COMMON SCENTS: AN ANALYSIS OF THE LAW OF
FEED LOT ODOR CONTROL

DENIS P. BURKE*

INTRODUCTION

The coexistence of feed lots and private residences in the same area has caused disputes over feed lot odors for years. The problem has intensified as our population has grown and the boundaries of our cities and towns have pushed out into what had been exclusively agricultural areas. Further compounding the problem has been the tendency towards larger scale, concentrated animal feeding operations due to perceived economies of scale and increased profitability. Conflicts have arisen even in rural areas between feed lot operators and other farmers and feed lot operators who live nearby.

On a societal level this conflict raises issues of land use planning: How are we going to allocate our resources between residential and agricultural purposes? On an individual level the issue is whether we will let a person use his land in pursuits which are necessary but which in a particular location may interfere with the use and enjoyment of other landowners of their property. This analysis does not attempt to resolve these problems of land use allocation and property rights. Rather it is an attempt to examine how our society, through its legal system, has responded to the problem, what rules have been developed, and what concepts have been employed to resolve the conflict. Such a review of the present law also suggests further questions about how we should respond to the problem in the future.

At present the problem is largely governed by court-made rules as to what constitutes a "nuisance." This common law concept

---


1. Feed lot odors are regulated by state and local law. This is a subject which the federal government has left open to varying responses and solutions by each local area. Consequently this analysis of the state of the law is divided into three parts: Nebraska, Iowa, and other states.

Within each state there are a number of bodies which make the rules which apply in that jurisdiction. Traditionally, of course, the legislature makes the law, the judicial branch interprets it, and the executive branch enforces it. However, the courts and executive agencies have had a sub-
developed from a distinction in the thirteenth century between the “assize of novel disseisen” which offered a remedy for interference with one’s possession of land and the “assize of nuisance” which protected one’s interest in its enjoyment and use. During the nineteenth century most areas of tort law underwent a transition to principles of fault. However, nuisance law has remained an area of liability without fault or negligence. The concept was embodied in the Latin maxim sic utere tuo ut alienum non laedas; one must use his property reasonably so as not to unreasonably interfere with another’s use of his property. This involves a judicial balancing of the reasonableness of the defendant’s use of his property and the unreasonableness of the harm to the plaintiff. Prosser facetiously points to an ancient case saying that “[1]e utility del chose excusera le noisomeness del stink” to illustrate that some uses of one’s property may be important enough to society to justify some interference with others’ use and enjoyment of their property.

In some jurisdictions, such as Iowa, the legislature has reasserted its lawmaking role by making special rules for feed lot odor suits. These rules supersede the case by case judicial approach. In some jurisdictions, executive departments charged by the legislature with protecting air quality have used this mandate to develop rules and procedures for handling odor disputes. As will be seen from what follows, these legislative and agency responses to the problem, as well as that of the courts in some cases, are still evolving in an uncertain attempt to balance the conflicting interests involved.

NEBRASKA APPROACH TO ODOR CONTROL

STATUTORY BACKGROUND

Although until recently the Nebraska statutes did not deal specifically with feed lot odor control, they have always provided substantial role in making, as well as clarifying and enforcing, the law of feed lot odor control. Therefore, each section is subdivided into three sections to examine the response of each branch of government to the problem. While the legislature has the ultimate authority within each jurisdiction to make the law, the response of the courts or agencies is often more important since the legislature often passes very general nuisance statutes, leaving the rulemaking function to them by default.

4. On February 17, 1977 the Nebraska legislature passed a bill (L.B. 132), proposed by the Department of Environmental Control and approved by the Agriculture and Environment Committee, to amend NEB. REV. STAT. § 81-1506 (Reissue 1976) of the Nebraska Environmental Protection Act.
a framework for regulation. Rather than trying independently to define what is legal and what is not, the legislature adopted the common law concept of nuisance:

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

In addition to the nuisance statute, there is also the Environmental Protection Act which prohibits air, water, and other forms of pollution. The Act declares that it is the public policy of Nebraska “[t]o achieve and maintain such a reasonable degree of pu-

The amendment provides that employment of reasonable techniques to minimize dust, noise, insects, and odor, and compliance with applicable regulations of the Environmental Control Council and local zoning requirements, will constitute prima facie evidence that a livestock operation is not a nuisance if the feedlot operator was in business before the complaining party moved into the area. For the prima facie defense to be available, the defendant would also have to show that he has an appropriate permit (NPDES) from the department for his operation or that an on-site inspection by the department revealed that none was required.

Unlike the Iowa statute, which provides an absolute defense, this statute only changes the burden of proof. It provides that:

It shall be prima facie evidence that a livestock operation is not a nuisance if:

(i) Reasonable techniques are employed to keep dust, noise, insects, and odor at a minimum;

(ii) It is in compliance with applicable regulations adopted by the council and zoning regulations of the local governing body having jurisdiction; and

(iii) The action is brought by or on behalf of a person whose date of lawful possession of the land claimed to be affected by a livestock operation is subsequent either to the issuance of an appropriate permit by the department for such operation, or to the operation of the feedlot and an on-site inspection by the department is made, before or after filing of the suit, and the inspection reveals that no permit is required for such operation.

5. Neb. Rev. Stat. § 28-1016 (Reissue 1975). The effect of this statute is to make a common law nuisance a crime. See, e.g., State v. DeWolfe, 67 Neb. 321, 93 N.W. 746 (1903). The statute forbids the maintenance of a nuisance whether in or out of municipal limits. See City of Lyons v. Betts, 184 Neb. 746, 748-49, 171 N.W.2d 792, 793 (1969). Since the nuisance is made criminal, however, it can be enforced by both the government and by the private parties affected by it.

rity of the natural atmosphere of this state that human beings and all other animals and plants which are indigenous to this state will flourish in approximately the same balance as they have in recent history."

This Act established the Department of Environmental Control. The Department is charged with enforcing the prohibitions of the Act, which include the declaration that

1. It shall be unlawful for any person:
   a. To cause pollution of any air, waters or land of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of any air, waters or land of the state; or
   b. To discharge or emit any wastes into any air, waters or land of the state which reduce the quality of such air, waters or land below the air, water or land quality standards established therefor by the [Environmental Control] Council. Any such action is hereby declared to be a public nuisance.

Thus the statute prohibits pollution without specifically defining what acts are forbidden. Definition is left largely to the courts and administrative agencies.

**Case Law**

**Nuisance**

The concept of nuisance was created by the courts to limit conduct or the use of property which interferes with other persons nearby. If the conduct or use is unreasonable, and if it produces material annoyance, inconvenience or discomfort in another, it may be enjoined in equity as a nuisance, and the plaintiff may recover damages.

The Nebraska Supreme Court stated in 1908 in *Francisco v. Furry* that odors from feed lots can constitute a nuisance. The court has also made it clear that property rights are not absolute and that the permitted use of one's property is limited by its effect on the neighbors:

---

7. NEB. REV. STAT. § 81-1501(2) (Reissue 1976).
10. NEB. REV. STAT. § 81-1506 (Reissue 1976).
12. 82 Neb. 754, 118 N.W. 1102 (1908).
13. Id. at 756, 118 N.W. at 1103. The court noted that: [t]he corruption of the atmosphere by the exercise of any trade
Generally, an owner of property has a right to make any use of it he sees fit. It is only where his use prevents his neighbors from enjoyment of their property to their damage that an owner’s use may be restricted.

It has been a settled rule of this country and of England that a man had no right to maintain a structure on his own land which made that of his neighbor dangerous, intolerable, or uninhabitable.14

The court also sketched three elements necessary to prove the existence of an odor nuisance which may be enjoined: (1) noxious odors; (2) which result in material injury to the property and the personal comfort; (3) of persons in the immediate vicinity.15

It is clear that the party complaining of a nuisance has the burden of proving its existence.16 What is not clear is what the plaintiff must prove. What constitutes a nuisance?

The cases are replete with statements that each case must be determined on its own facts.17 The question of whether an odor is so noxious as to injure, materially, a person in the vicinity is a matter of degree not readily quantifiable.18 The Nebraska court has made an attempt to define when odors give rise to a nuisance by stating the “ordinary olfactory test” which provides that “[f]or odors to be a nuisance, they must be such as offend the olfactories of an ordinary man, and not those of an individual with sensitive and delicate nostrils.”19

or by any use of property that impregnates it with noisome stenches has ever been regarded as among the worst class of nuisances. 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 [a] thickly settled district[ ]

Id. at 755-56, 118 N.W. at 1102-03.
15. Id. at 421, 113 N.W.2d at 523.
17. For example, the court has often used a formula like that developed in Prauner: “There is no arbitrary rule governing cases of this class. Each case must be determined by the facts and circumstances developed therein.” 173 Neb. at 418, 113 N.W.2d at 522. See also, Beisel v. Crosby, 104 Neb. 643, 178 N.W. 272 (1920); Sarraillon v. Stephenson, 153 Neb. 182, 43 N.W.2d 509 (1950).
18. See note 55 infra.
19. Prauner at 421, 113 N.W.2d at 524.
Confusion with Negligence

Nuisance and negligence are distinct concepts. Although they may coexist since the same act or omission may constitute negligence and also give rise to a nuisance, a nuisance can exist without any negligence on the part of the defendant. Nuisance is a condition whereas negligence is conduct. A business can constitute a nuisance even though it is operated properly and with due care. A feed lot built in the midst of a residential area might constitute a nuisance even though operated as cleanly and efficiently as feed lots can be operated. On the other hand, negligence means that the feed lot has not been operated properly and that it is more odorous than it should be, due to improper maintenance. Thus, such a business becomes a nuisance either because it is operated negligently so as to become excessively bothersome to neighbors, or because it is located in the wrong place, even though it would not be a nuisance if located elsewhere.

Despite this distinction, the Nebraska Supreme Court has confused the two concepts. The origin of this confusion can be traced to Francisco, where the court said, "[a] feeding yard is not necessarily a nuisance, and it becomes such only by being improperly maintained or conducted" [emphasis added]. Thus, the court, wishing to limit the use of injunctions to prohibit feed lot operations, engrafted the requirement of negligence onto the elements necessary to prove the existence of a nuisance and ignored the relevance of location. This probably did more to limit the cause of action for nuisance than the court really intended. Under this limitation a feed lot, if properly operated, could be located anywhere with impunity.

In 1943, the Nebraska Supreme Court reaffirmed, in dicta, its belief that negligence was a necessary element of a nuisance cause of action. The court further indicated that if due care were exercised, there would be no nuisance:

As one man's enjoyment of property must be considered in connection with the reasonable and lawful use of other property by his neighbors, where pigs are raised under conditions as clean and sanitary as can reasonably be obtained, considering the characteristics of the animal and the necessity of confinement to close quarters, the fact that odors from these quarters are carried over the premises of the summer residence of another will not make an actionable nuisance.

21. 82 Neb. at 756, 118 N.W. at 1103.
22. Vana v. Grain Belt Supply Co., 143 Neb. 118, 123-24, 10 N.W.2d
Subsequently, the Nebraska court in the 1950 case, *Sarraillon v. Stevenson*, 23 recognized the distinction between negligence and nuisance. It held that a showing of due care on the part of a feed lot operator was not a defense to a cause of action sounding in nuisance, thus implying that negligence is not a necessary element of a nuisance cause of action. The court stated:

The exercise of due care by the owner of a business in its operation does not constitute a defense to an action to enjoin its operation as a nuisance where notwithstanding such care the business as conducted seriously disturbs persons of normal and ordinary sensibilities in the comfort, use, and enjoyment of their homes and interferes with their property rights. 24

This constituted a complete turn around from the prior cases which had allowed such a defense and required negligence, bringing Nebraska law into conformity with that of other jurisdictions. 25

Finally, in an apparent attempt to reconcile the two lines of reasoning previously developed, the court, by deciding *Botsch v. Leigh Land Co.*, 26 instead left the issue hopelessly confused. This case arose when a farmer brought suit seeking an injunction and damages against the defendant operators of a feedlot located directly across the road from plaintiff's home. 27 In reversing the district court's finding that a nuisance did not exist as a matter of law absent a showing of negligent or improper operation, the Nebraska Supreme Court properly held, in accordance with *Sarraillon*, that negligence is not a necessary element. 28

23. 153 Neb. 182, 43 N.W.2d 509 (1950).  
24. *Id.* at 190, 43 N.W.2d at 514. The court further noted:  
Where the business casts off noxious and unwholesome odors, in fact annoying to and impairing the comfort of adjoining property owners, it is no defense to say that it was conducted in a reasonable and proper manner, and that the odors emanating therefrom were such as are ordinarily incident to the business when properly conducted.  
*Id.* at 191.  
25. See notes 102, 203, and 209 infra.  
27. The trial court originally held that a nuisance did not exist as a matter of law. The initial appeal was argued before four Justices of the Nebraska Supreme Court and a retired District Judge, who found that a nuisance did exist in fact. 195 Neb. 54, 236 N.W.2d 815 (1975). Later, this opinion was withdrawn and on rehearing before all seven Justices, the court remanded the case to the district court for a determination whether a nuisance in fact existed after defendants had an opportunity to present evidence to rebut plaintiff's prima facie case. 195 Neb. 509, 517, 239 N.W.2d 481, 487 (1976).  
28. *Id.* at 512, 239 N.W.2d at 484.
The court, however, was evidently still searching for some way to limit such suits. Apparently the court did not want to prohibit feed lot operations absent negligence. In a part of the decision which did not appear in the original version the court made the incredible statement, not that negligence is necessary to prove nuisance, but that nuisance proves negligence: "Proof of the existence of a nuisance establishes that the business has been operated negligently or improperly."  

