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**Equity: Real Property and the
Problem of the Troublesome
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Equity: Real Property and the Problem of the Troublesome Neighbor

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Something there is that doesn't love a wall

He is all pine and I am apple orchard.
My apple trees will never get across
And eat the cones under his pines, I tell him.
He only says, "Good fences make good neighbors"

Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.

Robert Frost
"Mending Wall" [1914]

Despite the sage advice of the Vermonter, neighbors do not always erect fences. Occasionally the construction of fences causes damage to another's property; occasionally they are erected on the wrong land and benefit the neighbor; occasionally they straddle the boundary line; occasionally they are erected for the wrong motives. In all these instances, and others not necessarily involving a fence or even a neighbor, equity is expected to step in, to exercise its discretion, to demonstrate its judicial creativity, and to provide solace between feuding neighbors.

TRESPASS: Black letter law states that equity will not intervene in trespass disputes, for damages constitute an adequate remedy. However, since equity exists to prevent irreparable harm, the pending

threat of damage to real property will allow intervention. Likewise, acknowledging its abhorrence of multiple lawsuits, equity will issue an injunction to restrain future trespasses when the evidence demonstrates prior and repeated trespasses.¹ Further, repeated trespasses may give rise to a claim for an easement or other adverse right that would cause irreparable injury to the owner's title.² For example, equity enjoined a planned land development that threatened to cross a buffer strip of another's land.³ The trespass would have been significant and ongoing. An award of mere damages would have countenanced the trespass. Accordingly, the black letter rule is logically limited to single, transitory trespasses that neither occupy nor damage the land.⁴

ENCROACHMENT: A landowner is entitled to the use of his land unhampered and unimpaired by the improvements of adjoining landowners. The adjoining landowner's house, fence or roof may cross over the boundary and encroach, ever so slightly, on the owner's land. An owner who is not willing to sell a small portion of land and who does not desire compensatory damages, even permanent damages, may instead seek to compel judicially the removal of the encroachment.⁵ Equity assumes that the available legal remedies are inadequate for such a trespass that is permanent in nature. Denial of a mandatory injunction would subject the owner to mere damages for permanent occupation of his land, which might in time support a claim of adverse possession. The legal remedy of ejectment,⁶ while designed to

put an owner in possession of land, is not authority to compel removal of an encroachment from the land. Sheriffs are not accustomed to removing buildings.

On numerous occasions the Arkansas Supreme Court has stated that the ancient principle of "*de minimis non curat lex*" is not applicable to real property disputes.⁷ Accordingly, the *de minimis* nature of the encroachment is not a reason to deny a mandatory injunction. The court has ordered encroachers to remove a sewer line that crossed two feet of another's property,⁸ a stone and cement wall twenty-six feet in length that encroached a maximum of a foot,⁹ a brick wall eight feet high, the top of which leaned ten inches over the plaintiff's property,¹⁰ and the eaves of a roof that extended six inches across the boundary.¹¹

Neither the effective destruction of property nor the burden of expense is sufficient to deny a mandatory injunction. For example, the court has ordered the removal of a house that encroached 3.4 feet on to other property.¹² It is not a defense that the mistake that caused the encroachment was made by a predecessor in title¹³ or by a third party. The court is particularly unsympathetic to apparently knowledgeable individuals who should be aware of the necessity for surveys before commencing construction.¹⁴ No relief is given to wilful encroachers.¹⁵ If one intentionally builds on another's land, no matter how slightly, the court can presume an intent to either acquire the land by virtue of adverse possession or by private condemnation through the payment of permanent damages.¹⁶ The court should in no way lend any support to such an intent, whether express or implied.

The doctrine applies regardless of the size or nature of the impacted property. The owner of a large tract is still entitled to the sole and exclusive use of the land. Even if the land is vacant and undeveloped, the owner is entitled to exclude others from encroaching on his domain. The owner is not required to show actual damages to prevent an encroachment.¹⁷ While an owner may have benefited from the encroachment, he is still entitled to removal.¹⁸

Traditional equitable discretion does not apply in such cases. An award of damages is subject to reversal on appeal and the entry of a mandatory injunction.¹⁹ This willingness to grant a mandatory injunction reflects the policy that an adjacent landowner should not be able to partially occupy another's land and then seek to legitimize the taking by offering to

pay for it. Such an attempted use of private eminent domain should not be tolerated.²⁰

However, relief may be denied to a plaintiff whose delay in commencing the action amounted to laches²¹ or who is estopped from seeking relief because his conduct, words, or silence caused the other party to rely to his detriment by continuing with the construction of an encroaching improvement.²² These defenses, if successfully asserted, may bar the plaintiff from equity and limit any relief to damages. Other defenses are even more devastating to the plaintiff. The defendant may assert that a new boundary was established by agreement or by acquiescence.²³ The defendant may even assert that title to the entire tract upon which the encroachment rests has been acquired by adverse possession.²⁴ The plaintiff faces the risk of losing, not just a mandatory injunction against the encroachment, but the very land itself.

