears in the opinion: "When a lawful business is operated in such a manner as to become a nuisance it is operated improperly. Proof of the existence of a nuisance establishes that the business has been operated negligently or improperly."[42] At first glance there appears to be a non sequitur in the court's reasoning. Upon closer examination, however, it becomes apparent that the language quoted above is not inconsistent with the holding in the case. The *existence* of a nuisance does not depend on an ability to characterize independently defendants' acts as negligent or improper. On the other hand, a showing that defendants' interference with the use and enjoyment of plaintiffs' property was substantial implies that the conduct, if not negligent, was at least improper in the sense that it is improper to cause a nuisance. Thus, a finding of substantial interference with plaintiffs' rights implies improper conduct but it is not necessary to show that defendants' conduct is improper in any sense other than as the cause of the interference. Consequently, if the

40. RESTATEMENT OF TORTS § 822, Comment *j* (1939).
41. 195 Neb. at 514, 239 N.W.2d at 485, *citing* Sarraillon v. Stevenson, 153 Neb. 182, 43 N.W.2d 509 (1950), and 58 AM. JUR. 2d *Nuisances* § 34, at 597 (1971).
42. 195 Neb. at 513-14, 239 N.W.2d at 485.

majority indeed considers unreasonableness to be an essential part of plaintiffs' prima facie case, it follows that they must infer such unreasonableness from the existence of a substantial interference with plaintiffs' use and enjoyment of their property rather than from an overt characterization of defendants' acts.

It makes little difference, then, whether one states that reasonable use is a matter of defense or that unreasonable use is an essential element of plaintiffs' prima facie case, but that such unreasonable or improper conduct is implied from the substantial nature of the interference. In either case, the burden of establishing reasonableness is shifted to the defense.[43] To avoid needless confusion, however, and to clarify the distinction between the interests invaded and the character of the underlying conduct, the court should use the following procedure to determine whether a prima facie case of nuisance exists. First, is the interest invaded one cognizable under the law of nuisance, that is, is there an interference with a plaintiff's use and enjoyment of his land? Second, is the interference complained of substantial, not trifling? If the interference is substantial, how does one characterize the nature of the underlying conduct, as intentional or negligent? If the interference is grounded in negligence, plaintiff must further demonstrate that defendant's conduct was unreasonable to state a prima facie case. If, however, the nature of defendant's conduct was intentional, a prima facie case has been stated and defendant should be required to proceed with his defense. Such a procedure is consistent with the court's actual holding in *Botsch*.

IV. DEFENSE AFTER PLAINTIFF STATES HIS PRIMA FACIE CASE

The majority opinion gave scant attention to the manner in which defendants could rebut plaintiffs' prima facie case.[44] It is well established that fouling the atmosphere can be a source of nuisance.[45] Likewise, while defendants will have an opportunity to offer conflicting evidence, the substantial character of the interference was strongly supported by plaintiffs' evidence.[46] Consequently, the only element of a private nuisance cause of

43. If unreasonableness is not a necessary part of plaintiff's prima facie case, it is clearly a matter for the defense. Similarly, if unreasonableness is implied in the substantial nature of the interference that must be proved as part of a prima facie case, reasonableness remains a matter for the defense.
44. 195 Neb. at 517, 239 N.W.2d at 487.
45. *See* note 19 and accompanying text *supra*.
46. *See* note 22 *supra*.

action open to serious dispute is the reasonableness of defendants' conduct under the circumstances. The issue, as stated by the dissent, is whether a feedlot in a rural area could be enjoined as a result of odors, flies, and dust emanating from the feedlot even if it were demonstrated by defendants that there was no way to operate the feedlot without such odors, dust, and flies.[47] While the majority clearly stated that feeding cattle is not per se a nuisance,[48] the implication of their decision is that a feedlot can be improperly located even in a rural area such that feeding cattle can give rise to an actionable nuisance.

It is well settled that an industry cannot be conducted in all places and at all times merely because it is lawful. As stated in *Sarraillon v. Stevenson*,[49] a suit to enjoin operation of a small slaughterhouse:

> It has not heretofore been considered that a property owner had a vested right in or a constitutional privilege to maintain or continue a nuisance. . . . An industry of this sort may not be conducted at any place or at all places merely because it is legitimate and lawful. The selection of a place of business is not necessarily left to the owner alone. That subject is often a matter of both private and public concern.[50]

It is equally well settled, however, that "rural residents must expect to bear with farm and livestock conditions normally found in the area where they reside."[51] The ultimate question is whether the interference complained of is of a type and degree that one would expect to find in a particular locality at a given point in time.[52] If it is, then defendants' conduct under the circumstances is reasonable, and there is no nuisance. If, on the other hand, the interference complained of is not of a kind or degree that one would expect to find in that locality, reasonable use should not be a valid defense.