The court offered no authorities in support of this startling proposition. In fact, the court immediately contradicted itself by reasserting its holding in *Sarraillon* that "[t]he exercise of due care by the owner of a business is not a defense to an action to enjoin its operation as a nuisance." The court's statement that a nuisance proves the existence of negligence implies that the absence of negligence (due care) would prove the nonexistence of a nuisance. This conclusion, however, contradicts the court's second statement.  

---

29. *Id.* at 514, 239 N.W.2d at 485.
30. *Id*.
31. It is argued in Note, *Private Nuisance: An Application to Feedlots in a Rural Area*, 55 Neb. L. Rev. 883, 891 (1976), that although the Botsch opinion is confusing, these two statements are not really contradictory. The statements are illustrated below with the reasoning expressed in symbolic logic on the right.

"Proof of the existence of a nuisance establishes that the business has been operated negligently or improperly."  

Let \( p \) represent the existence of a nuisance.

Let \( q \) represent the existence of negligence.

Then the court is saying if there is a nuisance then there is negligence.

"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."

The exercise of due care is the non-existence of negligence or not \( q \).

Thus, the court is saying that it is not true that the non-existence of negligence proves the non-existence of a nuisance.

If as the court says nuisance proves negligence,

Then it is impossible that there be a nuisance without negligence,
There are two ways of making sense out of the court’s holding. One is to simply disregard the statement that proof of a nuisance proves negligent operation. Such a result is desirable in that it would reconcile Nebraska law with that of other states. The problem is that it rewrites the decision and assumes that the court mis-spoke itself.

The other way to reconcile the two statements is to assume that the reason that due care is not a nuisance defense is that the existence of a nuisance raises a conclusive presumption of negligence so that the defendant cannot introduce evidence of due care. Assuming that a cattle feed lot can be operated without negligence, saying that nuisance conclusively implies negligence is equivalent to saying that a feed lot can be operated without causing a nuisance.

And the non-existence of negligence proves the non-existence of a nuisance.

But the court also said that it is not true that non-existence of negligence proves the non-existence of a nuisance. (Contradiction)

The author tries to avoid the contradiction by saying that the court is not saying that the existence of a nuisance establishes the existence of negligent conduct (number 4). He distinguishes between “negligent operation” and “improper operation”. There is indeed a distinction in that “improper operation” could include intentionally improper operation as well as “negligent operation”. Most continuing nuisances probably result from intentional rather than negligent conduct since, as the author correctly points out, failure to abate a nuisance of which one is aware is an intentional act. Id. at 690. However, such a nuisance is based on intentional conduct only upon the assumption that the critical event is the operation of the feed lot and not the original siting decision. Nevertheless, the contradiction remains. The existence of a nuisance proves neither the existence of negligent operation nor that the feed lot was operated intentionally in an improper manner. The nuisance may result from the location of a feed lot which is operated properly.

Thus the author goes further and argues that the court may mean that the existence of a nuisance “implies that the conduct, if not negligent, was at least improper in the sense that it is improper to cause a nuisance”. (page 691) However, this interpretation both distorts the phrase “operated improperly” by applying it to feed lots operated properly but located improperly and reduces the court's statement to a tautology. If “operated improperly” means operated as a nuisance, then the court is saying that proof of the existence of a nuisance establishes that the business has been operated as a nuisance.
As Justices McCown and White pointed out in their dissent, there is no foundation for taking judicial notice that a cattle feeding operation can be conducted without excessive odors and flies. One would not want to argue that such an operation could be conducted in the midst of a residential district without causing a nuisance, yet that is the conclusion to be drawn from the court's reasoning.

**Location of an Operation in Determining Nuisance**

One factor underlying most court decisions on nuisances, though not always articulated, is the location of the malodorous or otherwise offensive operation. As the United States Supreme Court has stated, "[a] nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." The court went on to hold, however, that "[e]ven in an industrial or rural area one cannot conduct a business enterprise in such manner as to materially prejudice a neighbor." The court pointed out that the Nebraska statutes do not distinguish between rural and urban areas but prohibit the generation of conditions injurious to the health, comfort, or property of individuals or the public. The location of a residence in a rural area does not mean that it can be subjected to "excessive abuse" which destroys the ability to live in and enjoy the home or reduces the value of the neighboring property. A rural location merely raises the expectation of normal rural conditions.

The Nebraska court referred to *Baldwin v. McClendon*, which pointed out that in determining whether odors emanating from a hog raising operation constituted a nuisance, rural location is one factor to be considered. Other factors include: (1) the proximity

---

32. 195 Neb. at 518, 239 N.W.2d at 487.
34. *Botsch* at 514, 239 N.W.2d at 485. The court quoted from *Sarraillon* that:
   [a] legitimate industry is generally not a nuisance, but it may become a nuisance in fact by reason of the manner of its operation and conditions implicit in and that unavoidably result from its operation, especially in a residential or other closely occupied area [emphasis added].

*Id.*
35. *Id.* at 514-15, 239 N.W.2d at 485.
36. *Id.* at 516, 239 N.W.2d at 486.
37. *Id.* at 515, 239 N.W.2d at 486 (citing 288 So.2d 761 ( Ala. 1974)).
of the operation to the neighbor's home, (2) the intensity and volume of the odors, (3) the interference with the neighbor's well-being and his enjoyment of his home, and (4) any consequential depreciation in the value of the home. Thus, although the court recognizes the relevance of location, it plays down its importance as a limiting factor on suits to enjoin odor nuisances.

In the animal odor cases preceding Botsch, location near a residential area was always a significant factor. The feed yard in Francisco was "on block 19, in Gage's addition to the city of Franklin" and was "adjacent to a thickly settled part of the city . . . ."38 In Sarraillon, which involved the slaughter as well as the keeping of animals, the court said:

The courts will not, where these conditions exist, permit such operations to continue in districts where people have their homes or where they are compelled to congregate in pursuit of their ordinary avocations, nor on such a restricted area that their operation must of necessity render materially less valuable to their owners abutting and adjacent property. . . . The area where the plant here in question is located is essentially residential.39

City of Lyons v. Betts40 established that the power of a city to maintain an equity action to enjoin a nuisance extends outside the corporate limits of the municipality.41 The court noted, however, that the property was within the city limits at the time of the suit and the court pointed out the presence of residences in the vicinity.42

Yet in Botsch the court noted that plaintiffs' farmhouse was located to the north directly across the road from the defendants' operation43 but did not mention the fact that both, by plaintiffs' admission in interrogatories, were in a rural area five and three-fourths miles from the nearest town. Nor was the majority impressed by the fact that there were several other feed lots in the immediate area, and that plaintiffs themselves ran a cattle feeding operation.44

The court could be doing one of two things, assuming it is not

38. Francisco at 754, 118 N.W. at 1102.
39. 153 Neb. at 190, 43 N.W.2d at 514.
40. 184 Neb. 746, 171 N.W.2d 792.
41. The court interpreted Neb. Rev. Stat. § 17-123 (Reissue 1974) to allow a city of the second class to enjoin a nuisance maintained outside the corporate limits. 184 Neb. at 749, 171 N.W.2d at 793.
42. Id. at 749, 171 N.W.2d at 794.
43. 193 Neb. at 510, 239 N.W.2d at 483.
banning all concentrated feeding operations. It may be expanding the concept of what is the “wrong place” to run a feed lot to include not just residential districts but areas adjacent to rural farmhouses. Feed lots would have to be located in rural areas remote from human habitation, at least if they are larger than others in the vicinity. Alternatively, the court may be saying that a feed lot cannot be operated negligently so as to cause more odor than necessary and thereby materially prejudice a neighbor. Perhaps the court could more effectively limit odor nuisance suits by applying the traditional nuisance criteria rather than confused notions of negligence.

**Priority of Use**

Another limitation on the right to enjoin an odor nuisance may be the doctrine of *prius in tempore, potior est in jure*. Fairness seems to require some consideration of “who got there first.”

A case involving an ammonia plant nuisance draws an analogy to the concept of a preexisting use in zoning law.

To obtain a vested interest in a nonconforming use, a person, prior to the effective date of the regulation or ordinance making such use nonconforming and while violating no existing law or regulation, must cause either substantial construction to be made thereon or incur substantial liabilities relating directly thereto, or both.\(^4\) Thus, the interest which should be protected is the detrimental reliance of the defendant on the conditions that exist at the time he commences his activity.

In *City of Lyons* the court made the broad statement that “[o]rdinarily a property owner does not have and cannot acquire a vested right, or a constitutional privilege, to maintain a nuisance.”\(^46\) However, the right to maintain a public nuisance may be acquired against a private individual who has acquiesced in the nuisance or delayed in asserting his rights.\(^47\)

A further question is whether an activity which is not a nuisance if carried on in a rural area can become a nuisance because it interferes with persons who later move into the area.\(^48\) This tem-

46. 184 Neb. at 749, 171 N.W.2d at 794.
47. 66 C.J.S. *Nuisances* § 90 (1950).
48. The change in the character of an area from a rural to a residential environment can cause a reasonable use to become unreasonable. See Pen-
poral priority is an underlying rationale in many of the cases. For example, the Nebraska court noted, while upholding an injunction in Sarraillon, that, "[t]his area is, and for many years before any of the acts of appellants complained of herein, was a residential area and is classified as such in the last zoning ordinance of the city" [emphasis added].\textsuperscript{49} The court also stated that "[a] proprietor cannot be permitted to convert his property into a nuisance to the detriment of other nearby proprietors."\textsuperscript{50} The negative implication is that a proprietor will be permitted to continue the use of his property if it becomes a nuisance not through a change in his use of it, but by the subsequent approach of others.

\textit{City of Lyons} qualifies this "grandfather right" noting that:

Defendants contend that they have what is sometimes referred to as a "grandfather right" to continue to operate their livestock business at its present location. It may be pointed out that the city of Lyons was in existence long before defendants commenced operations and the evidence shows that many of the homes and businesses were in the area prior to the institution of the defendants' confinement feeding system. Were "grandfather rights" to be recognized under such circumstances, the orderly growth of all municipal corporations would be jeopardized.\textsuperscript{51}

Far from abolishing the concept of "grandfather rights," the court seems to be applying the doctrine and finding that the city, rather than the feed lot operator, was there first. One qualification seems to be that the time of priority of a city accrues when the city is founded and applies not just to the area which the city then occupies, but to areas to which it subsequently expands. This would protect cities' ability to grow.

Considerations of time priority, however, are completely absent from the majority opinion in \textit{Botsch}. The defendants had alleged in their answer that they had been engaged in cattle feeding operations on the property for fifteen years,\textsuperscript{52} and the dissent, on first

\begin{flushleft}
\footnotesize
\begin{itemize}
\item However, the defendant may have made significant investments in his land for use as a feed lot at a time when such a use was reasonable. A plaintiff's knowledge of a preexisting nuisance and the payment of a lower price based on it do not necessarily bar recovery but are relevant in determining whether the defendant's use of his property is reasonable. See Patton v. The Westwood Country Club, Co., 18 Ohio App. 2d 137, 247 N.E.2d 761, 42 A.L.R.3d 337 (1969).
\item 49. Sarraillon at 184, 43 N.W.2d at 511.
\item 50. \textit{Id.} at 190, 43 N.W.2d at 514.
\item 51. \textit{City of Lyons} at 749, 171 N.W.2d at 794.
\end{itemize}
\end{flushleft}
hearing, noted that cattle had been kept on the feed lots for ninety years prior to the litigation. In answer to the defendants' interrogatories the plaintiffs stated that they purchased their adjoining land thirty years ago, at which time cattle were being fed on the defendants' land. Thus, the defendants' property which was causing the alleged nuisance was being used as a feed lot when the plaintiffs moved into the area. The majority opinion did not deal with this issue.

