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Nuisance Law—Lack of Criminal Intent and Use of Reasonable Care Are No Defense to Statutory Nuisances—State v. Lloyd A. Fry Roofing Co., ____ Minn. ____, 246 N.W.2d 692 (1976)

Nuisance Law—LACK OF CRIMINAL INTENT AND USE OF REASONABLE CARE ARE NO DEFENSE TO STATUTORY NUISANCES—*State v. Lloyd A. Fry Roofing Co.*, ___ Minn. ___, 246 N.W.2d 692 (1976).

Nuisance law is one area of law that has traditionally been used to deal with environmental concerns.[1] The law concerning public nuisance has served as a flexible and convenient tool for public officials in controlling a wide range of social problems.[2] The case of *State v. Lloyd A. Fry Roofing Co.*[3] is a recent example of the use of public nuisance law to control smoke emissions within a city. In *Fry*, the Minnesota Supreme Court upheld the criminal conviction of the Fry Company[4] on five violations of a city ordinance[5] that prohibited, as a nuisance, the emission of substances into the open air if "by reason of their objectionable properties . . . they . . . [c]reate an obnoxious odor in the atmosphere."[6]

The major issue on appeal was whether the state must prove that the defendant had intended to commit the violations and had failed to do all that it reasonably could to avert the nuisance.[7] The Fry Company

1. *See, e.g.*, United States v. Reserve Mining Co., 380 F. Supp. 11, 55 (D. Minn.) (injunction issued against industrial dumpings into Lake Superior), *modified on other grounds*, 490 F.2d 688 (8th Cir.), *motion for stay of injunction granted*, 498 F.2d 1073 (8th Cir.), *successive motions to vacate stay denied*, 418 U.S. 911, 419 U.S. 802, 420 U.S. 1000 (1974), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975); Heller v. American Range Corp., 182 Minn. 286, 288, 234 N.W. 316, 317 (1931) (abatement of operation emitting lead oxide dust into the air); State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 125-26, 130 N.W. 545, 546-47 (1911) (conviction for allowing emission of dense smoke within city limits); City of St. Paul v. Haugbro, 93 Minn. 59, 61, 100 N.W. 470, 471 (1904) (same). *See generally* Note, *Air Pollution Control In Minnesota*, 54 MINN. L. REV. 953, 961-62 (1970).

2. Nuisance law has been used as a social control regarding such diverse problems as air pollution, *see, e.g.*, State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 125-26, 130 N.W. 545, 546-47 (1911), and disorderly houses, *see, e.g.*, State v. Wheeler, 131 Minn. 308, 311, 155 N.W. 90, 92 (1915). *See* note 13 *infra* and accompanying text.

3. ___ Minn. ___, 246 N.W.2d 692 (1976).

4. The Fry Company operates an asphalt roofing plant in a mixed industrial-residential area of northern Minneapolis, zoned for heavy industry. The company has been operating in the area since 1947 and has been the subject of other litigation concerning the emission of smoke and asphalt odors from its smokestack. *See, e.g.*, State v. Lloyd A. Fry Roofing Co., ___ Minn. ___, 246 N.W.2d 696 (1976) (action brought to compel defendant to conduct stack emission tests); State v. Lloyd A. Fry Roofing Co., 280 Minn. 265, 158 N.W.2d 851 (1968) (defendant found guilty of violating ordinance prohibiting emission of obnoxious odors). In the present case, defendant was convicted in a municipal court and fined $1,000. The conviction was appealed to and affirmed by the district court.

5. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 47.180 (1976) (formerly MINNEAPOLIS, MINN., CODE OF ORDINANCES § 180.015 (1960)).

6. *Id.* The complaint was based on air pollution emanating from defendant's smokestack; smoke had settled in the surrounding residential and recreational areas. ___ Minn. at ___, 246 N.W.2d at 694.