In *Botsch*, defendants' feedlot was located in the worst possible location vis-à-vis plaintiffs' farmstead. The feedlot and lagoons were located directly across the road from and to the south of plaintiffs' residence.[53] In eastern Nebraska, the prevailing summer winds are from a southerly direction.[54] Furthermore, when lots

47. 195 Neb. at 518, 239 N.W.2d at 487.
48. *Id.* at 514, 239 N.W.2d at 485, *citing* City of Syracuse v. Farmers Elevator, Inc., 182 Neb. 783, 157 N.W.2d 394 (1968), and Sarraillon v. Stevenson, 153 Neb. 182, 43 N.W.2d 509 (1950).
49. 153 Neb. 182, 43 N.W.2d 509 (1950).
50. *Id.* at 188, 43 N.W.2d at 485.
51. 195 Neb. at 514, 239 N.W.2d at 485.
52. St. Helen's Smelting Co. v. Tipping, 11 Eng. Rep. 642 (H.L. 1865).
53. 195 Neb. at 510-11, 239 N.W.2d at 483.
54. *See* ENVIRONMENTAL SERVICES ADMINISTRATION, U.S. DEP'T OF COMMERCE, SELECTED CLIMATIC MAPS OF THE UNITED STATES (1966).

were operated at capacity, the lagoons complained of could collect waste material from nearly 5,000 head of cattle.[55] Thus, the location of defendants' feedlot and lagoons tended to maximize the conflict between the parties. Under such circumstances, the location of defendants' feedlot was improper and the feedlot constituted a private nuisance irrespective of the degree of care used in operating and maintaining the lot once it was constructed, and notwithstanding the fact that the feedlot was located in a rural area. Although only 300 head of cattle were being fed in defendants' lots,[56] the majority correctly recognized that the potential for larger operations remained and thus, the essential nature of the case did not change.[57]

Defendants, however, could have argued that if feeding cattle in a rural area can be unreasonable conduct absent any showing of negligence or improper conduct in the maintenance or operation of the feedlot, then there is no place where large feedlots could exist. Such an argument would be specious, in that large feedlots can be located in rural areas provided they are located so as not to constitute a nuisance. At a minimum this means not locating large feedlots adjacent to neighboring residences. It also may mean that feedlots which, by virtue of their size, have significant odor, flies, and dust problems may be required to maintain a buffer zone between their feedlot and adjoining property. Such a buffer zone could be in the form of an actual fee interest in property or perhaps in the form of foul air easements. While rural residents may never be completely insulated from feedlot odor, the interference should be reducible to a level where it is one of the expected incidents of rural life.

A legal system which recognizes the nuisance potential of feedlots in rural areas would, of course, result in higher costs to large cattle feeders than a system which immunized rural feedlots from nuisance suits. Such a result is economically desirable. A basic principle of economics is that those who receive the benefits of production should be required to bear the full costs of that production.[58] To the extent that feedlots are immunized from nuisance suits because of their rural location alone, feedlot neighbors in effect subsidize the feedlot operation by bearing part of the costs of production in the form of inconvenience, discomfort, and declin-

55. 195 Neb. at 510-11, 239 N.W.2d at 483. The lagoons drained the Land Company's 3,750 head lot and an adjoining 1,100 head lot.
56. 195 Neb. 54, 59, 236 N.W.2d 815, 818 (1975).
57. 195 Neb. at 514, 239 N.W.2d at 485. *Cf., e.g.*, Cumberland Torpedo Co. v. Gaines, 201 Ky. 88, 255 S.W. 1046 (1923).
58. For a nontechnical discussion by a noted British economist of the theory behind what are referred to as externalities, or spill-over effects see E. MISHAN, TECHNOLOGY AND GROWTH (1969).

ing property value. Professor Coase notwithstanding,[59] the consequence of such a rule would be to skew the production of cattle into larger lots than would be economically optimal. The *Botsch* decision avoids such an uneconomic result by clearly rejecting the notion that a feedlot operating in a rural area cannot be denominated a nuisance and enjoined.[60] It is important to recognize that the court does not thereby strike a balance against an adequate supply of beef. Rather, it strikes a balance between competing property interests such that adequate beef supplies will be produced without imposition of undue burdens on feedlot neighbors.