Courts of equity have been concerned about actions by the landowner that constitute extortion. A landowner may be barely interested in the removal of the encroachment but thrilled at the possibility of obtaining a mandatory decree to use as a "club" to support an outrageously high selling price for a small tract of land. The landowner might be tempted to say to the encroacher: "It's your choice: either purchase the two-foot strip for \$100,000 or obey the injunction and remove your building from my land." Always desiring to keep its hands clean, equity has no desire to aid a plaintiff with such a motive or objective.

Reflecting a gentler approach, courts in other jurisdictions have denied an injunction when the encroachment was the result of mistake, the damage to the plaintiff relatively minor, and the cost of the removal disproportionate to the damages to the landowner.²⁵ In such a case the balancing of the hardships yields only an award of damages. For example, the removal of a skyscraper whose foundation encroached on another's land would clearly be economic waste. At least one Arkansas case suggested that the chancellor should consider the cost of removal in relationship to the value that the landowner places on the land.²⁶

However, the long string of Arkansas cases granting mandatory injunctions and decreeing the removal of an encroachment is undermined, if not reversed, by the most recent appellate opinion. In *Stuttgart Electric Co., Inc. v. Riceland Seed Company*,²⁷ a portion of a metal warehouse (with dimensions of 101 by 124 feet) encroached 2.3 feet onto

the plaintiff's property. The court of appeals affirmed the chancellor's denial of a mandatory injunction. First, the encroachment was the result of an innocent mistake; the encroachment was not intentional nor was it the result of reckless action. Second, the \$10,000 cost of removal of the encroachment was, if not substantial, at least more than trivial. Third, the boundary was the result of an original transaction between the parties. Fourth, the actual encroachment was "slight." Fifth, the value of the remaining land was not altered by the encroachment. Concluding that the removal of the building would be "harsh, drastic and totally inequitable," the court balanced the hardship and the equities and affirmed the award of \$1000 in compensatory damages.

While this case is not as simple as the eaves of a roof or the porch of a house extending over the boundary, neither is it as compelling as the skyscraper whose foundation crossed the border. If the court of appeals' multi-faceted evaluation of equities, hardships and conveniences governs in the future, mandatory injunctions are less likely to be granted.

LATERAL SUPPORT: The common law rule is that the owner of land has the right to lateral support of the soil in its natural state.²⁸ A party who excavates upon his own land is under a duty not to remove the lateral support that maintains the adjoining land, and indeed may be under a corollary duty to replace natural support with an artificial support.²⁹ The duty to support the land, which is of ancient origin, is absolute and does not require a showing of negligence.³⁰ However, when neither landowner is responsible for the collapse of the support and both landowners would benefit from restoration, the court of equity has discretion to apportion the cost of restoration.³¹

Frequently, the evacuation was performed not by the adjoining landowner, but some time in the past by the predecessor in title to the adjoining landowner.³² If the predecessor in title erected an artificial support, equity may grant relief for the failure of the present owner to maintain it. However, if the predecessor only removed natural support, equity will not compel relief against the present owner.³³ In the absence of an artificial support, the present owner has nothing to maintain. Any claim against the present owner must be based in negligence, and not on the absolute duty to maintain support.