Remedy

On removal of the Botsch case, the district court found that as a matter of fact a nuisance did exist. This does not mean, however, that defendants should be enjoined from feeding cattle. In Francisco the court stated that the injunction should prohibit conducting the business in such a manner as to make it a nuisance, but should not prohibit the feeding of cattle per se unless it was shown that the yard could not be maintained as a feeding yard without becoming a nuisance. The court held that the remedy should not go beyond enjoining the nuisance and should not attempt to limit the amount of time for which defendants could use their lot for keeping cattle or hogs, or the number of animals which could be kept.

The court in Botsch seems to agree with this limitation of the remedy, finding that a court should initially require that the cause of the grievance be corrected and that the conduct of the enterprise itself should be enjoined only after it is proven that no technique can remedy the nuisance. The court, however, then seemed to shift the burden of proof from the plaintiff to the defendant before applying this limited remedy, holding that

if a nuisance is finally established but it is shown that the nuisance-creating factors may be dispensed with by enlarging or otherwise handling the lagoons, removing manure or other means, then the nuisance only but not the feeding business would be subject to injunction.

The court says that it must be shown that the nuisance can be

55. Francisco at 756, 118 N.W. at 1103.
56. Id.
57. Botsch at 517, 239 N.W.2d at 486-87.
58. Id. at 517, 239 N.W.2d at 487.
avoided without abandoning the feeding business, not that the nuisance cannot be avoided by remedies short of prohibiting all feeding. Evidently, if a nuisance is shown, the defendant must show that he can continue to run his feed yard in a different manner which will not harm the plaintiff or he will be prohibited from operating it at all. It is not clear that the court really wanted to change the law in this regard. Formerly, the court would merely have prohibited the defendant from harming the plaintiff by maintaining a nuisance. The court would prohibit the defendant's feeding operation itself only if the plaintiff proved to the court that the operations would continue to be a nuisance no matter how the defendant conducted them.

Regulations

The Nebraska Environmental Protection Act makes it the responsibility of the Department of Environmental Control to prevent pollution of the air, land, and water.\(^{59}\) Feed lot odor control is handled by the Agricultural Pollution Control Division.\(^{60}\) This administrative agency provides an alternate enforcement procedure rather than any new substantive regulations. Because of the lack of technology to quantify what odors are objectionable,\(^{61}\) it applies

\(^{59}\) NEB. REV. STAT. § 81-1504 (Reissue 1976).
\(^{60}\) NEB. REV. STAT. § 81-1504(14) (Reissue 1976).
\(^{61}\) For a listing and an appraisal of the various technological developments in odor evaluation, see Recker, Animal Feeding Factories and the Environment: A Summary of Feedlot Pollution, Feedlot Controls, and Oklahoma Law, 30 Sw. L.J. 556, at 558, 567-68 (1976), which relates that:

Current techniques do not permit an accurate measurement of either odor intensity or odor quality since the extremely sensitive human olfactory senses can detect and identify odors at levels far lower than the levels capable of detection by the best instruments currently available. At present there are five basic approaches to odor measurement:

1. Identification of odorous gases (chromatograph)
2. Measurement of odorant concentrations (wet chemistry and correlation)
3. Measurement of odor intensity by vapor dilution (scentometer)
4. Measurement of odor intensity by liquid dilution (laboratory procedures)
5. Ranking of odor intensities by arbitrary offensiveness scales.

None of these approaches has been entirely satisfactory. The first and second methods merely identify the presence of odor-producing gases and measure their concentrations, but do not measure the intensity or quality of the odor. The third, fourth, and fifth methods of odor measurement are organoleptic in nature and utilize the human nose as the detector. The problem with these methods is primarily the lack of objectivity: each individual will have varying impressions and sensitivities as to what constitutes an objectionable
nuisance law concepts such as the proximity of the feed lot to residences. Neither the Department nor the Environmental Control Council have come up with substantive air quality standards for odors. As an official at the Division put it, "what smells like a nuisance to one man smells like money in the bank to another."

The Division has not instigated a systematic odor check of all Nebraska feed lots. Instead it acts upon the voluntary request of a feed lot operator or the complaint of an injured party.

It is not clear that the Division has the statutory authority to regulate odors directly since, unlike other state environmental protection acts such as Iowa's, the definition of "air contaminant" and consequently of "air pollution" does not include "odorous substances." Nevertheless, the Division regulates feed lot odors indirectly by enforcing feed lot management practices which reduce odors. When there is a justified complaint, the Division sets out management procedures to help control odors and tries to engineer an amicable settlement. If the feed lot operator does not cooperate and the Division feels a nuisance exists, it can institute an administrative hearing to compel compliance, with ultimate appeal to the courts under the Administrative Procedure Act.

**SUMMARY**

Feed lot odor in Nebraska is governed by nuisance law. Enforcement may be through private civil litigation, through criminal odor. The two most popular methods of odor detection and measurement are the third method, vapor dilution, and the fourth method, liquid dilution. In brief, vapor dilution is a method of measuring odor intensities expressed as dilutions to threshold (Dt). This is defined as the number of times that odorous air must be diluted with odor-free air to reach the point where the odor is barely perceptible. Two commercially available vapor dilution devices are the scentometer and the dynamic olfactometer, both of which operate on the principle of blending odorous and non-odorous gas streams at known ratios. Several states have enacted odor intensity standards based on vapor dilution measurements of odors. Liquid dilution of odor intensity involves diluting an odorous liquid or solid substance with odor-free water until the odor threshold is reached. Although this method is usually precise and repeatable, its value rests on the necessary assumption that odors emitted by the diluted waste material in the laboratory are representative of odors emitted under field conditions.

63. See Neb. Rev. Stat. §§ 81-1507, -1509 (Reissue 1976). The Division inspected the feed lot involved in the Botsch case in 1973 and 1974. No odor nuisance conditions were observed at these times. Consequently, the suit was brought in court by a private party rather than through administrative action.
prosecution, or through administrative action by the Agricultural Pollution Control Division of the Department of Environmental Control.

The substantive law of nuisance has developed through case law. The basic standard is whether the odor produces material injury to the property or personal comfort of another. Each case must be judged on its own facts as to whether the odor is offensive to the olfactories of an ordinary man.

There are three factors which are relevant in determining whether such a nuisance exists. One basis for a nuisance suit is if the defendant has operated his feed lot negligently, causing more odor emission than necessary.

Formerly, the Nebraska Supreme Court had said that this is the only basis. Now the court has apparently abandoned this position, adopting instead the confusing statement that the existence of a nuisance proves the feed lot was operated negligently. A second basis for an odor nuisance suit is the location of the defendant’s feed lot. Even if the defendant is operating his lot in as careful and proper a manner as is reasonably possible, it may constitute a nuisance if it is located near a residential area. Thus, the exercise of due care is not a defense to a nuisance action. The Nebraska court has broadened this concept to prohibit the location of a feed lot near a single family farm dwelling if the feed lot is larger than those in the vicinity and the odor causes material injury. Finally, an often unarticulated rationale in many decisions involving negligence or location appears to be time priority, i.e., who got there first. A feed lot could not prevail against an expanding city by arguing that the feed lot was there first since this would inhibit municipal growth. Where only one plaintiff is involved, however, this consideration has some validity according to prior cases and the original dissent in Botsch.

Where a plaintiff proves that a nuisance exists, the court should enjoin only the nuisance, not the feeding of cattle. If the nuisance cannot be avoided without prohibiting all cattle feeding operations on the property, however, the court may enjoin all feeding. Traditionally, the plaintiff has been required to prove that only such

66. L.B. 132 provided that compliance with certain requirements constitutes prima facie evidence that a livestock operation is not a nuisance. See note 4 supra.
67. 195 Neb. 54, 58, 236 N.W.2d 815 (1975).
a total prohibition would abate the nuisance and that no remedial measures short of ceasing operations would be effective. The Nebraska court, however, may have shifted to the defendant the burden of showing that he can take remedial steps which will allow him to continue his cattle feeding operation without causing material injury to the plaintiff.

**IOWA APPROACH TO ODOR CONTROL**

**Legislation Past and Present**

Formerly, feed lot odors were regulated, as in Nebraska, by the general nuisance law. The applicable statute provides in broad terms that a nuisance is:

[w]hatever is injurious to health, indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property . . . .

The statute also lists specific acts which are deemed nuisances. These include:

1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.

Thus, in general terms, an odor is a nuisance if it is injurious and dangerous to health, comfort, or property.

The statute provides that a civil action may be brought by ordinary proceedings to both enjoin and abate the nuisance and to recover the damages which it has caused. The operation of a public nuisance may also subject the perpetrator to criminal prosecution. Maintaining a public nuisance is a misdemeanor punishable by a fine of up to one thousand dollars or by imprisonment in the county jail for up to one year. When the defendant is convicted after criminal prosecution, the court may also order that the nuisance be abated at the defendant's expense, whether or not the court imposes a fine or imprisonment.

---

On November 1, 1976 a new law took effect which limits the effect of the Iowa nuisance law on the operation of livestock feed lots. The bill was supported by the Farm Bureau. The provisions of the law are designed to give livestock producers some protection against nuisance court actions and changing pollution regulations. The protection takes the form of an extension of the time period within which producers must comply with pollution and zoning regulations, and the creation of a defense to nuisance suits if producers comply with the regulations.

The Air Quality Commission of the Department of Environmental Quality can establish regulations for feed lots, subject to some limitations. If the Commission adopts a rule after November 1, 1976, compliance with which would require the feed lot operator to spend an amount of money less than or equal to two percent of the cost or value of his feed lot when the feed lot began operations (a feed lot management standard rule), and if the feed lot was in operation before the rule took effect, then the feed lot operator need not comply with the rule until one year after it takes effect.

If the rule which takes effect after November 1, 1976, requires the expenditure of more than two percent of the establishment cost of the feed lot (a feed lot design standard rule), and if the feed lot was in operation before the rule took effect, then the feed lot operator has at least two years from the effective date of the rule to comply with it. The operator need not comply for ten years from the date of the start of his operation if this period is longer than the two years. This gives an extra extension of time for compliance with the regulations to operators whose feed lots were established within the last eight years (since November 1, 1968).

The Commission cannot make a rule pertaining to the location or siting of a feed lot unless the feed lot is established after the effective date of the rule. This substantive provision does not
merely extend a compliance deadline but prohibits the Commission from adopting rules after a feed lot has been constructed which would require its relocation.

The act also extends the period for compliance with zoning require-ments, which include any regulation adopted by a city, county, township, district, or authority which materially affects the operation of the feed lot. Such zoning requirements always apply to feed lots established after the zoning regulation. Under certain circumstances, zoning requirements will apply to feed lots established before the zoning regulation takes effect:

1. If the zoning requirement is in effect by November 1, 1976, all feed lots must comply with it even if they were established earlier.

2. If the zoning requirement is adopted by a body other than a city, it will not apply to a feed lot with an established date of operation prior to the date the requirement takes effect until ten years after that effective date.

3. If the zoning requirement is adopted by a city, and if the feed lot is located within an incorporated or unincorporated area which is subject to regulation by that city as of November 1, 1976, the feed lot must comply with the requirement immediately.

4. If the zoning requirement is adopted by a city, and if the feed lot is located within an incorporated or unincorporated area which is not subject to regulation by that city as of November 1, 1976, but becomes subject to regulation by the city by virtue of an incorporation or annexation after November 1, 1976, then the feed lot must comply with the requirement within ten years after the incorporation or annexation.

For purposes of applying these rules, the "established date of operation" of the feed lot must be determined. Basically this is the date on which the feed lot began operating. If the physical facilities are subsequently expanded, however, the established date of operation for each expansion is a separate date, and only applies

86. IOWA CODE ANN. § 172D.4(2) (a) (1976).
87. IOWA CODE ANN. § 172D.4(2) (c) (1976).
88. IOWA CODE ANN. § 172D.4(2) (b) (1976).
89. IOWA CODE ANN. § 172D.4(2) (d) (1976).
to the expansion. The rest of the feed lot retains its earlier established date of operation.  

Perhaps the most important provision of the new law provides that compliance with the rules of the Department of Environmental Quality and all local zoning requirements provides an absolute defense to a nuisance suit. This limitation is a significant substantive change in the law which should make nuisance suits against feed lot owners more difficult. To take advantage of this defense, the feed lot operator must be able to show that his established date of operation is prior to the plaintiff's date of ownership of the realty affected by the alleged nuisance. Thus, the defense is only effective against those who move into the area after the feed lot has been established. Further, the defense does not preclude a suit by a new resident if the feed lot were subsequently expanded.