7. *See* ___ Minn. at ___, 246 N.W.2d at 694. Two minor issues were also raised: whether the evidence to sustain defendant's conviction was sufficient and whether the city inspector's agreement to notify defendant prior to issuance of violation tags precluded prosecution. *Id.* The court concluded that the evidence presented to the lower courts was

argued that the mere fact that obnoxious odors were emitted from its smokestack did not establish a violation because the state must prove criminal intent and lack of due care.[8] The state contended that the obnoxious smoke emissions were violations per se, regardless of the Fry Company's intent or steps taken to avert the nuisance.[9] The court adopted the state's position, concluding that the company's conduct was a nuisance per se.[10]

At common law, nuisances can be private or public.[11] Private nuisance involves the interference with an individual's use and enjoyment of his private property.[12] Public nuisance involves the interference with interests common to the general public.[13] Actionable nuisance requires a substantial and unreasonable interference with either the use and enjoy-

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sufficient to sustain the conviction, *id.*, and that the agreement between defendant and the city inspector was not binding upon the city and could not circumscribe the city's power to prosecute, *id.* at ____, 246 N.W.2d at 696.

8. *Id.*

9. *Id.*

10. *See id.* at ____, 246 N.W.2d at 695.

11. *See, e.g.*, 1 F. HARPER & F. JAMES, THE LAW OF TORTS § 1.23, at 64 (1956); Boger, *The Common Law of Public Nuisance in State Environmental Litigation*, 4 ENVT'L AFF. 367, 368 (1975); Comment, *Nuisance or Negligence: A Study in the Tyranny of Labels*, 24 IND. L.J. 402, 403 (1949).

12. *E.g.*, Schmidt v. Village of Mapleview, 293 Minn. 106, 108, 196 N.W.2d 626, 628 (1972) (fire hydrant near private driveway interfered with access to property); Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 228, 234 N.W. 326, 328 (1942) (lead oxide dust blown onto plaintiff's property from enameling plant); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 337-38, 200 N.W. 350, 351 (1924) (operation of ice crusher and loading of milk wagons during sleeping hours); Dorman v. Ames, 12 Minn. 451, 461 (Gil. 347, 360) (1867) (erection of dam caused overflow of water onto neighboring property); Boger, *supra* note 11, at 368. *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 89 (4th ed. 1971). *See also* MINN. STAT. § 561.01 (1976) (statutory prohibition of private nuisance).

Private nuisances include interferences with the physical condition of the land, such as blasting, flooding, or water pollution; interferences with the comfort or convenience of the occupant, such as foul odors, excessive noise or light, and repeated telephone calls; and interferences with the occupant's health and peace of mind, such as a malarial pond and the depressing effect of a funeral parlor. W. PROSSER, *supra*, at 591-92.

13. *See, e.g.*, Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393, 77 N.W.2d 188, 192 (1956) (door-to-door solicitation); State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 125-26, 130 N.W. 545, 546-47 (1911) (burning of soft coal within city limits); MINN. STAT. § 609.74 (1976); J. MACDONALD & J. CONWAY, ENVIRONMENTAL LITIGATION § 2.07, at 21 (1972); Boger, *supra* note 11, at 368; Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 999 (1966). *See generally* W. PROSSER, *supra* note 12, § 88. *See also* MINN. STAT. § 609.745 (1976) (prohibition against permitting public nuisance).

Public nuisances include interferences with the public health, such as the keeping of a hogpen, diseased animals, or a malarial pond; interferences with public safety, such as storing explosives, shooting fireworks in the streets, keeping dangerous animals, and the unlicensed practice of medicine; interferences with public morals, such as houses for prostitution or gambling, indecent exhibitions, bullfights, unlicensed prize fights, or public profanity; and interferences with public peace, comfort, and convenience, such as loud disturbances, foul odors, smoke, and the blocking of a public highway or navigable stream. W. PROSSER, *supra* note 12, § 88, at 583-84.

ment of private property rights or the public welfare;[14] a substantial and unreasonable interference is determined by such factors as the nature and extent of the harm,[15] the possibility of averting the harm,[16] the social utility of the conduct,[17] and the setting in which the conduct took place.[18]

Today most state legislatures have enacted general public nuisance statutes that essentially restate the common law.[19] In addition, a state

14. *See, e.g.*, Fish v. Hanna Coal & Ore Corp., 164 F. Supp. 870, 872 (D. Minn. 1958) (interference must be material and substantial, as measured by sensibilities of ordinary people of that locality); Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229, 4 N.W.2d 326, 328 (1942) (only the substantial and material phase of a nuisance, as compared to the ordinary discomforts to living in the area, may be enjoined); Heller v. American Range Corp., 182 Minn. 286, 288, 234 N.W. 316, 317 (1931) (zinc oxide dust considered a serious interference with enjoyment of property); Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 477, 177 N.W. 641, 641 (1920) (conduct must interfere materially to be actionable); F. HARPER & F. JAMES, *supra* note 11, § 1.26, at 79 (annoyance caused by air pollution must be material and substantial to be unreasonable); Boger, *supra* note 11, at 368 (unreasonable and substantial invasion).