NUISANCE: Although the owner of land is free to use the land as he wishes, unless restrained by governmental restrictions, the owner can only use it in a fashion that does not interfere with another's use and enjoyment of his own land. Conduct that constitutes an unreasonable interference with another's peaceful, quiet and undisturbed use and enjoyment of his own land is a nuisance.³⁴ Equity will enjoin a private nuisance in fact when the resulting injury to the adjacent property is certain, substantial, and non-speculative.³⁵ Generally, the intrusion must result in physical harm.³⁶

Interference with the peaceful enjoyment of land may occur because the alleged nuisance creates reasonable fear for the safety of the neighboring residents,³⁷ is a depressing and constant reminder of death,³⁸ restricts the play and activities of children,³⁹ emits offensive and nauseous odors,⁴⁰ generates excessive noise and dust,⁴¹ or creates loud and distracting noises.⁴²

A nuisance per se is an activity or structure that is a nuisance at all times, in all locations and under all circumstances.⁴³ Legitimate businesses such as funeral homes,⁴⁴ motorcycle racetracks,⁴⁵ sanitary landfills,⁴⁶ and even poultry rendering plants⁴⁷ are not nuisances per se. But if carried on in the wrong locality or in an improper fashion, they may become nuisances in fact.⁴⁸ Even the use of a noxious building may be a nuisance and subject to the injunctive powers of equity.⁴⁹ A lawful and useful business may not be enjoined because of "every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person."⁵⁰ Strong, clear and urgent reasons must be demonstrated. On the other hand, the commercial enterprise may not be permitted to drive a person from his home or compel him to live in positive discomfort.⁵¹

A nuisance cannot be established by a mere assertion of a depreciation in property values,⁵² although a change in property values is certainly a critical factor.⁵³ The predominance of commercial property, residential property or vacant land in the area is also significant.⁵⁴ A proposed construction project of a legitimate business will be enjoined only when the testimony establishes that the activity is certain to be a nuisance.⁵⁵

Even after deciding that a nuisance exists, the court may evaluate the hardships, the impact on the public interest and third parties and the difficulty of enforcement and supervision, and conclude that injunctive relief is not appropriate. The plaintiff

then is limited to damages, either permanent or temporary,⁵⁶ which are available under equity's clean-up power.⁵⁷

Even if the court finds that a nuisance does exist, the more difficult question is the appropriate equitable remedy. Occasionally, an outright prohibition of the conduct may be appropriate. However, equity specializes in novel, flexible, and unique decrees.

It is disappointing when equity does not use that flexibility. For example, a dirt motorcycle track was found to be a nuisance in light of the noise and dust generated that made it difficult for neighbors to enjoy television, to hold conversations outside and to sleep.⁵⁸ The permanent injunction barred the owners from conducting motorcycle races at the facility. Surely less drastic remedies were available. The defendants offered evidence of the capital investment in the facility, landscaping plans, acoustical research undertaken, and plans to place mufflers on the motorcycles. Not only the owners, but also the riders, the fans and especially the track's employees would be handicapped by a permanent injunction. Rather than a complete prohibition, equity might have decreed mufflers on the motorcycles, wetting of the track before racing, paving of the track, limited hours and days of operation, sound containment modifications, or similar restrictions. The court might have left the technical details to the defendants, by decreeing only that the sound not exceed a specified decibel level according to established standards and technology.⁵⁹ The opinion does not discuss such options. Admittedly, perhaps the reality of dirt motorcycle tracks is that such relief is not feasible, practically or economically. Perhaps fans will not attend such restrained motorcycle racing, or, possibly, the defendants were willing to gamble their entire enterprise on an all or nothing decision.

However, in contrast, other courts have utilized their drafting ability. For example, in finding that 60 head of cattle constituted a nuisance to neighbors, the court's injunction limited the cattle to ten, barred the cattle from breeding or giving birth on the lands (technically, since the cattle were not named defendants, ordered the owners to prevent the cattle from breeding), and directed the defendant to take steps to prevent the land from being a breeding place for flies and mosquitoes, while placing more subjective restrictions on offensive odors.⁶⁰ Similarly, a brooder house with 40,000 broilers was a nuisance in light of the noise, odor, and attendant flies.⁶¹ Along with other provisions, the trial court's

injunction barred the defendant from catching and shipping the chicks from the hours of 9:00 p.m. to 7:00 a.m. However, the defendant successfully convinced the appellate court that such an injunction would in effect cripple the business. The reality of the poultry business is that the chickens are raised in 24-hour-a-day light, and when the lights are turned off they are stunned and motionless for quick capture before the trip to the processing plant. The case was remanded, with the clear implication that the trial court should draft a more carefully tailored injunction.