Nevertheless the statute makes compliance an absolute defense to a nuisance action. The statutes in Kansas and Oklahoma, as well as the new Nebraska statute, only provide that compliance is prima facie evidence that a nuisance does not exist. Some question has been raised as to the constitutionality of denying property owners the right to bring a nuisance suit to protect the use and enjoyment of their property since it is clear that the compliance which would provide an absolute defense under the statutes does not guarantee the nonexistence of a nuisance as heretofore defined by the courts. The theory is that the statute deprives individuals of a property right to bring a nuisance suit and does not provide the due process of law required by the fourteenth amendment. In fact the Iowa Attorney General opined that a prior version of the statute which denied the right to bring a suit rather than providing an absolute defense to a suit (a seemingly insignificant distinction) was unconstitutional. On the other hand, it could be argued that the legislature in enacting the statute is redefining what constitutes a nuisance and that there is no constitutionally vested property right in the prior common law definition.

91. IOWA CODE ANN. § 172D.1(3) (1976).
93. Id.
98. OP. IOWA ATT'Y GEN. No. 76-2-16; Senate File 367, 66th Gen. Assembly (Feb. 10, 1976).
A feed lot operator has complied as a matter of law with the rules of the Department and with the zoning requirements if none exist. To allow an operator to take advantage of the compliance defense, the conditions or circumstances alleged to constitute a nuisance must be subject to the regulatory jurisdiction of either the Department of Environmental Quality or to some local zoning regulations.  

The combined effect of this nuisance defense and the extensions of compliance deadlines for Department rules and zoning requirements is to give the feed lot owner an additional temporary defense to a nuisance action. For example, if the feed lot owner is not in violation of any Department of Environmental Quality regulations, but becomes subject to regulation by a city due to an incorporation or annexation after November 1, 1976, then the owner has ten years to comply with the zoning requirement. In the meantime, however, the owner is not in violation of this act. Thus, the owner apparently also has ten years from the date of incorporation or annexation in which he has an absolute defense to an odor nuisance suit. If an owner is subject to the regulatory jurisdiction of either the department or a zoning authority and is not in violation of the rules of either, then he has a permanent absolute defense against a nuisance action brought by a neighbor who moved to the area after the feed lot was in operation.

Case Law

Nuisance

Although the Iowa legislature has adopted a general definition of nuisance, the Iowa Supreme Court has held that this definition does not modify the common law. Of course the new Iowa statute modifies the common law, but it is important to examine those judge-made rules to understand the basic principles applied by Iowa courts in nuisance cases and how the new statute will affect them.

Iowa courts have defined a private nuisance as an "actionable interference with a person's interest in the private use and enjoy-

ment of his land.” By “actionable” is meant “substantial and unreasonable.” Thus, there is a threshold requirement of “substantial harm” or a “substantial invasion” before the reasonableness of the conduct is assessed by weighing the gravity of the harm against the utility of the defendant’s conduct.

A public nuisance is an interference with the public as a whole rather than particular individuals. To prove the existence of a public nuisance there is an additional element of proof, i.e., the public nature of the harm. “Public” and “private” refer to the extent and scope of the interest invaded, not to the invader. If the interference affects the public in general it will be characterized as a public nuisance. For example, in State v. Kaster, the Iowa court held that the fact that the feed lot “from whence issued noxious exhalations” was within a few rods of a public street, situated in a populous neighborhood, and that people passing by were greatly annoyed by the smell was sufficient to establish the public character of the nuisance. The effect of this distinction is that a public nuisance is subject to a suit in equity for abatement, and the perpetrator is subject to indictment by the public authorities. An individual suffering special damages can still sue for abatement or damages despite the fact that the nuisance is public.

Whether a particular interference is a nuisance is generally a question of fact to be answered by the trier of fact, often a jury. The basic standard to guide their determination is the test of “reasonableness.”

A fair test as to whether the operation of such industry constitutes a nuisance has been said to be the reasonableness of conducting it in the manner, at the place and under the circumstances in question.

On the other hand, some conditions have been declared unreasonable interferences anywhere at anytime. These “nuisances per se”, unlike “nuisances per accidents”, are nuisances as a matter of law, regardless of their location or surroundings. Nuisances per se are activities which draw together disorderly persons, promote immorality, and lead to breaches of the peace and are generally

105. 35 Iowa 221 (1872).
106. Id. at 226.
outlawed by statutes or ordinances. Examples of nuisances per se include houses of prostitution and gambling establishments; however, "[t]he general rule is that stockyards are not nuisances per se." The court reiterated this point more recently, in a way that may confuse the issue, by noting that "stockyards in a heavy industrial district are not nuisances per se. Of course they may be so conducted as to become nuisances. If these stockyards are erected and so operated as to become a nuisance parties in interest will have their remedy." The court implied that while a stockyard in a heavy industrial district is not a nuisance per se, a stockyard located somewhere else may be. However, this proposition is not supported by the cases and annotations cited by the court.

In the case of either private or public nuisances, the general rule is that while stockyards are not nuisances per se, even where located in a thickly populated district, they may become nuisances in fact or per accident by reason of the manner in which they are conducted or the place where they are located.

The significance of a "nuisance per se" is that it is a nuisance no matter where or how it is operated. Since stockyards are not nuisances per se, the particular elements of the "reasonableness" of the stockyard's operation must be examined.

If, however, [a poultry and produce plant] is so located, maintained, and operated as to emit noxious odors or give off noises so as essentially to interfere with the comfortable enjoyment of the property of others, it may constitute a nuisance. A perfectly lawful business, operated under some circumstances and in some locations, may so interfere with the comfortable use and enjoyment of private property as to constitute a private nuisance, and, when this occurs, it is subject to abatement as such.

For purposes of defining a nuisance generally, however, the Iowa court has cited with approval the elements of a nuisance listed in the Restatement of Torts.

112. See Riter v. Keokuk Electro-Metals Co., 248 Iowa 710, 721, 82 N.W.2d 151, 158 (1957). See also, RESTATEMENT OF TORTS § 822 (1939) which provides the general rule that:

The actor is liable in an action for damages for a non-trespassory
Just what odors constitute an unreasonable interference with the use or enjoyment of one's property is based on what would bother the normal person in the particular locality. People of abnormal sensitivity may have to put up with odors they consider unreasonably bothersome. The opinions of people from other areas who are used to more, less, or different types of ambient odors are similarly irrelevant.

Of course the standard used in determining whether an invasion involving personal discomfort or annoyance is substantial, is the standard of normal persons in a particular locality. Expert testimony is received in order to throw light on the normal person's standard and not to supplant the standard itself. Absent evidence to the contrary, however, it is presumed that plaintiffs in a nuisance suit are of normal or ordinary sensibilities.

The effect of this rule is to put on the defendant the burden of proving that the persons objecting to his feed lot's odor are abnormally sensitive.

**Nuisance Distinguished from Trespass and Negligence**

The distinction between trespass and nuisance is a difference in invasion of another's interest in the private use and enjoyment of land if,

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

It should be noted that the American Law Institute is considering simplifying this rule as follows:

One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land, and such invasion is

- intentional and unreasonable;
- negligent or reckless; or
- actionable under the rules governing liability for abnormally dangerous conditions or activities.

**Restatement (Second) of Torts** § 822 (Tent. Draft No. 16, 1970).


In support of its statement, the court noted Restatement of Torts § 822, Comment g (1939) which provides:

If normal persons living in the locality would regard the particular situation as definitely offensive or annoying, then the invasion is substantial. Rights and privileges in respect to the use and enjoyment of land are based on the general standards of normal persons.

in the type of interest invaded. "Trespass is an actionable invasion of interests in the exclusive possession of land, while a nuisance is an actionable invasion of interests in the use and enjoyment of land" [emphasis added].\footnote{115}

Negligence is one type of conduct that may result in a condition which is a nuisance. Negligent conduct, however, is neither a necessary nor a sufficient condition for a nuisance.

The terms 'private nuisance' and 'negligence' are in different classes...

Although negligence may accompany the creating of a nuisance, many invasions are intentional, and continued conduct resulting in continuing or recurrent invasions, after the actor knows the invasions are resulting, is always intentional. Many authorities hold that any unreasonable or unlawful use of property which unreasonably interferes with the lawful use and enjoyment of other property is an actionable nuisance; that negligence is not an essential or material element of such an action and that the actor is, as a rule, liable for the resulting injury to others notwithstanding his exercise of skill and care to avoid such injury.\footnote{116}

\footnote{Nuisance is a condition. Negligence is a type or quality of conduct, an act or failure to act. An action for damages from nuisance is not predicated on negligence.\footnote{117} If the wrongful condition exists, the defendant is liable. The wrongful condition may have resulted from the manner in which the stockyard is operated (negligently), from the place in which it is located, or from some other factor. "The authorities all recognize that a stockyard may become a nuisance by reason of the manner in which it is conducted and there is authority that a stockyard in an exclusive residential district may constitute a nuisance, irrespective of the condition in which it is kept."\footnote{118}

The person responsible for the existence of a condition which constitutes a nuisance is liable for the resulting damages even though he used the highest possible degree of care to prevent or minimize the effects of the nuisance.\footnote{119} Proof of negligence is not

\footnote{115. \textit{See Note, The Law of Nuisance of Iowa, 12 Drake L. Rev. 107 (1962).}}
\footnote{116. Ryan v. City of Emmetsburg, 232 Iowa 600, 604-05, 4 N.W.2d 435, 439 (1942).}
\footnote{117. Kreiner v. Turkey Valley Community School Dist., 212 N.W.2d 526, 531 (Ia. 1973).}
\footnote{118. Funnell v. City of Clear Lake, 239 Iowa 135, 140, 30 N.W.2d 722, 724 (1948).}
\footnote{119. Ryan v. City of Emmetsburg, 232 Iowa 600, 605, 4 N.W.2d 435, 439 (1942).}
essential to a nuisance action. Nor is contributory negligence a defense to a nuisance action.\textsuperscript{120}

\textit{Location}

There are a number of factors which go into the determination of whether a particular feed lot constitutes a nuisance or is a reasonable use of one's property under the circumstances. One of the most important factors in Iowa law is its location. One author has concluded that "[a]pparently, under nuisance theory in Iowa avoidance of liability for production of odors from animal-confinement facilities depends mainly upon how well the facilities have been located."\textsuperscript{121}

The character of the location is an important factor. Feed lots are more reasonably located in rural than in residential areas.

\[T\]he operation of a lawful industry which would be considered a nuisance in a residential section might not be considered such when conducted in an industrial locality.

Many authorities point out that the right of a person to pure air may be surrendered in part by his election to live in a city where the atmosphere is impregnated with smoke, soot and other impurities.\textsuperscript{122}

For example, an Iowa district court case\textsuperscript{123} involved a commercial cattle feeding operation in a rural area. It was alleged that offensive odors, flies, and noise from the feed lot adversely affected the adjacent properties of nineteen parties. The jury held that the feed lot was not a nuisance, basing its decision primarily on the predominantly rural character of the locality.\textsuperscript{124}

Another important factor besides the character of the surrounding area is the distance between the plaintiff's property and the defendant's alleged nuisance. A district court has held that even though the defendant built his poultry confinement buildings in an agricultural area, where they were placed within 190 feet of plaintiff's farm home, they constituted a nuisance.\textsuperscript{125}

\begin{footnotes}
\item[121] See Note, "Ill Blows the Wind that Profits Nobody": Control of Odors from Iowa Livestock-Confinement Facilities, 57 Iowa L. Rev. 451, 466 (1971).
\item[124] Id.
\item[125] Trottnow v. Kullmer, Civil No. 23482 (D. Ia., Benton Cty., filed Nov. 28, 1968).
\end{footnotes}
noted that locating the buildings even a few hundred feet further away might have been sufficient to diffuse the odors. Another factor in this case was the court's judgment that other suitable locations for the buildings were available on the defendant's property which would have put them further away from plaintiff's home.126

Priority of Use

Priority of occupation is another important factor in Iowa in determining the reasonableness of the condition. Formerly, this temporal priority was often considered an absolute defense to nuisance complaints.