15. *See* Marshall v. Consumers Power Co., 65 Mich. App. 237, 265, 237 N.W.2d 266, 279 (1975) (character, volume, time, and duration of nuisance); Roukovina v. Island Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924) (character and extensiveness of a business are factors to be considered in determining whether that business constitutes a nuisance); *cf.* Note, *Enjoining a Public Nuisance*, 7 NAT. RESOURCES LAW. 157, 159 (1974) (character and extent of harm considered in balancing equities for injunctive relief).

16. *See* Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 230-31, 4 N.W.2d 326, 329 (1942) (industry has the duty to use devices which minimize the effect of the alleged nuisance; "[T]he cost of a change, the probability of betterment and the effect upon performance were all factors which any industry should consider in determining whether to experiment with devices other than those now in use."); *cf.* Note, *supra* note 15, at 159 (impracticability of preventing the invasion is equitable consideration in action for injunctive relief).

17. *See* Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924) (whether defendant's business is lawful and useful are to be considered in determining the existence of an abatable nuisance); Note, *supra* note 15, at 159.

18. *See* Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 230, 4 N.W.2d 326, 328 (1942) (smoke, cinders, and coal dust from defendant's plant located in heavily industrialized area held not to constitute a nuisance; residents living in areas zoned for industry cannot expect the same freedom from air pollution as those who live in residential areas); City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) (existence of public nuisance depends on locality and surroundings); Note, *supra* note 15, at 159. *See generally* Comment, *Enjoining Private Nuisances: Consideration of the Public Interest*, 43 U. COLO. L. REV. 225 (1971).

19. Prosser, *supra* note 13, at 999. For example, MINN. STAT. § 561.01 (1976) provides in part, concerning a private nuisance: "Anything which is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance . . . ."

Similarly, MINN. STAT. § 609.74 (1976) provides in part, concerning public nuisance:

> Whoever by his act or failure to perform a legal duty intentionally does any of the following is guilty of maintaining a public nuisance, which is a misdemeanor:
>
> (1) Maintains or permits a condition which unreasonably annoys, injures or endangers the safety, health, morals, comfort, or repose of any considerable number of members of the public . . . .

legislature may declare specific actions to be public nuisances,[20] and may empower municipalities to pass and enforce ordinances to the same effect.[21] The legislatures are limited, however, in that they cannot declare something to be a nuisance which could not in fact be a nuisance,[22] nor can they create arbitrary classifications in passing such legislation.[23]

At common law, the commission of a public nuisance constituted a crime.[24] Similarly, once the legislative body declares an act to be a nuisance, conduct in violation of that law constitutes a criminal nuisance, nuisance per se, or nuisance at law.[25] This was the position taken

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Other state legislatures have also passed nuisance statutes. *See, e.g.*, IOWA CODE ANN. § 657.1 (West 1950); S.D. COMP. LAWS ANN. §§ 21-10-1 to -3 (1967).

20. Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 491-92 (1916) (state legislature may declare emission of dense smoke to be a nuisance); *see, e.g.*, Barrett v. Nash Finch Co., 228 Minn. 156, 159, 36 N.W.2d 526, 528 (1949) (state legislature has power to determine whether a violation of statute constitutes a nuisance); IOWA CODE ANN. § 657.2 (West 1950) (restriction against, *inter alia*, houses of gambling, prostitution or narcotics, impeding passage on a river or public road, and water or air pollution).

21. *E.g.*, Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 491-92 (1916) (state, through authorized municipality, may declare emission of dense smoke to be a nuisance); *see* State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 126, 130 N.W. 545, 547 (1911) (city council, under legislative sanction, may restrain production of dense smoke as a nuisance).