Sometimes equity's solution may please neither party. In recent years a public minded Little Rock citizen has constructed and expanded a massive Christmas lights display. Stretching over several lots, including over 1,600,000 lights, complete with reindeer and sleighs, Mickey Mouse driving a steam engine, a musical calliope and a rotating illuminated carousel suspended in the air, and camels and wise men, the spectacle attracted thousands. Most, apparently, were delighted and thrilled. But a handful of neighbors alleged that the display was a private nuisance. They complained of trash on their property, parking on their lawns, vandalism in the neighborhood, traffic hazards, limited access to their own homes, and unreasonable noise and lighting. The chancellor determined it was both a public and private nuisance.⁶² But what form of relief is appropriate? Providing token damages or even compensation for the diminished market value or rental value of their property during the Christmas season would not address the wrong, and would hardly be an adequate remedy at law, as equity demands before denying relief. Reducing the size of the display or the number of the lights and limiting its expansion might control the nuisance, just as limiting the number of cattle on land from sixty to ten did. But the chancellor's solution was merely to limit the number of days the display would be turned on. In other words, the nuisance will be in operation on Monday, but not on Tuesday. Both parties have appealed.

SPITE FENCES: The common law rule is that an owner of property may erect on his property any type of structure desired, provided neither statute nor express agreement prohibits the structure. Regardless of the motive of the owner and equally regardless of the impact the structure might have on adjoining landowners, the owner of the land may use it as he wishes.⁶³

Some courts have recognized an exception to that general rule: if the structure can have no benefit or advantage to the owner, but was undertaken for the "avowed or manifest purpose of damaging a neighbor," then equity may enjoin the structure.⁶⁴ Obviously that test is extremely difficult to satisfy. Most landowners would be circumspect enough not to avow or manifest such a nefarious purpose. Furthermore, property owners, or their attorneys, would be resourceful enough to find some benefit or advantage to the owner. For example, in the sole Arkansas case on a spite fence, the court concluded that regardless of the animosity between the neighbors, the construction of the high solid fence was designed at least in part to protect a garden.⁶⁵ Courts in other jurisdictions have been more willing to balance the injury suffered by the plaintiff and the benefit gained by the defendant from the fence.⁶⁶

THE MISTAKEN IMPROVER: The plight of the mistaken improver is the most disturbing. He has no improper motives, he does not act out of spite or ill will, he invests his time and resources in improving land. But he is mistaken as to which land is his. His entire building, for example, is built on another's property. Under the common law rule, improvements mistakenly made on the property belong to the owner of the land, with no obligation to provide any compensation to the mistaken improver.⁶⁷

At first glance the solution is the Arkansas Betterment Statute.⁶⁸ This provision of the ejectment statute amends the common law and provides that any person who, believing himself to be the owner either in law or equity and acting under color of title, has mistakenly and peaceably improved the land of another may be entitled to compensation for the value the improvements have added to the land.⁶⁹ However, the statute is applicable only when the person in possession acts in good faith and under color of title.⁷⁰ Good faith consists of an honest belief and an ignorance that any other person claims a better right to the land.⁷¹ Color of title refers to an instrument that passes what purports to be a title, but which is defective in form.⁷² A mistaken improver, who, innocently and in good faith, but without color of title, benefits the land of another by building on the wrong tract, consequently has no claim for compensation under the statute.⁷³

However, if the property is removable, the statutes grant the innocent improver one year to remove the construction if that can be accomplished without damage to the land.⁷⁴ Basic principles of unjust

enrichment likewise permit removal if feasible.⁷⁵

Similarly, if the owner initiates an action in equity, perhaps to quiet title, the mistaken improver can counterclaim for relief, relying in part on the maxim that "he who seeks equity must do equity." For that reason, cautious legal advice to the owner would be not to sue in equity.

Therefore, the unfortunate improver's last resort is to assert a claim in simple or pure unjust enrichment. The argument would be that modern jurisprudence, fairness and equity should not permit an individual to receive a free home or other improvement simply because an innocent party, acting in good faith, built on the wrong tract.

However, the court has not been sympathetic to the plight of the mistaken improver. The court has refused to condone or tolerate a church constructed on the wrong tract of undeveloped land,⁷⁶ and a brick residence built on the wrong lot.⁷⁷ Equity lacks authority to compel a swap of land⁷⁸ or the sale of a small parcel of land to the innocent improver.⁷⁹ Courts in other jurisdictions, although equally distressed at the plight of the mistaken improver, have likewise been reluctant to grant relief.⁸⁰ Even equity places limits on the extent of its mercy and grace.