If a certain noxious trade is already established in a place remote from habitations . . . and persons afterwards come and build houses within the reach of its noxious effects . . . the party would be entitled to continue his trade, because his trade was legal before the erection of the houses . . . .127

While the overwhelming majority of English and American cases have rejected this absolute defense proposition, time priority is still important in determining reasonableness. The equities are in favor of the party that has already established himself in the area and has an investment in his feed lot or in his home.128 Priority of occupation is only one, and not necessarily a decisive, factor in determining the reasonableness of the condition. A plaintiff is not estopped by having moved into an area after the commencement of the alleged nuisance.129 The Iowa court has spoken of the "coming to the nuisance" concept and held that priority of location is important in determining whether a nuisance has been created.130 It is also important in determining what remedy is available.131

Nature and Duration of Odor

An unusual odor is more likely to be held unreasonable than

126. Id.
130. Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 561 (Ia. 1972). However, the plaintiffs must have known when they moved into the area that the condition constituted a nuisance. A plaintiff could also object to the subsequent expansion of a preexisting nuisance. See Payne v. Town of Wayland, 131 Iowa 659, 109 N.W. 203 (1906).
131. See text at nn. 135-46 infra.
a usual farm odor.\textsuperscript{132} The length of time during which an odor is noticeable and the frequency of its occurrence are also important factors to be weighed. In \textit{Patz v. Farmegg Products, Inc.}\textsuperscript{133} two of the factors leading the court to find that the facility was a nuisance were that the odor was that of decaying or decomposed matter rather than normal farmyard odors and that they were not limited to short periods of time.\textsuperscript{134}

\textbf{Remedy}

The measure of damages to which a plaintiff is entitled depends on whether the nuisance is permanent or temporary, continuing, and subject to abatement. A permanent nuisance is one that will be reasonably certain to continue in the future.\textsuperscript{135} The measure of damages for a permanent nuisance is the difference in value of the affected land immediately before and immediately after the creation of the nuisance.\textsuperscript{136} Odors are generally considered temporary nuisances under Iowa holdings. Thus, the proper measure of damages is the change in rental value. "Where a nuisance is not permanent but subject to abatement, in the absence of injury to the property itself, the measure of damages is the diminution in rental value caused by the nuisance, together with such special damages as may result therefrom."\textsuperscript{137}

Special damages include resultant discomfort, annoyance, sickness, and loss of time. This measure of damages was applied in \textit{Shively v. Cedar Rapids, I.F. \& N. Ry. Co.}\textsuperscript{138} There the court held that if a feed lot were found to be a nuisance, it would be a temporary one and the measure of damages would be "the loss or diminution of the fair rental value of the property in question from the time . . . said nuisance was established up to the commencement of [the] suit . . . ."\textsuperscript{139}

Exemplary or punitive damages may also be available if actual damages are substantial and actual or legal malice is shown.\textsuperscript{140}

\textsuperscript{133} 196 N.W.2d 557 (Ia. 1972).
\textsuperscript{134} Id. at 561-62.
\textsuperscript{135} Id. at 562.
\textsuperscript{136} Wesley v. City of Waterloo, 232 Iowa 1299, 1303, 8 N.W.2d 430, 432 (1943).
\textsuperscript{137} Kellerhals v. Kallenberger, 251 Iowa 974, 981, 103 N.W.2d 691, 695 (1960).
\textsuperscript{138} 74 Iowa 169, 37 N.W. 133 (1888).
\textsuperscript{139} Id. at 171, 37 N.W. at 134.
\textsuperscript{140} Although punitive damages are seldom awarded in a feed lot nuisance action, see Bower v. Hog Builders, Inc., 461 S.W.2d 784 (Mo. 1970).
Legal malice may be found where a defendant is motivated merely by economic gain, but acts with indifference to, and in wanton disregard of, the rights of those whom he injures.

Where a nuisance is shown, the injured party is not entitled to its abatement by injunction as a matter of right. Instead, in Iowa the appropriateness of injunctive relief is based on the "relative hardship" or "balance of convenience" standard. An action may be brought either in equity or at law to enjoin a nuisance and recover damages. Equity may grant an injunction, however, only where there is no adequate remedy at law. In Iowa the conflicting interests of the plaintiff and the defendant are balanced twice—once to determine if there is a nuisance, and a second time to determine whether or not an injunction should be granted. Although a condition may constitute a nuisance, the plaintiff may simply be awarded damages. The defendant may be ordered to make changes in his method of operation rather than to cease business entirely. The factors to be weighed in determining whether an injunction is appropriate are listed in the Restatement as the relative adequacy to the plaintiff of an injunction as opposed to some other remedy, the plaintiff's delay in bringing suit or his misconduct, the relative hardship to the defendant if the injunction is granted and to the plaintiff if it is not, the interests of third persons and of the public, the practicability of framing and enforcing a decree, and the character of the interest to be protected. The Iowa court has applied many of these criteria in determining whether to grant an injunction.

Nuisance claims of private owners must at times yield to public interest and convenience, and under the pressure of public necessity what would otherwise constitute a nuisance may be inflicted upon certain members of the community, subject to the limitation that if the creation or maintenance of the nuisance amounts to a taking of property compensation therefor must be made. When the public welfare requires it a nuisance may, for special purposes, be permitted, and, as has been seen, public convenience or necessity may be taken into consideration in some cases in determining whether or not to grant equitable relief.

144. RESTATEMENT OF TORTS § 936 (1939).
Injunctions may take a number of forms. They may direct the defendant to take specific steps to reduce the harm, they may set a performance standard ranging from the vague command to stop being a nuisance to specific requirements, or they may order the defendant to close down. The court can also order the defendant to come up with a solution within a certain grace period or liquidate his operation.

Similarly, priority of occupation is a factor both in determining whether a nuisance exists and whether it should be enjoined. The Iowa Supreme Court has noted a very marked distinction in reason and equity between a long-established business, "which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection or business threatened in such vicinity; and it requires a much clearer case to justify a court of equity in interfering by injunction to compel a person to remove" such long-established business.146

It may be reasonable to continue an important activity if payment is made for the harm done, even though the conduct and resultant condition would otherwise be unreasonable.

Regulations

Local health boards147 and the State Board of Health148 have the potential ability to regulate feed lot odors under their broad powers. They can act only where there is an injury to public health, however, rather than mere interference with comfort or the enjoyment of property. Health officials have been reluctant to exercise their powers because of the difficulty of showing an injury to public health and because of the availability of a private nuisance action.

Municipalities may regulate feed lots under their zoning power where the feed lot is located within its boundaries, or up to two miles beyond its limits if no county zoning ordinance exists.149 Counties may also adopt zoning regulations which would affect rural areas.150 There is, however, a broad exemption from county and from extramunicipal regulation for facilities used for “agricul-
While there has been some attempt to limit this exception, it largely exempts rural feed lots from zoning control.

Thus, in Iowa the administrative regulation of feed lot odors falls primarily under the jurisdiction of the Air Quality section of the Department of Environmental Quality. "Air contaminant" is defined to include "dust, fume, mist, smoke, other particulate matter, gas, vapor (except water vapor), odorous substance, radioactive substance, or any combination thereof." The rules which have been adopted by the Department, however, regulate air pollution but not odors. Formerly, the rules did contain a definition of "objectionable odor" as "an odor that is believed to be objectionable by 30 percent or more of a random sample of the people exposed to such odor, with the sample size of at least 30 people." In December of 1974, however, this definition was eliminated.

At present the Department is guided by nuisance law in its regulation of feed lot odors. New rules establishing standards and regulations for any facility emitting odors have been drafted by the Air Quality section. A public hearing on the regulations was held in September of 1976. The Air Quality Commission, a five-member panel appointed by the Governor, considered the regulations and the mixed public comments and must give its approval before the regulations take effect.

151. Iowa Code Ann. § 358A.2 (1977) provides:

No regulation or ordinance adopted under the provisions of this chapter shall be construed to apply to land, farm houses, farm barns, farm outbuildings, or other buildings, structures or erections which are primarily adopted, by reason of nature and area, for use for agricultural purposes, while so used; provided, however, that such regulations or ordinances which relate to any structure, building, dam, obstruction, deposit or excavation in or on the flood plains of any river or stream shall apply thereto.

156. The Air Quality Commission has modified these regulations. The changes were scheduled for consideration at another public hearing on April 13, 1977. This revised version of the rules would differ from that described in the text as follows:

(1) For a complaint to be "actionable" it must allege that the odor occurs in a frequency of 10 (rather than three or more days per thirty-day period for a total of 12 (rather than three) or more hours on each of those days. In effect, this is equivalent to requiring a minimum "time factor" of 16. Such a requirement makes use of the "frequency" and "duration" scales unnecessary.

(2) A construction permit would be required for anaerobic lagoons (a newly defined term). In general, such an odorous substance permit would
Substance of Proposed Regulations

The proposed rules represent an attempt by the Department to conceptualize, codify, and quantify the odor nuisance problem. First an “odorous substance” is broadly defined as “a gaseous, liquid, or solid material that elicits a physiological response by the human sense of smell.” Then an “odorous substance source” is given a similarly all-inclusive definition.

Any equipment, installation, operation, or material which emits odorous substances; such as, but not limited to, a stack, chimney, vent, window, opening, basin, lagoon, pond, open tank, storage pile, or inorganic or organic discharges.

These definitions would include the odor emitted by a feed lot.

The substantive provision of the rules provides a standard for determining when an odor violation has occurred.

The emission of an odorous substance or odorous substances from an odorous substance source shall constitute a violation of the rules if the emission is of such frequency, duration, quality and intensity as to be harmful or injurious to human health and welfare, or so as to unreasonably interfere with the comfortable use and enjoyment of life and property or so as to constitute a nuisance as defined in Section 657.1 of the Code and if the procedures specified in 14.3(3) are followed.

Two specific exceptions are provided. Such odors are not a violation if they are occasioned by maintenance or repair work or breakdown. Further, odors resulting from the periodic spreading of animal waste on farmland are not considered violations if reasonable care is taken to minimize odor problems. Thus, a negligence standard is grafted onto the nuisance concept. Manure spreading is permitted if not done negligently. This exception, however, does not exempt the feed lot itself from the odor rules.

The standards of “harmful or injurious to human health and welfare” and “unreasonabl[e] interfer[ence] with the comfortable

be required only for those lagoons which also require a water quality permit.

(3) Recommendations concerning the periodic spreading of animal waste are added and may provide guidelines for determining whether the operator has exercised the “reasonable care” which exempts such spreading from the rules.

158. Id., § 1.2(37).
159. Id., § 4.5(1).
160. Id., § 5.1. This exception applies to industrial plants and equipment.
use and enjoyment of life and property" are simply restatements of the general principles of nuisance law in the Iowa statute and cases. Additionally, however, the rules specify four relevant aspects of the odor emissions: frequency, duration, quality, and intensity. In Addendum A to the rules, the Department attempts to provide numerical scales to quantify these four factors.\textsuperscript{161} By establishing this mathematical scale system for determining violations, the Department has attempted to make the determination of what constitutes an odor nuisance more objective. It appears, however, that what they have really done is simply moved the subjective judgment back one step in the process. The seemingly objective categories such as "neutral, disagreeable, repulsive" and "barely detectable, easily noticeable, strong, very strong" do not provide standards upon which all would agree. A subjective judg-

\begin{table}[h]
\centering
\begin{tabular}{l|l}
\hline
\textbf{Frequency} & \\
\hline
0 & less than one time per two months \\
1 & one time in two months \\
2 & one time per month \\
3 & two to four times per month \\
4 & five or more times per month \\
\hline
\textbf{Duration} & \\
\hline
0 & less than 30 minutes \\
1 & more than 30 minutes but less than one hour \\
2 & more than one hour but less than three hours \\
3 & more than three hours but less than six hours \\
4 & six hours or more \\
\hline
\textbf{Quality} & \\
\hline
0 & no odor \\
.5 & pleasant \\
1 & neutral \\
1.5 & disagreeable \\
2 & repulsive \\
\hline
\textbf{Intensity} & \\
\hline
0 & no odor \\
1 & barely detectable \\
2 & easily noticeable \\
3 & strong \\
4 & very strong \\
\end{tabular}
\caption{Frequency, Duration, Quality, and Intensity Scales}
\end{table}

Each suspected odor violation is assigned a numerical value for its frequency, duration, quality, and intensity. Then the frequency factor is multiplied times the duration factor to give a time factor. $F \times D = T$ (frequency $\times$ duration $= $ time factor). Similarly, the quality factor is multiplied times the intensity factor to yield an acceptability factor. $Q \times I = A$ (quality $\times$ intensity $= $ acceptability factor). Finally, the time factor is multiplied by the acceptability factor to produce an odor index number. $T \times A = OI$ (time factor $\times$ acceptability factor $= $ odor index number). From these numbers, the Department has proposed maximum allowable odor limits. The least protected area would be industrial regions. Odors with an odor index number of 60 would be allowed here. There would be greater limitations on odors in rural areas (odors with an index number of 22 allowed), and still greater limitations in residential areas (odors with an index number of 10 allowed).
ment as to what is a nuisance is still at the heart of the process.\textsuperscript{162} Further, it is not clear that the particular values which the Department has selected for the factors are appropriate, or that the four factors are of equal importance and should be simply multiplied together to reach a cumulative judgment as to a violation.