22. State v. Guilford, 174 Minn. 457, 460-62, 219 N.W. 770, 771 (1928) (legislature cannot declare something to be a nuisance which clearly is not; the inherent nature of publication of scandalous material bears such a relation to social and moral welfare that it could be declared a nuisance by legislature); *see* State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 125-26, 130 N.W. 545, 547 (1911) (legislature may prohibit emission of dense smoke); City of St. Paul v. Gilfillan, 36 Minn. 298, 300, 31 N.W. 49, 50 (1886) ("dense smoke" may be declared a nuisance).

However, the Minnesota court has stated that despite this limitation, the legislature still retains a high degree of discretion. *See* State v. Guilford, 174 Minn. 457, 460, 219 N.W. 770, 771 (1928).

23. *See* Claesgens v. Animal Rescue League, Inc., 173 Minn. 61, 64, 216 N.W. 535, 536 (1927) (municipal ordinance prohibiting all dog pounds within city limits held invalid on its face as arbitrary and unreasonable); Lachtman v. Houghton, 134 Minn. 226, 237, 158 N.W. 1017, 1021 (1916) (ordinance prohibiting property owner from erecting a store building within residential district held unconstitutional); State v. Sheriff of Ramsey County, 48 Minn. 236, 239-40, 51 N.W. 112, 113 (1892) (ordinance prohibiting emission of dense smoke, excepting certain types of manufacturers, held to be arbitrary and unconstitutional).

24. Culwell v. Abbott Constr. Co., 211 Kan. 359, 363, 506 P.2d 1191, 1195 (1973); Prosser, *supra* note 13, at 999.

25. *See, e.g.*, State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 130, 130 N.W. 545, 548 (1911) (emission of dense smoke in city railroad yard, in violation of city ordinance prohibiting such emissions, held to be a nuisance per se).

In Marshall v. Consumers Power Corp., 65 Mich. App. 237, 265, 237 N.W.2d 266, 283 (1975), the court distinguished between a nuisance per se (or nuisance at law) and a nuisance in fact: a nuisance per se is an act, occupation or structure which is a nuisance at all times regardless of the attendant circumstances; a nuisance in fact is a nuisance by reason of circumstances and surroundings. The court concluded that although a future nuclear power plant would not violate any law or ordinance, and hence could not be a nuisance per se, it remained to be seen whether the plant would constitute a nuisance in fact.

by the *Fry* court in rejecting the Fry Company's defenses of its lack of intent to commit the crime and its exercise of reasonable care.[26] In discussing the intent issue, the court recognized the power of the state legislature to define crimes without regard to criminal intent or motive.[27] This is consistent with Minnesota case law, which has generally held that the legislature need not include criminal intent or motive as an essential element of a crime.[28] When intent is not a part of the statutory

26. *See* ___ Minn. at ___, 246 N.W.2d at 695. A number of other courts have rejected reasonable care as a defense in a nuisance action. *See, e.g.*, Ryan v. City of Emmetsburg, 232 Iowa 600, 604, 4 N.W.2d 435, 439 (1942) (defendant is liable for creating a nuisance notwithstanding the exercise of skill and care to prevent any damage); Robinson v. Westman, 224 Minn. 105, 111, 29 N.W.2d 1, 6 (1947) (due care is not a defense where business operation seriously affects public health and nearby property rights); Johnson v. City of Fairmont, 188 Minn. 451, 453, 247 N.W. 572, 573 (1933) (nuisance does not depend on the degree of care used); Lead v. Inch, 116 Minn. 467, 471-72, 134 N.W. 218, 219 (1912) (reasonable care in operation of horse barn in residential area is no defense if the operation still results in obnoxious odors); Pearson v. Kansas City, 331 Mo. 885, 894, 55 S.W.2d 485, 489 (1932) (" 'Negligence' is the failure to exercise the degree of care required by the circumstances. . . . A 'nuisance' does not rest *on the degree of care used, but on the degree of danger existing* with the best of care.") (emphasis in original); Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. Ct. 496, 509, 353 A.2d 471, 478 (1976) (elements of negligence do not apply to nuisance law), *aff'd*, 472 Pa. 115, 371 A.2d 461 (1977). *But see* Power v. Village of Hibbing, 182 Minn. 66, 72, 233 N.W. 597, 599 (1930) (negligence is an unnecessary element in a nuisance action only when the act causing the nuisance is "unlawful"; defendant's sewers, which flooded when over three inches of rain fell within 45 minutes, did not constitute a nuisance).