NOTES

* *The author gratefully acknowledges the research assistance of Shane Roughley, Class of 1995.*

1. *Brown v. Land, Inc.*, 236 Ark. 15, 364 S.W.2d 659 (1963). *See also* *Thomas v. Weller*, 204 Neb. 298, 281 N.W.2d 790 (1979) (duck hunter enjoined from annually trespassing on plaintiff's land).

2. WILLIAM Q. DEFUNIACK, *HANDBOOK ON MODERN EQUITY* 54 (2d ed. 1950).

3. *Carlisle School District v. Carlisle Development Co.*, 243 Ark. 6, 417 S.W.2d 952 (1967).

4. *See* DAN B. DOBBS, *HANDBOOK ON REMEDIES*, Section 5.10(3) (2nd ed. 1993).

5. Some encroachment can be remedied without the assistance of equity. A property owner subject to encroaching branches, roots and other forms of vegetation can usually resort to self-help within the borders of his own property. *See* the cases collected in Annotation, 65 ALR 4th 587.

6. *See* ARK. CODE ANN. § 18-60-201, *et seq.*

7. *Carlisle School District No. 3 of Lonoke County v. Carlisle Development Co.*, 243 Ark. 6, 417 S.W.2d 952 (1967); *Fulks v. Fredeman*, 224 Ark. 413, 273 S.W.2d 528 (1954).

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8. *Brown v. Land, Inc.*, 236 Ark. 15, 364 S.W.2d 659 (1963).
9. *Leffingwell v. Glendenning*, 218 Ark. 767, 238 S.W.2d 942 (1951).
10. *Fulks v. Fredeman*, 224 Ark. 413, 273 S.W.2d 528 (1954).
11. *Beaty v. Gordon*, 236 Ark. 50, 364 S.W.2d 311 (1963).
12. *McLendon v. Johnston*, 243 Ark. 218, 419 S.W.2d 309 (1967).
13. *Id.*
14. *Id.* (defendant was an experienced builder who had constructed 10 homes in the neighborhood).
15. *Brown Derby Hollywood Corp. v. Hatton*, 40 Cal. Rptr. 848, 395 P.2d 896 (1964).
16. *E.g., Welton v. 40 East Oak St. Building Corp.*, 70 F.2d 377 (7th Cir. 1934)(twenty story building constructed in knowing violation of set back requirement; mandatory injunction to remove encroachment issued).
17. *Fulks v. Fredeman*, 224 Ark. 413, 273 S.W.2d 528 (1954).
18. *Leffingwell v. Glendenning*, 218 Ark. 767, 238 S.W.2d 942 (1951).
19. *See Beaty v. Gordon*, 236 Ark. 50, 364 S.W.2d 311 (1963)(award of \$1000 for damages over overhanging caves set aside); *Brown v. Land, Inc.*, 236 Ark. 15, 364 S.W.2d 659 (1963); *Fulks v. Fredeman*, 224 Ark. 413, 273 S.W.2d 528 (1954).
20. *See DAN B. DOBBS, HANDBOOK ON REMEDIES* 355 (1973).
21. *Hamilton v. Smith*, 212 Ark. 893, 208 S.W.2d 425 (1948). *See Howard W. Brill, The Maxims of Equity*, 1993 ARK. L. NOTES 29.
22. *See McLendon v. Johnston*, 243 Ark. 218, 419 S.W.2d 309 (1967)(evidence fell short of establishing estoppel against the plaintiff).
23. *Rabjohn v. Ashcraft*, 252 Ark. 565, 480 S.W.2d 138 (1972).
24. *McLendon v. Johnston*, 243 Ark. 218, 419 S.W.2d 309 (1967)(no semblance of actual hostile possession by the encroacher); *Clark v. Clark*, 4 Ark. App. 153, 632 S.W.2d 432 (1982)(six elements of adverse possession not established).
25. DOBBS, *supra* note 4, at Section 5.10(4).
26. *Leffingwell v. Glendenning*, 218 Ark. 767, 238 S.W.2d 942 (1951). Evaluation of real property may be either objectively based upon the fair market value of the land or subjectively based upon the value to the particular owner. The latter approach considers such factors as the owner's use of the land, prospective use of the land, and family ties to the land. This approach, while seemingly fairer to the owner, is subject to both a lack of evidentiary certainty and owner manipulation.
27. 33 Ark. App. 108, 802 S.W.2d 484 (1991).
28. *Urosevic v. Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ark. App. 1979).
29. *Id.*
30. *See Frances Shane Fendler, Note, Property-Lateral Support—Effect of an Act of God on Absolute Liability*, 4 U. ARK. LITTLE ROCK L.J. 103 (1981).
31. *Urosevic v. Hayes*, 267 Ark. 739, 590 S.W.2d 77 (Ark. App. 1979)(brick wall built 65 years earlier hit by lightning collapsed, causing land to subside).
32. *Keck v. Longoria*, 28 Ark. App. 277, 771 S.W.2d 808 (1989).
33. *Id.* (evacuation of land 26 years before commencement of action).
34. *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987). Public nuisances violate a public right possessed by the community as a whole, and an action must be brought by the government or by a citizen who has suffered special damage. *See Southeast Arkansas Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993)(off-loading facility and landfill constituted a public nuisance). Some public nuisances are defined by statute. *See ARK. CODE ANN. § 16-105-204* (public dance halls, roadhouses, tourist camps, nudist camps and establishments serving alcoholic beverages, when carried on in violation of the statutory law). A private nuisance is a violation of the rights of an individual, who is empowered to seek relief. Conduct may constitute both a public and a private nuisance. *Ozark Poultry Products, Inc. v. Garman*, 251 Ark. 389, 472 S.W.2d 714 (1971). The governing maxim is "Sic utere tuo ut alienum non laedas," that is, use your own property in such a manner as not to injure that of another.
35. *Arkansas Release Guidance Found. v. Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972)(injunction against a halfway house for parolees and prisoners).
36. *Southeast Ark. Landfill, Inc. v. State*, 313 Ark. 669, 858 S.W.2d 665 (1993). Equity will not enjoin a nuisance which causes only diminution in the value of the property or business. *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987).
37. *Arkansas Release Guidance Found. v. Needler*, 252 Ark. 194, 477 S.W.2d 821 (1972).
38. *Howard v. Erchieson*, 228 Ark. 809, 310 S.W.2d 473 (1958).
39. *Id.*
40. *Ozark Poultry Prod., Inc. v. Garman*, 251 Ark. 389, 472 S.W.2d 714 (1971).
41. *Baker v. Odom*, 258 Ark. 826, 529 S.W.2d 138 (1975)(dirt race track).
42. *Green v. Smith*, 231 Ark. 94, 328 S.W.2d 357