\textit{Procedure Under the Proposed Rules}

The proposed odor rules also spell out the enforcement procedure to be used when there is a suspected violation. An odor complaint is originally submitted to a local board of health or to the Department of Environmental Quality.\textsuperscript{163} If the Department received the complaint it may either proceed directly with a hearing or refer the complaint to the appropriate local board of health for settlement.\textsuperscript{164} The board has sixty days to settle the problem to the satisfaction of all parties, whether the complaint was received directly by the board or referred to it by the Department. After sixty days either party may ask for a departmental hearing.\textsuperscript{165} The Department can hold a hearing only if the complaint is "actionable", meaning (1) that it must be filed in accordance with departmental rules\textsuperscript{166} or by three or more citizens from different households within a five-mile radius of the odorous substance source, and (2)

\textsuperscript{162} The proposed system could be applied to a feed lot in a rural area as follows: assuming that the odor is more or less continuous (at least five times per month for periods of six hours) the time factor would be 16. Such an odor would be acceptable in a rural area only if it were barely detectable and neutral in quality. If the odor were barely detectable but disagreeable, it would be a violation in a rural area unless it occurred less than five times per month or for less than six hours per occurrence. If the odor were found to be disagreeable and easily noticeable it could permissibly occur in a rural area only once in two months for six hours or more, once a month for less than six hours, up to four times a month for less than three hours, or every day for less than one hour per day. A perhaps unintended result of the use of zeros in the frequency and duration scales is that any odor, even one that is "very strong" and "repulsive," is permitted even in residential areas if it lasts for less than 30 minutes or if it occurs less frequently than once every two months. The procedural requirements discussed below apparently increase the time in which any odor is permitted anywhere. An odor is permitted if it occurs less than three days per thirty-day period or if it occurs for less than three hours per day. Although an odor occurring less frequently for shorter periods may violate the maximum permissible odor index, for a complaint to be "actionable" by the Department it must allege that the odor occurs at least three days per thirty-day period for at least three hours per day. (For the new definition of an "actionable" complaint, see note 156 supra).

\textsuperscript{163} Iowa DEPARTMENTAL RULES § 14.3(3) (Proposed 1977).

\textsuperscript{164} Id.

\textsuperscript{165} Id.

\textsuperscript{166} Id., and see Iowa DEPARTMENTAL RULES § 51.3(1) (1973).
that it must allege that the odor occurs at least three days per month for three hours per day.\textsuperscript{167} The departmental hearing is "local, informal and non-contested."\textsuperscript{168}

On the basis of this hearing the Department determines whether an investigation is warranted. The proposed rules spell out the steps which the Department must follow if it decides to investigate.\textsuperscript{169} The investigation is followed by an attempt to negotiate a plan for resolving the problem. If negotiations are unsuccessful, however, the Department is empowered to issue a notice of violation and proceed in accordance with Chapter 55 if certain conditions are met.\textsuperscript{170}

These proposed departmental rules represent an attempt to make the determination of what constitutes an odor nuisance more objective and less arbitrary. Whether they have succeeded in doing so is questionable. The rules may have over-quantified an area that is not susceptible to such an attempt at scientific treatment.

Unlike many other air contaminants, odors present exceedingly difficult detection and measurement problems. Unlike sound which can be measured in decibels, or dust which is susceptible to particulate counts, odors have thus

\begin{itemize}
    \item[167.] \textit{Iowa Departmental Rules} § 14.3 (3) (Proposed 1977). This second requirement is substantive and is approximately equivalent to requiring a time factor of nine. \textit{See} note 156 \textit{supra}; text at nn. 159-62 \textit{supra}.
    \item[168.] \textit{Iowa Departmental Rules} § 14.3 (3) (Proposed 1977).
    \item[169.] If it decides to investigate, the Department:
        \begin{enumerate}
            \item Obtains completed odor complaint forms from complainants.
            \item Inspects complainants’ premises and tracks the odor upwind by “olfactory observation” or if no evidence of odors is present contacts complainant for a description of the odors and possible sources.
            \item Checks areas around the probable odor source to exclude them.
            \item Inspects the premises of the alleged source and tries to determine the specific equipment or processes causing the odor.
            \item Determines the name and title of persons contacted at the alleged source premises.
            \item Attempts to negotiate by establishing a plan of action for resolving the odor problem.
        \end{enumerate}
    \item[170.] Enforcement can proceed if:
        \begin{enumerate}
            \item The Department has observed, identified or otherwise established the emissions complained of at or near the complainants’ premises.
            \item The Department has established the source of the emissions.
            \item The complainant has been interviewed at the time the complaint form is collected if the complaint form is to be used as evidence.
            \item The inspector has confirmed the completion of these procedures and criteria in the inspector’s written report and the reports support a chronological sequence of events.
            \item The Department has reason to believe there is a violation of the odor standard (4.5(1)).
        \end{enumerate}
\end{itemize}
far resisted all efforts to devise an objective scale of measurement. The only instrument capable of detecting and ‘measuring’ odors in any meaningful way is the human olfactory facility—a facility which scientists have been unable to duplicate and quantify mechanically.  

Moreover, the particular values assigned to factors, the direct mathematical relationship posited between each factor, and the permissible odor indices assigned to residential, rural, and industrial areas are all open to question. In proposing these rules the Department has, at least, identified four relevant factors in determining what constitutes an impermissible odor: frequency, duration, quality, and intensity. The Department has also provided guidelines in a previously uncharted area by suggesting specific rules of procedure for handling odor complaints.

**Summary**

Iowa’s nuisance statute is a general one which does not modify the common law. However, on November 1, 1976 a law applying exclusively to livestock raisers took effect. This statute extends the time period within which producers must comply with Department of Environmental Quality pollution regulations and city, county, township, or district zoning regulations. It also gives producers a defense to nuisance suits brought while they are in compliance with the regulations.

Under Iowa decisions, whether the operation of a feed lot constitutes a nuisance depends upon the reasonableness of its operation. The most important factor is location—whether it is in a rural area, whether it is at a significant distance from the injured party, and whether it is as far as possible from the injured party given the potential locations on the defendant’s land. Another important factor is priority of use: who was there first, the feed lot owner or the plaintiff. Other relevant factors include the particular nature, the frequency, and the duration of the odor. The fact that the feed lot is operated negligently may be a basis for finding it to be a nuisance, but feed lots may also be adjudged nuisances when operated with the greatest possible care. The test of what constitutes an unreasonable odor is what would bother a normal person in the particular locality.

The measure of damages for a feed lot odor nuisance is gen-

---

erally the diminution in rental value of the land affected by the
nuisance, since odor nuisances are generally found to be temporary.
The plaintiff may also recover as special damages an amount to
compensate him for discomfort, annoyance, sickness, and loss of
time and may be awarded punitive or exemplary damages where
the feed lot operator acted with malice or in wanton disregard of
his rights.

Once a nuisance is determined to exist the courts again consider
the relative hardship on the parties and the public in deciding
whether to grant an injunction. They may, however, merely award
damages or order the defendant to change his method of operation
so as to minimize odors.

Although local health boards, the State Board of Health, and
cities and counties, through their zoning powers, have some poten-
tial ability to regulate feed lot odor, the primary enforcement mech-
anisms are the private nuisance suit and the rules of the Air Quality
section of the Department of Environmental Quality. The Depart-
ment is currently enforcing the common law of nuisance, but it
has drafted odor rules which will take effect after filing with the
Secretary of State in accordance with the Iowa Administrative Pro-
cedure Act\textsuperscript{172} if first approved by the Air Quality Commission.
The proposed rules attempt to provide a more objective basis for
determining which odors are objectionable and to establish proce-
dures for departmental enforcement.

METHODS OF ODOR CONTROL IN OTHER STATES

Statutory Innovations

Most states currently have general nuisance statutes. These
laws provide that whatever endangers or is injurious to life, health,
comfort, or property is a nuisance.\textsuperscript{173} Some states have gone be-

\textsuperscript{172} Iowa Code Ann. ch. 17A (1967).

\textsuperscript{173} An example is the South Dakota statute, which provides:
A nuisance consists in unlawfully doing an act, or omitting to per-
form a duty, which act or omission either:
(1) Annoys, injures, or endangers the comfort, repose,
health, or safety of others;
(2) Offends decency;
(3) Unlawfully interferes with, obstructs, or tends to ob-
struct, or renders dangerous for passage any lake or navigable
river, bay, stream, canal, or basin, or any public park, square,
street or highway;
(4) In any way renders other persons insecure in life, or
in the use of property.

As interpreted by the South Dakota courts, this statute prohibits
yond these general nuisance statutes which require the courts to
decide what is unreasonable and have enacted legislation specifi-
cally dealing with feed lots.\textsuperscript{174}

Another legislative technique is to require that feed lots be li-
censed, to specify standards of operations, and to empower a regu-
latory commission to make and enforce more specific standards.
The Kansas system is an example.\textsuperscript{175} It is unlawful for any person
to operate a feed lot within the state without a license from the
livestock commissioner. Licenses are issued for one year for a fee
which varies according to the capacity of the lot.\textsuperscript{176} “Livestock”
includes cattle, swine, sheep, and horses, but a “feed lot” only in-
cludes a lot having more than one thousand head of livestock at
one time during the year.\textsuperscript{177} Thus smaller feed lot operators need
not obtain a permit unless they elect to do so.\textsuperscript{178}

The Livestock Sanitary Commissioner of Kansas is empowered
to carry out the licensing procedure by issuing licenses, to investi-
gate complaints, to suspend and revoke licenses, and to make and
enforce feed lot operation regulations consistent with the standards
set out in the statute.\textsuperscript{179} These statutory standards of operation
specify some of the requirements for a license, requirements de-
dsigned to minimize the adverse effects of feed lots.\textsuperscript{180} The Commis-

\begin{itemize}
\item as a nuisance an unreasonable use of property which offends the
senses of others. For example, a horse barn in a residential district
has been held to be a nuisance. Johnson v. Drysdale, — S.D. —,
285 N.W. 301 (1939).
\end{itemize}

\textsuperscript{174} The Iowa statute was discussed earlier. See text at nn. 73-101 su-
pra. The Nebraska statute appears in note 4 supra.
\textsuperscript{175} KAN. STAT. ANN. §§ 47-1501 to -1511 (1973).
\textsuperscript{176} KAN. STAT. ANN. § 47-1503 (1973).
\textsuperscript{177} KAN. STAT. ANN. §§ 47-1501(a) (1), (c) (1973).
\textsuperscript{178} KAN. STAT. ANN. §§ 47-1501(a) (2), -1503 (1973).
\textsuperscript{179} KAN. STAT. ANN. § 47-1508 (1973).
\textsuperscript{180} KAN. STAT. ANN. § 47-1505 (1973) provides:

\begin{itemize}
\item Owners and operators who are granted a feed lot license shall:
\item (1) Provide reasonable methods for the disposal of animal excre-
ment; (2) provide chemical and scientific control procedure for
prevention and eradication of pests; (3) provide adequate drainage,
from feed lot premises, and such drainage shall be so constructed
as to control pollution of streams and lakes; (4) provide adequate
veterinarian services for detection, control and elimination of live-
stock diseases; (5) have available for use at all times, mechanical
means for scraping, cleaning and grading feed lot premises; (6)
provide weather resistant aprons adjacent to all permanently aff-
ixed feed bunks, water tanks, and feeding devices; (7) conduct
feed lot operations in conformity with established practices in the
feed lot industry as approved by regulations made and promul-
gated by the commissioner, and in accordance with the standards
set forth in this act.
\end{itemize}

\textit{Id.}
sioner's regulations are intended to make these statutory require-
ments more specific. Violations of the statute or regulations are
a misdemeanor, punishable by a fine of up to one hundred dollars
per day. 181

The statute does more than provide new licensing requirements,
standards, and regulations for feed lots. Sections of the law are
designed to protect feed lot operators. First, operation of a feed
lot in compliance with the standards and regulations is deemed to
be prima facie evidence that a nuisance does not exist. 182 This pro-
vision makes a feed lot operator's defense to a suit easier and makes
the manner of operation, rather than the propriety of the lot's loca-
tion, the only real issue.

Second, the act provides location protection from zoning ordin-
ances by specifying that the feeding of livestock and animal hus-
bandy are agricultural pursuits. 183 Agricultural pursuits are ex-
empted to some degree from zoning regulations.

Finally, the state Livestock Commissioner is empowered to
make available the staff engineers of the Secretary of Health and
Environment to assist a feed lot operator or license applicant to de-
velop plans and design facilities in order to control the pollution
of streams and lakes. 184 The provisions allowing an operator with
less than one thousand head of livestock to voluntarily come under
the act are presumably designed to allow him to receive such assist-
ance, as well as to avail himself of the compliance defense to a nui-
sance action.