Finally, defendants in *Botsch* could have argued that they had a prescriptive or grandfather right to feed cattle in their present location. In dissenting to the first *Botsch* decision, Judge McCown stated that cattle had been kept in the area used by defendants' feedlots for approximately 90 years and that there were approximately 1100 head of cattle on feed there as early as 1946. Further, two of the dams had been constructed more than 20 years prior to trial with the other two added in 1969.[61] The issue before the court, however, was whether plaintiff had stated a case of prima facie nuisance. Such historical facts were, therefore, irrelevant because a prima facie case of private nuisance depends solely on the substantial nature of defendants' interference with the use and enjoyment of plaintiffs' property, at least where the underlying conduct was intentional.[62] Nevertheless, priority of location may have some relevance as an element of defense.

In general, however, there is no prescriptive right to maintain a nuisance.[63] Nor is there any grandfather right to continue a livestock operation in its present location.[64] While this is especially true when the character of the area changes as where a feedlot is absorbed by an expanding municipality,[65] the principle should be equally applicable whenever a previously lawful activity becomes a nuisance. Nevertheless, priority of location may be of some importance in deciding on an appropriate remedy. One should not, for instance, be able to disregard the location of a preexisting feedlot when locating a farmstead and then seek to enjoin operation

59. *See* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), wherein Professor Coase argues that under certain highly restrictive conditions, an optimal resource use pattern can develop through exchange, irrespective of how legal rights are initially assigned.
60. 195 Neb. at 514-15, 239 N.W.2d at 485-86.
61. 195 Neb. 54, 58-59, 236 N.W.2d 815, 818 (1975).
62. *See* Section III *supra*.
63. *See* note 50 and accompanying text *supra*
64. City of Lyons v. Betts, 184 Neb. 746, 171 N.W.2d 792 (1969).
65. *See generally, e.g., id.*

of the feedlot in a court applying equity principles.[66] Assuming suitable alternative sites are available, a plaintiff should arguably have some burden to locate his farmstead so as to minimize conflicts with preexisting livestock operations. Evaluating priority of location is, however, complicated by the fact that while small or moderately sized livestock operations may be compatible with closely adjoining farmsteads, a larger operation may not be. A farmstead might be located near an existing small livestock operation without conflict. A subsequent increase in the size of the feedlot may, however, cause it to become a nuisance. Thus, the historical perspective of priority in a location may be of less value to a court than it might initially appear. Ultimately, such an inquiry is important only as it relates to a plaintiff's role in the conflict, that is, did the plaintiff increase or mitigate his damages by his own conduct. In any event, while priority of location ultimately may be useful in resolving the *Botsch* conflict, particularly as it relates to the choice of remedies if a nuisance is ultimately found, clearly such an historical perspective does not bear on the substantive question of whether or not a nuisance exists.

V. CONCLUSION

In *Botsch*, the Nebraska Supreme Court correctly held that evidence of odors, dust, and flies from a feedlot is sufficient to constitute a prima facie case of nuisance where the evidence indicated that there was a substantial interference with plaintiffs' use and enjoyment of their property. Unfortunately, the opinion did little to clarify the confusing area of private nuisance law. In fact, much of the opinion adds to the confusion currently surrounding the distinction between public and private nuisance. The holding of the court and much of the language of the opinion does indicate, however, that the majority correctly perceived the nature of the conflicting property interests. One can only hope that if the court again is given the chance to rule on the *Botsch* facts after the district court reaches a final decision on the merits, it will use the opportunity to clarify the Nebraska law of private nuisance.

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66. *Cf.* Carrol Springs Distilling Co. v. Schepfe, 111 Md. 420, 74 A. 828 (1909); Baltimore & S.P.R.R. v. Hackett, 87 Md. 224, 39 A. 510 (1898). *But cf.* American Smelting & Refining Co. v. Riverside Dairy & Stock Farm, 236 F. 510 (9th Cir. 1916) (not required to shut down business where smelter smoke damages crops); Champa v. Washington Compressed Gas Co., 146 Wash. 190, 262 P. 228 (1927) (not required to move away from an operating gas plant).