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(1959)(poultry brooder house); *Higgs v. Anderson*, 14 Ark. App. 113, 685 S.W.2d 521 (1985)(barking dogs at open-air kennel).

43. *Miniat v. McGinnis*, 26 Ark. App. 157, 762 S.W.2d 390 (1988).

44. *Elston v. Paal*, 261 Ark. 644, 550 S.W.2d 771 (1977).

45. *Baker v. Odom*, 258 Ark. 826, 529 S.W.2d 138 (1975).

46. *Miller v. Jasinski*, 17 Ark. App. 131, 705 S.W.2d 442 (1986).

47. *Ozark Poultry Prod., Inc. v. Garman*, 251 Ark. 389, 472 S.W.2d 714 (1971).

48. *Milligan v. General Oil Co.*, 293 Ark. 401, 738 S.W.2d 404 (1987)(above-ground gasoline storage tanks not a nuisance in fact); *Higgs v. Anderson*, 14 Ark. App. 113, 685 S.W.2d 521 (1985)(outdoor dog kennel was a nuisance in fact).

49. *See* *Murphy v. Cupp*, 182 Ark. 334, 31 S.W.2d 396 (1930)(injunction against construction of a church prematurely issued).

50. *Durfey v. Thalheimer*, 85 Ark. 544, 109 S.W. 519, 522 (1908)(stable in Little Rock).

51. *Durfey v. Thalheimer*, 85 Ark. 544, 109 S.W. 519, 522 (1908).

52. *City of Newport v. Emery*, 262 Ark. 591, 559 S.W.2d 707 (1977); *Higgs v. Anderson*, 14 Ark. App. 113, 685 S.W.2d 521 (1985).

53. *Mitchell v. Bearden*, 255 Ark. 888, 503 S.W.2d 904 (1974).

54. *Id.*

55. *Miniat v. McGinnis*, 26 Ark. App. 157, 762 S.W.2d 390 (1988)(no injunction to prevent construction of a long term care institution). *See also* *City of Newport v. Emery*, 262 Ark. 591, 559 S.W.2d 707 (1977)(sanitary landfill); *Ryall v. Waterworks Imp. Dist. No. 3*, 247 Ark. 431, 445 S.W.2d 883 (1969)(sewage treatment plant). Equity will enjoin a prospective nuisance only if it is a nuisance per se or if the evidence demonstrates that the activity is certain to be a nuisance in fact.