The Oklahoma Feed Yards Act 185 is modeled on the Kansas
statute. The Oklahoma statute provides that operation of feed
yards in compliance with the statutory standards and the regula-
tions constitutes prima facie evidence that a nuisance does not ex-
ist. 186 Feed yards cannot be located or operated in violation of any
zoning regulations, however. 187

cedure for appeal from the Commissioner's regulations to the Kansas Live-
47-1507 (1973).
tailed analysis of this Oklahoma law see Recker, Animal Feeding Factories
and the Environment: A Summary of Feedlot Pollution, Federal Controls,
and Oklahoma Law, 30 Sw. L.J. 556 (1976).
It is unlawful for any person to operate feed yards in the state without a license from the Oklahoma State Board of Agriculture. Licenses are issued annually and the amount of the fee varies according to the feed lot capacity. Poultry, as well as cattle, swine, sheep, and horses, are considered livestock. However "feed yards" only include areas not used normally for raising crops and in which no vegetation intended for livestock feed is growing (dry lots) and having more than 250 "animal units" at one time during the licensed year. An "animal unit" means 1 beef animal, 4½ hogs, 12 sheep, or 180 poultry. Consequently, a feed lot is not subject to regulation as a "feed yard" unless it contains 250 cattle, 1,125 hogs, 3,000 sheep, 45,000 chickens, or some combination of the above.

The Oklahoma State Board of Agriculture is authorized to investigate complaints, promulgate rules and regulations, and issue, suspend, or revoke licenses. The Board is advised by five feed yard operators who are appointed by it.

The statutory standard of feed lot operation which establishes the duties of feed yard owners and operators is practically identical to the Kansas standard, as is the punishment for a violation of the statute or regulations. The action of the Board in denying, suspending, or revoking a license is governed by the Oklahoma Administrative Procedures Act.

The Kansas and Oklahoma feed lot statutes were originally enacted in 1963 and 1969, respectively. They represent a legislative attempt to regulate feed lots by providing general standards and procedures and empowering a specialized regulatory agency to make and enforce more detailed regulations. As such, like the Iowa statute, they are an attempt to take away the function of regulating feed lot location and manner of operation from the courts and private litigants.

**Judicial Peculiarities**

The common law of feed lot odor nuisances is basically alike in all the states. The courts have followed similar paths in defin-
ing the rules of what is permitted and what considerations are relevant in so deciding. These judicial concepts and criteria have been outlined in the sections on Nebraska and Iowa. Consequently, this section will concentrate primarily on the peculiarities and differences in the ways in which some states have approached the problem.

Reasonableness

The central concept in all nuisance cases is reasonableness, a balancing of the reasonableness of the defendant's use of his property and the unreasonableness of the harm to the plaintiff. For example, the South Dakota Supreme Court affirmed an order enjoining the operation of a horse barn near a residential district. In its analysis, the court explained the operation of the rule of reason:

Through the operation of the rule of reason, not only is a balance maintained between the right to the enjoyment of property on the one hand and the right to use property on the other . . . but through it also, because what is reasonable is determined in the light of neighborhood uses of property and the trends and changes in such use, as well as in view of the more immediate situation of the parties litigant, the way is opened for the march of civilization. It is in the field of unreasonable use that the law of nuisance is operative. The ultimate question in each cause is whether the challenged use is reasonable in view of all of the surrounding circumstances. Having regard for the needs and methods of defendant, the degree of discomfort and injury occasioned plaintiff in person or in the enjoyment of his property, and the present use and trends of use of surrounding property, if the use made by defendant is not such as an ordinary man would make, and the resulting discomforts and injuries are not such as people of common sensibilities and tastes should be required to endure, the questioned use is unreasonable.196

Negligence

The various ways in which courts have applied this general principle of reasonableness, however, has led to some confusion of concepts. The relationship between negligence and nuisance is one of these areas. The confusion which has resulted in Nebraska was discussed above. This confusion is not confined to the courts.

The torts of negligence and nuisance should be distinguished. Negligence implies that the force expends itself

in one act, although the consequences may be of lasting duration, whereas a nuisance ordinarily implies a repetitious course of conduct in the operation of some business or facility.\textsuperscript{197}

Of course, the distinction is not the duration of the cause of the condition but the fact that nuisance is an actionable condition, an invasion of one's interest in the use and enjoyment of one's land, whereas negligence is a type of conduct and is one of the causes which may give rise to a nuisance.

Negligent operation, as well as location, is a factor which can cause a condition to be considered a nuisance. For example, the Kansas Supreme Court has held that a dump operated negligently so as to cause excessive odors is a nuisance.\textsuperscript{198}

Another area of confusion is the “nuisance per se” concept. This properly means something which is a nuisance regardless of where it is located or how it is operated. Defined in this manner it is a very strong term which should be used sparingly. If a change in location or technology would render a condition inoffensive, it should not be considered a nuisance per se, but courts have so classified a number of such conditions. In one such case, garbage was held to be a nuisance per se although the nuisance actually resulted from the fact that a piggery, established by the city to dispose of the garbage, was located near private homes.\textsuperscript{199}

\textsuperscript{197} See Note, Commercial Feed Lots—Nuisance, Zoning and Regulation, 6 Washburn L.J. 493, 494 (1967).

\textsuperscript{198} Steifer v. City of Kansas City, 175 Kan. 794, —, 267 P.2d 474, 476 (1954) related that:

\begin{quote}
The defendant city began operating the dump some time after April 26, 1949 and have [sic] operated it so negligently and carelessly that it has, as more refuse has been dumped, caused noxious and offensive odors to come therefrom, tainting and corrupting the air in and about plaintiffs' premises so as to render the dwelling house, which is about 700 feet from the dump, and premises of plaintiffs unhealthy and unfit for occupation.
\end{quote}

The court then went on to explain what constitutes a nuisance and what factors are significant:

\begin{quote}
Nuisance means annoyance, and any use of property by one which gives offense to or endangers life or health, violates the laws of decency, unreasonably pollutes the air with foul, noxious, offensive odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another, may be said to be a nuisance. What may or may not constitute a nuisance in a particular case depends upon many things, such as the type of neighborhood, the nature of the thing or wrong complained of, its proximity to those alleging injury or damage, its frequency or continuity, and the nature and extent of the injury, damage or annoyance resulting. Each case must, of necessity, depend upon particular facts and circumstances.
\end{quote}

\textit{Id.} at —, 267 P.2d at 478.

Location and Priority of Use

Where the feed lot is located and whether it was there before the complaining party moved to the area are generally considered two important factors in determining whether a nuisance exists. Courts, however, attach varying importance to location and priority of use.

The Kansas Supreme Court overturned a trial court judgment enjoining the operation of a cattle feed lot located six miles from a city’s limit with a maximum capacity of 3,000 head of cattle. The court noted that it was an “average kept” feed lot and was located in an area of primarily agricultural uses with the exception of a few suburban tracts with homes. The primary consideration affecting the court’s decision as to whether or not the feed lot was a nuisance appeared to be its location. The case affirmed that

201. Id. at —, 331 P.2d at 547.
202. Id. The court discussed the applicable law and the relevant factual considerations.

Obviously, the feeding of livestock in any number within the limits of a residential area would be a nuisance. In fact, ordinances have been passed by cities to prevent the maintenance of poultry and livestock within the city limits. What may be a nuisance in one location and subject to abatement may not be a nuisance, however, in another location. The question may be seriously posed: Where can cattle be fed if not in a sparsely populated area which is primarily agricultural? Are cattle feeders to be forced many miles from the cities when the packing plants which slaughter these cattle are located at the cities and provide employment for numerous city dwellers? . . .

Admittedly, in an agricultural area where cattle are fed it is practically impossible to eliminate completely the odors and flies from [such] an operation . . . since it is of necessity a day to day operation where the materials causing the odors are being continually deposited in the area. . . .

Plaintiffs chose to live in an area uncontrolled by zoning laws or restrictive covenants and remote from urban development. In such an area plaintiffs cannot complain that legitimate agricultural pursuits are being carried on in the vicinity, nor can plaintiffs, having chosen to build in an agricultural area, complain that the agricultural pursuits carried on in the area depreciate the value of their property. . . .

. . . [T]his area is primarily agricultural in its nature. Anyone moving into the area is bound to accept the agricultural pursuits carried on in the area, or which under reasonable circumstances might be expected to be carried on in the area. Moreover, the history of the area in question indicates that it has been used for feeding livestock since 1924 with only occasional interruption. Due to the natural contours of the land and its proximity to a growing and expanding population it follows that injuries of which these appellees complain resulted from the development of the natural and historical resources of Kansas, to-wit: Cattle. When viewed in this light, the use to which appellants have put their land, under the conditions existing in this area as indicated by the trial court’s findings, cannot be said as a matter of law, or as a matter of fact,
a feed lot is a reasonable use of one's property in an agricultural area.

On the other hand, a recent Texas case found a feed lot in a rural area to constitute a nuisance justifying the award of permanent damages. The court went to great lengths to find liability. In the first place, the feed lot was located in a rural, agricultural area. The court ignored this defense, saying that it goes to the question of remedy rather than liability, holding instead that a feed lot in an agricultural area may constitute a nuisance. Here, rather than enjoining continuing operations, the court compelled the payment of money damages to neighboring land owners.

This is a surprising approach to the location factor. Few courts have held, as this case did, that location goes only to the question of remedy and not to the issue of whether or not there is a nuisance. Most courts have held that location or the character of the surrounding area is an important factor—often the most important factor—in determining whether a nuisance exists.

---

203. Meat Producers, Inc. v. McFarland, 476 S.W.2d 406 (Tex. Ct. App. 1972). In this instance, defendant's cattle feeding operation consisted of 96 pens, each designed to hold 125 cattle. At one time more than 14,000 cattle were in the feeding pens and the catch pens. The cattle were fed in 120-day cycles, each pen being filled to capacity with incoming cattle and not being cleaned out until those cattle were removed and the pen made ready for the next lot. Plaintiffs alleged that odors from the operation constituted a nuisance.

There may have been some partisan political considerations flavoring the outcome of the case which are only obliquely referred to in the record. After the plaintiff had cross-examined one of the defendant's witnesses, the judge said in the presence of the jury that there would be a recess to allow the Republicans (the feed lot owners) time to prepare a rebuttal. Since the defendants did not show that this partisan political reference probably influenced the verdict, it was held to be harmless error.

204. Id. at 411, where the court noted that:

Defendant also contends that there is no evidence of unreasonable interference with the use of plaintiff's land in view of the character of the community. Defendant argues that a feed lot is a lawful and useful business, and that if such a facility cannot be operated in a purely rural area . . . there are few places where it can be operated. For the purpose of determining liability for damages, interference with use of land may be unreasonable, even though utility of the activity causing such interference is great and the harm is relatively small, since it may be reasonable to continue a useful activity causing such interference if payment is made for the harm, but unreasonable to continue it without paying.

205. Some courts have even gone to the other extreme and held that a feed lot in a rural agricultural area cannot constitute a nuisance as a matter of law. For example, this was the opinion of the trial court which was overruled by the Nebraska Supreme Court in Botsch.
The Texas court further appeared to be going out of its way to find a nuisance in that the feed lot odors were not shown to interfere with the plaintiff's residence. No one was living on the plaintiff's land when the feed lot was in operation or at the time of trial. Thus, there was no interference with plaintiff's home. The court noted, however, that "[e]ven raising crops and grazing cattle require human activity on the land from time to time, and anyone engaged in such activities while the feed lot was in operation would have to endure the odor." The court seems to be breaking new ground. Most other cases have involved interference with a residence in a rural area, not just interference with a ranch area occasionally occupied by its operators while working.

The court suggested another reason, besides the annoyance of ranchers working on the land, for declaring the feed lot a nuisance. In a startling bit of reasoning the court applied a rule for the measure of damages to the issue of whether there is a nuisance. Starting from the proposition that damages for nuisance are measured by the reduction of market value, rather than the reduction in the value for its present use, the court applied this rule to the liability issue and concluded that a nuisance exists if there is interference, not with some actual present use, but with a potential future residential use of the land.

Aside from the fact that the conclusion does not follow from the principle cited, this conclusion wreaks havoc with the very concept of nuisance, i.e., the right thing in the wrong place. Under this decision any potential residential area becomes the 'wrong place.' Location, the central factor determining the existence of a nuisance, becomes irrelevant. Time priority, another important factor, is similarly denigrated since homes which are not presently extant or even planned are given priority over an existing feed lot.

206. 476 S.W.2d at 410.
208. 476 S.W.2d at 410. There the court found that:

[b]y the same reasoning, in determining the existence of a nuisance, the jury is not limited to consideration of the actual use of the land. It would be illogical to hold that reduction in market value for any use is the measure of recovery for damages from nuisance, but that a nuisance exists only if there is interference with the actual use to which the land is being put at the time of trial. Plaintiff's appraiser testified that the highest and best use of the land was homesites with acreage, and since there was evidence that odors from the feed lot would substantially interfere with that use, we hold that there was evidence to support the finding that a nuisance existed.

Id.
Hopefully the case is an aberration. The importance attached to the location and time priority factors by the court in the Kansas case represents the more common judicial approach.