27. *See* ___ Minn. at ___, 246 N.W.2d at 695.

28. *See, e.g.*, State v. Everson, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970); State v. Kremer, 262 Minn. 190, 191, 114 N.W.2d 88, 89 (1962); State v. O'Heron, 250 Minn. 83, 85, 83 N.W.2d 785, 786 (1957); State v. Quackenbush, 98 Minn. 515, 521, 108 N.W. 953, 956 (1906); *cf.* United States v. Hart Motor Express, Inc., 160 F. Supp. 886, 887-88 (D. Minn. 1958) (omission of element of scienter for violation of statutory prohibition held constitutional).

The United States Supreme Court stated the rationale for imposing strict criminal liability for certain statutory violations as follows:

> The accused, if he does not will the violation, is usually in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities. Also, penalties commonly are relatively small, and conviction does no grave damage to an offender's reputation.

Morisette v. United States, 242 U.S. 246, 256 (1951). However, in State v. Kremer, 262 Minn. 190, 192, 114 N.W.2d 88, 89 (1962), where defendant did not violate a traffic law intentionally, the court found that the conviction for the violation was unjustified despite the absence of a requirement of intent in the statutory language. The court held that the above quoted language from *Morisette* did not apply to that situation. *See also* Haddad, *The Mental Attitude Requirement in Criminal Law—And Some Expectations*, 59 J. CRIM. L.C. & P.S. 4, 17-21 (1968); Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55-84 (1933). According to one authority, *mens rea*, or criminal intent, may not be necessary where the prohibition is merely regulatory, as opposed to being designed to maintain the social order, and where the possibility of incarceration for the offense is minimal. *Id.* at 72. Public nuisance has traditionally been punishable without a showing of *mens rea*. *See id.* at 73.

prohibition, what must be shown to prove the violation is that the defendant intended to do the act which constituted the crime, not that he intended to commit the crime.[29] Therefore, in *Fry* the court required the state to prove only that the company intentionally operated a plant which produced obnoxious smoke emissions as a normal incident to its operation.

The court rejected the Fry Company's argument of reasonable care as irrelevant.[30] The court based its decision on the distinction between negligence and nuisance, concluding that the Fry Company ignored this distinction in its argument.[31] Whereas negligence is a form of action based on fault or breach of duty,[32] nuisance action is based on an interference with another's use and enjoyment of his land or with some public interest.[33] Negligence law emphasizes *how* the defendant has acted; nuisance law is concerned primarily with the *result* of the defendant's activity.[34] One source of confusion between these concepts is the reasonableness factor.[35] Conduct must create an unreasonable risk of harm in

29. *See* DeLahunta v. City of Waterbury, 134 Conn. 630, 634, 59 A.2d 800, 802-03 (1948) ("intent" refers to the intent to bring about the conditions causing the nuisance rather than the intent to create the nuisance); State v. Everson, 286 Minn. 246, 248, 175 N.W.2d 503, 505 (1970) (to prove intent, it is sufficient that defendant intends the act which constitutes the crime); Comment, *supra* note 11, at 407.

30. *See* ___ Minn. at ___, 246 N.W.2d at 695.

31. *See id.*

32. *See* Mokovich v. Independent School Dist. No. 22, 177 Minn. 446, 449, 225 N.W. 292, 293 (1929). *See generally* W. PROSSER, *supra* note 12, § 30.