56. *See* HOWARD W. BRILL, *THE ARKANSAS LAW OF DAMAGES*, chapter 30 (2nd ed. 1990).

57. *See* Howard W. Brill, *Law and Equity in Arkansas: Will Liles v. Liles Lead Us Out of the Morass?*, 1987 ARK. L. NOTES 1. *See also* BRILL, *supra* note 56, at § 2-2.

58. *Baker v. Odom*, 258 Ark. 826, 529 S.W.2d 138 (1975).

59. This technique of placing the burden on the defendant to rectify the nuisance is common. For example, in *Ozark Poultry Products, Inc. v. Garman*, 251 Ark.

389, 472 S.W.2d 714 (1971), the court found a poultry rendering plant to be a nuisance and ordered it closed "unless conditions at the plants are corrected within a reasonable time fixed by the court." Keep in mind that any injunction must be specific in its terms. It must describe with reasonable detail the acts mandated upon the defendant and likewise the acts from which the defendant must refrain. ARK. R. CIV. P. 65(e). Only with this specificity can a party be held in contempt for disobedience.

60. *Bryson v. Ellsworth*, 211 Ark. 313, 200 S.W.2d 504 (1947).

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

62. *Power v. Osborne*, 93-3148 (Chancery Court, Pulaski County).

63. *DeMers v. Graupner*, 186 Ark. 214, 53 S.W.2d 8 (1932).

64. *Id.*

65. *Id.*

66. *See* *Schorck v. Epperson*, 74 Wyo. 286, 287 P.2d 467 (1955)(home-owner constructed a solid 9 foot high and 106 foot long fence, topped off by a defiant red flag, which cut off neighbor's air and light; fence had some minimal value as a snow fence or windbreak, but injunction decreed that fence be lowered to the level of neighbor's window sills).

67. *Hughey v. Bennet*, 264 Ark. 64, 568 S.W.2d 46 (1978). *See* Jay N. Tolley, Note, *Equity Rights of a Mistaken Improver*, 24 ARK. L. REV. 133 (1970).

68. ARK. CODE ANN. § 18-60-213(a).

69. *See, e.g.*, *Wallis v. McGuire*, 234 Ark. 491, 352 S.W.2d 940 (1962). *See* BRILL, *supra* note 56, at § 32-16.

70. *Berry v. Bierman*, 248 Ark. 440, 451 S.W.2d 867 (1970).

71. *Vernon v. McEntire*, 234 Ark. 995, 356 S.W.2d 13 (1962).

72. *Baker v. Ellis*, 245 Ark. 484, 432 S.W.2d 871 (1968).

73. *Foltz v. Alford*, 102 Ark. 191, 143 S.W. 905 (1912).

74. ARK. CODE ANN. § 18-60-105. The statute not only permits the improver to remove the construction, but also provides that the improver "shall not be held responsible for any damages to the owner of the adjoining lands." That provision is arguably unconstitutional for violating the principle of Article 2, § 13 of the Arkansas Constitution that every person is entitled to a remedy for injuries suffered to his property. *See* *Dendy v. Greater Damascus Baptist Church*, 247 Ark. 6, 9, 444 S.W.2d 71, 72 (1969)(Fogelman, J., concurring). The legislation should probably be viewed as eliminating nominal damages for the trespass, but not the actual dam-

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ages caused by the construction or the removal.

75. *Young v. Mobley Construction Co.*, 266 Ark. 935, 587 S.W.2d 837 (1979); *Shick v. Dearmore*, 246 Ark. 1209, 442 S.W.2d 198 (1968)(well casing and 191 feet of pipe).

76. *Dendy v. Greater Damascus Baptist Church*, 247 Ark. 6, 444 S.W.2d 71 (1969).

77. *Smith v. Stewart*, 10 Ark. App. 201, 662

S.W.2d 202 (1983)(mistake due to incorrect survey).

78. *Dendy v. Greater Damascus Baptist Church*, 247 Ark. 6, 444 S.W.2d 71 (1969).

79. *See Smith v. Stewart*, 10 Ark. App. 201, 662 S.W.2d 202 (1983).

80. *See, e.g., James v. Bailey*, 370 F. Supp. 469 (U.S.D.C.V.I. 1974).