Remedy

Once a nuisance is established, courts must choose between awarding damages, granting an injunction, or both. The traditional prerequisite for an injunction in equity, that is, an inadequate remedy at law, must be shown. There is often also a second balancing of the relative hardships to the parties caused by a grant of an injunction.

The type of odor involved and its offensiveness in the particular location is, of course, a prime factor in determining whether a nuisance exists. The nature of the odor is also an important consideration in the further question of whether a nuisance should be enjoined.209

It is also possible for courts to enjoin merely the condition itself, without enjoining the use of the property for any particular purpose. This is a viable alternative where the method of operating the feed lot, rather than merely its location, causes the nuisance. The courts can order the defendant to take steps to minimize the odors from his feed lot.

Regulatory Techniques

Many states have adopted environmental protection acts which establish an administrative agency to regulate pollution. Although the acts all tend to follow the same basic pattern, there are differences in the type of agency established and in the scope of its responsibilities.210

209. Smith v. City of Ann Arbor, 303 Mich. 476, 6 N.W.2d 752 (1942). The court held that the nature of a particular odor may, of itself, be grounds sufficient to justify abatement, saying:

While smoke and odor from burning leaves and brush cannot generally be considered to be ground for abating a nuisance, excessive smoke, especially if accompanied with any odor of burning rags or offensive material, might afford ground for abatement. Id. at —, 6 N.W.2d at 755. In this case the court balanced the equities, noting that the city had no other location within its corporate limits where it could perform its duties of disposing of nongarbage rubbish. Pointing out that equity looks at the whole situation, and grants or withholds relief as good conscience would dictate, the court decreed the adoption of methods calculated to eliminate the injurious features rather than compelling the abatement of the use of the property as a dump. Id. at —, 6 N.W.2d at 756.

210. In Nebraska, the Department of Environmental Control is charged
The common statutory pattern in defining the scope of the authority of the department established by the Environmental Protection Act is to define "air contaminant" and "air pollution" and then give the department the authority to establish standards and rules for the control of air pollution. The definitions of air pollution in the statutes follow similar lines. All of the definitions are built upon a reference to "air contaminant."

The definition of air contaminant should be the key to determining the scope of the authority of the state regulatory agency to control feed lot odors. The agencies are authorized to regulate air pollution which is defined as the presence of air contaminants. Unless a feed lot odor comes within the statutory definition of air contaminant, it would seemingly be outside the jurisdiction of the department or agency.

The definitions of air contaminant fall into two categories, those that include odors and those that do not. The former type predominates among the states surveyed. For example, the Iowa statute defines air contaminant as "dust, fume, mist, smoke, other par-

with preventing pollution. The Agricultural Pollution Control Division is responsible for the regulation of feed lot odors. In Iowa, the Air Quality section of the Department of Environmental Quality handles feed lot odors. South Dakota created an Air Pollution Control Commission in 1970, but in 1973 abolished it and transferred its functions to the Department and the Board of Environmental Protection. Similarly, in Kansas the Air Quality Conservation Commission was abolished and its functions transferred to the Secretary of Health and Environment. The Texas Clean Air Act established the Texas Air Control Board to regulate air pollution. These regulatory agencies are charged with controlling air pollution.

211. For example, Neb. Rev. Stat. § 81-1502(2) (Reissue 1976) provides that:

[air] pollution shall mean the presence in the outdoor atmosphere of one or more air contaminants or combinations thereof in such quantities and of such duration as are or may tend to be injurious to human, plant, or animal life, or property or the conduct of business.

In Iowa the definition is similar, with a "reasonableness" requirement grafted and the "characteristics" of the air contaminant considered. See Iowa Code Ann. § 455B.10 (3) (1977) which states:

'Air pollution' means presence in the outdoor atmosphere of one or more air contaminants in sufficient quantities and of such characteristics and duration as is or may reasonably tend to be injurious to human, plant, or animal life, or to property, or which unreasonably interferes with the enjoyment of life and property.

The South Dakota definition in S.D. Compiled Laws Ann. § 34-16A-2(2) (1972) is similar to the others but it specifies that the injury must affect health or welfare and be "unreasonably" injurious.

'Air pollution' means the presence in the outdoor atmosphere of one or more air contaminants in such quantities and duration as is or tends to be unreasonably injurious to human health or welfare, animal or plant life, or property, or would unreasonably interfere with the enjoyment of life or property.
COMMON SCENTS

ticulate matter, gas, vapor (except water vapor), odorous substance, radioactive substance, or any combination thereof. The Kansas and South Dakota definitions are similar. The Texas statute seems more inclusive by including odors rather than just "odorous substances." This definition, however, excludes "natural" odors.

The Colorado Air Pollution Control Act of 1970 on the other hand, does not include odors or odorous substances within the definition of air contaminant. The Nebraska definition does not explicitly include odors either.

Air contaminant or air contamination shall mean the presence in the outdoor atmosphere of any dust, fume, mist, smoke, vapor, gas, or other gaseous fluid, or particulate substance differing in composition from or exceeding in concentration the natural components of the atmosphere. . . .

The exclusion of odors and odorous substances from the de-

214. TEX. REV. CIV. STAT. ANN. art. 4477-5, § 1.03(1) (Vernon 1972) provides that "'air contaminant' means particulate matter, dust, fumes, gas, mist, smoke, vapor or odor, or any combination thereof produced by processes other than natural . . ." [emphasis added]. The Texas courts, however, have narrowly construed this statute to include many odors prohibited by other statutes with stricter provisions. See Europak, Inc. v. County of Hunt, 507 S.W.2d 884 (Tex. Ct. App. 1974) wherein a horse slaughtering and packing plant was held to produce odors by a process other than natural. In attempting to define what odors are produced by natural processes, the Texas court found two meanings of the word "natural": "(1) that which occurs in nature, as distinguished from that which is brought about by man's devices, and (2) that which occurs in the course of normal experience, as distinguished from the abnormal or unusual." Id. at 890. The court went on to judicially define the "processes other than natural": [T]he only interpretation which gives the words "produced by processes other than natural" any meaning consistent with the other provisions of the Act is to apply both the basic concepts expressed in the definition above quoted. In other words, a "natural process is one that occurs in nature and is affected or controlled by human devices only to an extent normal and usual for the particular area involved. All other contaminants are "produced by processes other than natural" within the meaning of the Act . . . [A]lthough the process which directly produces the odor may be one that occurs in nature, the evidence is sufficient to support a finding that concentration of such a large number of animals into such a small area would not be normal or usual in this vicinity. Id. at 891. Consequently, the key elements in determining whether the odor from a feed lot is produced by processes other than natural, and thus is an "air contaminant" subject to regulation, appear to be the size of the feed lot and the concentration of the animals.
217. NEB. REV. STAT. § 81-1502(a) (Reissue 1976).
inition of air contaminant may not be as important as might be imagined. For example, in Nebraska the exclusion does not force the Agricultural Pollution Control Division of the Department of Environmental Control to avoid feed lot odor complaints and problems. Instead the Department regulates odors indirectly by controlling feed lot management practices and eliminating the cause of the odors. Of course, some odor is inevitable from even the best managed feed lots, especially the larger ones. These problems have to be dealt with by properly locating feed lots.

In most states, cities and counties also have some authority to regulate feed lots through their zoning powers. State legislatures have the power, within constitutional limitations, to grant authority to control nuisances and regulate land use.

Both municipalities and counties have zoning powers in Kansas, for example. Cities are expressly empowered to prohibit livestock feeding within city limits.\(^{218}\) Such ordinances do not apply, however, to existing uses of land and buildings. Also, although the county commissioners are normally empowered to exercise zoning power within the three mile area surrounding the city limits, they may not zone against the use of land and buildings for agricultural purposes within that area.\(^{219}\)

Similarly, in South Dakota municipalities may regulate feed lots within their municipal boundaries. An incorporated town may enact an ordinance excluding stockyards from residential districts and declaring a stockyard located in a residential district to be a prima facie nuisance regardless of the condition in which it is maintained.\(^{220}\)

Such zoning restrictions may have some impact on the locating decision for new feed lots, but they probably have little effect on how feed lots are operated. They provide a much more blunt instrument for controlling feed lot odors and much less flexibility than air pollution control departments.

CONCLUSION

This has been an analysis of how the legislative, judicial, and executive branches of government in various states have resolved

\(^{218}\) KAN. STAT. ANN. § 47-1502 (1973).


the conflict between the feed lot owner's need to operate his business and the homeowner's desire to live in an environment free from odors. The legal responses have been varied. This analysis has attempted to organize the responses into a system of rules, to build a conceptual framework, and to see the law of feed lot odor control as a consistent and orderly whole.

The problem with this approach is that this area of the law is peculiarly unsusceptible to quantification and general rules. Beyond any tendency of the law in general to overrationalize rather than recognize a conflicting and contradictory set of responses to problems, any area of the law based primarily on judicial decisions made in response to individual cases is likely to be more fragmentary than an all inclusive set of legislative rules. This is particularly true, however, in an area such as odor nuisance law where there is no scale to quantify what is unreasonable and each case must be judged on its own facts. Thus, due to the nature of the feed lot odor problem, it is difficult to announce an inclusive set of rules which will define what is legally permitted and what is not.

Yet such a system of rules is necessary so that individual cases will be decided in a consistent rather than an arbitrary and haphazard fashion. Consistency is also necessary to facilitate planning and predicting, so that individuals can know in advance whether their activities are permitted by the law and so that disputes can be settled without bringing each one to the courts for a judicial resolution.

A feed lot odor dispute is not simply a conflict between private parties. The rules which are established by and during the judicial resolution of such disputes determine where feed lots can be located, which feed lots must be abandoned or moved, and what techniques, procedures, and equipment a feed lot operator must use to control odors. This intervention imposes costs on the feed lot operator which, as costs of production, are ultimately reflected in the price which consumers must pay for his product. Beyond deciding what is fair to the individual parties to a suit, the rules which society establishes for feed lot odors affect the public in general. The public, of course, makes the ultimate decision as to how much of our physical and economic resources we should devote to meat production through the market mechanism by deciding how much they are willing to pay for it. However, if extra costs of production are imposed on feed lot operators, a higher price will be charged and less meat bought by consumers. Similarly, if meat can be pro-
duced without paying for all the costs which it entails, a lower price can be charged, more meat brought by consumers, and more of our resources devoted to meat production. The problem thus arises before the market mechanism takes effect. What costs are properly allocable to the production of meat? Should the cost of meat reflect the increased costs of production imposed on feed lot operators by judgments for plaintiffs in odor nuisance suits?

Thus, the effect of a decision as to who wins an odor nuisance suit is not confined to the parties. On a societal level, it affects the trade off between the odors which we are willing to put up with and the grocery prices we are forced to pay. It is an environmental and an economic decision. It is a decision as to our priorities as a society. It is the kind of decision that should be reached as a consensus on a societal scale. Although since the “Brandeis brief” the courts have been increasingly receptive to economic and sociological data as well as legal precedents in making their decisions, the courts are not designed to make broad policy decisions. Popularly elected legislatures have the mandate to make policy. Legislatures are open to the pressure of public opinion. There are mechanisms such as public hearings, lobbying, and ultimately elections through which the people can make their priority judgments known. A decision as to the rules which will govern feed lot loca-

221. The answer to this question is not as obvious as some believe. For example, in Note, Private Nuisance: An Application to Feedlots in a Rural Area, 55 Neb. L. Rev. 683 (1976), the author states that “[t]o 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 declining property value.” Id. at 694-95. It is assumed that the discomfort is a cost allocable to the production of meat rather than a cost allocable to the decision to live in a rural, meat producing area. Perhaps feed lot operators should bear the costs associated with commencing operations near established dwellings. On the other hand, perhaps someone who moves into a cattle feeding area should have to bear the costs associated with the decision to live in that location. The proper allocation of such costs is the question at issue. The author dismisses Professor Coase on another issue, but Coase is certainly correct in recognizing the reciprocal nature of the problem.

The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A? R. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1960).

Until legal rights are determined it is not clear who is subsidizing whom.
tion and operation requires such a societal perspective since the public, as well as the plaintiff and defendant, is in a real sense a party in interest.

As has been seen, some legislatures have accepted the challenge to go beyond a generalized nuisance statute and make some specific rules governing feed lot odors. This may be a step in the right direction. Many of these responses, however, are merely stopgap solutions providing procedural protections. Ultimately we must face the conflict between the feed lot operator and the consumer on the one hand, and the individuals downwind from the feed lots on the other. We must make some hard decisions about the relative value of having odorless air wherever people may choose to live and keeping meat prices low and feed lots operating. Currently the courts are making such decisions in individual cases with little legislative guidance. Reconciling the opposing interests and creating a substantive law of feed lot odor control which reflects our values and priorities is a formidable challenge facing our legislatures.