33. *See* City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) ("Anything is a nuisance . . . which renders the enjoyment of life and property uncomfortable."); MINN. STAT. § 561.01 (1976) (nuisances); J. MACDONALD & J. CONWAY, *supra* note 13, § 2.07; W. PROSSER, *supra* note 12, § 86; Boger, *supra* note 11, at 368. *Compare* Randall v. Village of Excelsior, 258 Minn. 81, 85, 103 N.W.2d 131, 134 (1960) (the repeated sales of intoxicating liquor to minors, where the plaintiff was injured by an intoxicated minor, held not a wrongful invasion of a legal right or interest) *and* Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393-94, 77 N.W.2d 188, 192-93 (1956) (house-to-house solicitation of bakery goods held not an annoyance within the meaning of public nuisance) *with* Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229-30, 4 N.W.2d 326, 328 (1942) (cinders, smoke, and ashes from smokestack held to be a substantial interference with plaintiff's enjoyment of life) *and* Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 476-77, 177 N.W. 641, 641 (1920) (noise, smoke, and dust from operation of limestone quarry held to interfere materially with physical comfort of neighboring residents) *and* State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 126, 130 N.W. 545, 547 (1911) (dense smoke resulting from the burning of soft coal held to interfere with public comfort, property and health).

34. *See* Culwell v. Abbott Constr. Co., 211 Kan. 359, 364, 506 P.2d 1191, 1196 (1973) ("[N]uisance is a result and negligence is a cause and they cannot be distinguished otherwise."). Thus, negligence may be thought of as one type of conduct, in addition to intentional conduct and abnormally dangerous conduct, that can give rise to a nuisance. W. PROSSER, *supra* note 12, § 87, at 573-74; *see* Mokovich v. Independent School Dist. No. 22, 177 Minn. 446, 449, 225 N.W. 292, 293 (1929).

35. *See* Ryan v. City of Emmetsburg, 232 Iowa 600, 605, 4 N.W.2d 435, 439 (1942). *See also* Commonwealth v. Barnes & Tucker Co., 23 Pa. Commw. Ct. 496, 509, 353 A.2d 471, 478 (1976), *aff'd*, 472 Pa. 115, 371 A.2d 461 (1977).

order to constitute negligence,[36] whereas a nuisance involves an unreasonable interference with the use and enjoyment of another's property rights.[37] Reasonableness of the interference has long been a factor in determining the existence of a common law nuisance.[38] This often requires a balancing of interests: the severity of the injury in light of the social utility of defendant's conduct[39] and the cost of eliminating the alleged nuisance.[40] The Fry Company's argument appears to have been based on the negligence concept of reasonable care rather than on the nuisance concept of an unreasonable interference with a public interest.

In holding violations of criminal nuisance statutes to be nuisances per se, the *Fry* court highlighted and clarified the distinction between common law and statutory nuisances. In holding a defendant liable for the commission of a common law nuisance, the court must determine the existence of a substantial interference, the unreasonableness of that interference, and the appropriate remedy.[41] In statutory nuisance cases,

36. W. PROSSER, *supra* note 12, § 31, at 145.

37. *See, e.g.,* Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393, 77 N.W.2d 188, 192 (1956); Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 229-30, 4 N.W.2d 326, 328 (1942); Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 476-77, 177 N.W. 641, 641 (1920); State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 126, 130 N.W. 545, 547 (1911); City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886); MINN. STAT. § 609.74(1) (1976); W. PROSSER, *supra* note 12, § 87, at 580. The Iowa Supreme Court explained the difference between unreasonableness as it applies to negligence law and unreasonableness as it applies to nuisance law:

> The unreasonableness of the use, which causes the harm, and the unreasonableness of the injury are, to some extent, related and must be determined by reference to all the circumstances. The unreasonableness of the conduct is determined largely by the character and gravity of the resulting injury rather than the injury threatened. In determining whether conduct is unreasonable in a nuisance case, the test is not unreasonable risk or foreseeability as those terms have been used in cases based on negligence. If the conduct causes an unreasonable amount of harm there may be a nuisance even though it created no unreasonable risk of harm.

Ryan v. City of Emmetsburg, 232 Iowa 600, 605, 4 N.W.2d 435, 439 (1942).

38. *See, e.g.,* City of St. Paul v. Gilfillan, 36 Minn. 298, 299, 31 N.W. 49, 50 (1886) (whether or not dense smoke emitted from chimney is a nuisance depends on the "locality and surroundings").

39. *See* Excelsior Baking Co. v. City of Northfield, 247 Minn. 387, 393, 77 N.W.2d 188, 193 (1956) ("public convenience and reasonable necessity are controlling considerations, and regard must be given to the time, place, and all the other circumstances of a particular case"); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924) (operation of ice crusher and milk delivery wagon during normal sleeping hours held to be a nuisance, despite social utility of the business); notes 15-18 *supra* and accompanying text.

40. *See* Jedneak v. Minneapolis Gen. Elec. Co., 212 Minn. 226, 231-32, 4 N.W.2d 326, 329 (1942); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 338, 200 N.W. 350, 351 (1924); notes 15-18 *supra* and accompanying text.

41. *See, e.g.,* United States v. Reserve Mining Co., 380 F. Supp. 11, 55 (D. Minn.), *modified on other grounds,* 490 F.2d 688 (8th Cir.), *motion for stay of injunction granted,* 498 F.2d 1073 (8th Cir.), *successive motions to vacate stay denied,* 418 U.S. 911, 419 U.S.

however, one could argue that the legislative body has already determined which public interests are worthy of protection and that interferences with those interests are presumptively unreasonable.[42] Therefore, the court's function is limited to the determination of a violation of the statute, the constitutionality of the statute, and the selection of a remedy.[43] Once an activity is codified as a nuisance and the literal terms of the ordinance are violated, no other factors need be examined by the court.[44] Following the *Fry* decision, a manufacturer will be guilty of a violation regardless of attempts to avoid the nuisance, if in the end the nuisance still occurs.

Although the Minnesota courts will not consider a defendant's attempts to avoid the nuisance in determining whether the criminal nuisance statute has been violated, presumably reasonable attempts to avoid the nuisance would have an effect on the court's determination of appropriate punishment. Likewise, the defendant's exercise of due care might bear on the remedy chosen by the court in a civil action for nuisance.

Real Property—ABANDONMENT OF CONTRACT FOR DEED—*Berman v. Kieren*, ___ Minn. ___, 247 N.W.2d 405 (1976).

In the law of real property, abandonment refers to the voluntary relinquishment of an interest in land.[1] Although a perfect legal title may not

802, 420 U.S. 1000 (1974), *modified on other grounds*, 514 F.2d 492 (8th Cir. 1975); Note, *supra* note 15, at 159; Comment, *supra* note 18, at 226.

42. *See* State v. Guilford, 174 Minn. 457, 459-60, 219 N.W. 770, 771 (1928) (prerogative of the legislature to determine that it was in the public interest to declare distribution of scandalous material to be a nuisance; the determination by the legislature is presumptively valid, but not conclusive); State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 130, 130 N.W. 545, 547 (1911) (legislature and city council presumed to have all the necessary facts to make a rational decision on what constitutes a nuisance).

43. *See, e.g.*, State v. Chicago, M. & St. P. Ry., 114 Minn. 122, 130 N.W. 545 (1911) (ordinance prohibiting dense smoke from the burning of soft coal upheld as constitutional; fine imposed on defendant for violating the ordinance); City of St. Paul v. Gilfillan, 36 Minn. 298, 31 N.W. 49 (1886) (ordinance prohibiting emission of dense smoke from chimneys held void as unauthorized by the legislature).

44. State v. Lloyd A. Fry Roofing Co., ___ Minn. ___, ___, 246 N.W.2d 692, 695 (1976); H. Christiansen & Sons v. City of Duluth, 225 Minn. 475, 483, 31 N.W.2d 270, 275 (1948); W. PROSSER, *supra* note 12, § 87, at 576.

1. *See* Melco Inv. Co. v. Gapp, 259 Minn. 82, 85, 105 N.W.2d 907, 909 (1960) (contract for deed); Mineral Land Inv. Co. v. Bishop Iron Co., 134 Minn. 412, 414, 159 N.W. 966, 967 (1916) (mineral lease); Norton v. Duluth Transfer Ry., 129 Minn. 126, 131-32, 151 N.W. 907, 909 (1915) (easement). *See generally* 5 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF PROPERTY § 2515 (1957 & Supp. 1976). The principles applicable to a determination of abandonment of personal property are discussed at some length in Erickson v. Sinykin, 223 Minn. 232, 239-42, 26 N.W.2d 172, 176-77 (1947).