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Baker v. Burbank-Glendale-Pasadena Airport Authority: The California Approach to Inverse Condemnation and Nuisance

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INTRODUCTION

Damage caused by airport noise has been the subject of extensive litigation. The judicial trend in these cases reflects an expansion of the theories available to adjacent homeowners.[1] In *Baker v. Burbank-Glendale-Pasadena Airport Authority*,[2] the Supreme Court of California reinforced this trend by expanding two legal theories commonly used to obtain relief for airport noise: inverse condemnation and nuisance. The court held that an inverse condemnation action may be maintained against a public entity even though the entity does not have the power of eminent domain.[3] The court further held that a plaintiff may elect to treat airport noise as a "continuous" nuisance rather than a "permanent" nuisance, thereby avoiding invalidation of the plaintiff's claim by the statute of limitations.[4] Part I of this Note sets forth the facts and decision of the *Baker* case. Part II discusses the legal background of both inverse condemnation and nuisance actions. Part III reviews the legal ramifications of the dual holding of *Baker*.

I. THE CASE

A. The Facts

In 1978, the defendant, Burbank-Glendale-Pasadena Airport Authority, became a public entity pursuant to statute when the three cities purchased the Hollywood-Burbank Airport.[5] Under this statute, the Airport Authority was denied eminent domain powers.[6] In 1982,

1. Bennet, *Airport Noise Litigation: Case Law Review*, J. AIR L. & COM. 449, 474 (1982).
2. 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985).
3. *Id.* at 868, 218 Cal. Rptr. at 296.
4. *Id.* at 873, 218 Cal. Rptr. at 300.
5. CAL. GOV'T CODE §6546.1 (statute specifically authorizing the acquisition and operation of the Hollywood-Burbank Airport as a public airport). *See also id.* §§6500-6519 (authorizing joint powers agreements for the purchase of public agencies).
6. *Id.* §6546.1. This section provides in part that the defendant "shall not authorize or

ten homeowners who lived adjacent to the airport filed suit raising inverse condemnation and nuisance claims. The plaintiffs sought recovery for damages caused by noise, smoke, and vibrations from flights over their homes.

The trial court sustained a demurrer to the inverse condemnation claim on the ground that an inverse condemnation action can be filed only against public entities having eminent domain powers.[7] A demurrer to the nuisance claim was also sustained on the basis that the claim was barred by the statute of limitations.[8] The court held that airport noise constituted a permanent nuisance upon which the one-year statute of limitations[9] had run in 1979.[10] The trial court stated that the legal test for determining whether a nuisance is permanent or continuing is whether the nuisance was subject to judicial, rather than voluntary, abatement.[11] The appellate court upheld the demurrer to the inverse condemnation action, but reversed the trial court on the nuisance cause of action.[12] The appellate court ruled that the plaintiff may elect to treat the nuisance as continuous to resolve statute of limitation problems.[13]

B. The Opinion

The holding of the California Supreme Court focused on two issues. The court first discussed whether a public entity lacking eminent domain power may nonetheless be held liable for inverse condemnation. Secondly, the court considered whether airport operations not subject to judicial abatement could be characterized as a continuing nuisance, thereby allowing successive lawsuits. The court answered both questions in the affirmative.

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permit . . . the purchase of fee title to condemned real property zoned for residential use . . . ." *Id.*

7. *See* Baker v. Burbank-Glendale-Pasadena Airport, 197 Cal. Rptr. 357, 360 (depublished appellate court decision).

8. *Id.*

9. CAL. GOV'T CODE §911.2, CAL. CIV. PROC. CODE §§338(2), 340. Claims against public entities alleging injuries to persons or property must be brought by the one hundredth day after the accrual of the cause of action. All other claims must be brought within one year of the accrual of the cause of action. *Id.* The plaintiffs in *Baker* had alleged the defendant became a nuisance as of the date the airport became a public entity in 1978. *Baker*, 39 Cal. 3d at 868, 705 P.2d at 869, 218 Cal. Rptr. at 296.

10. *Baker*, 197 Cal. Rptr. at 360 (depublished appellate court decision).

11. *Id.* at 360.

12. *Id.* at 371.

13. *Id.* at 370.

1. *Inverse Condemnation*

The court first examined the inverse condemnation claim. The defendant argued that inverse condemnation was a form of eminent domain initiated by the landowner rather than the government.[14] Therefore, a public entity lacking the power to condemn by eminent domain could not be liable for inverse condemnation.[15] The court unanimously rejected this argument, and held that an inverse condemnation action is grounded, not on statutory eminent domain power, but on proscriptions against a taking set forth in both the California and United States Constitutions.[16] The supreme court reasoned that a homeowner can still suffer a taking despite a defendant's lack of statutory authority to take.[17]

2. *Nuisance*

The court next considered whether the nuisance action was barred by the statute of limitations.[18] The answer depended on whether the activities of the defendant were classified as a permanent or continuous nuisance. Permanent nuisances are generally nuisances which by one act result in a permanent injury, and therefore require that damages for past, present, and future harm be assessed at one time.[19] Continuous nuisances, on the other hand, are nuisances which may be discontinued at any time, and the persons harmed may bring successive actions for past damages until the nuisance is abated.[20] Classification of the airport in *Baker* as a permanent nuisance would invoke the one-year statute of limitatons and bar the plaintiff's action.[21]

a. *Majority Opinion*

The majority articulated that the test for classifying a nuisance as either permanent or continuous should focus on the type of harm suffered by the plaintiff, and not on the interest of the offending

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14. *Baker*, 39 Cal. 3d at 866, 705 P.2d at 868, 218 Cal. Rptr. at 295.
15. *Id.*
16. CAL. CONST. art I, §19 provides in part: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." U.S. CONST. amend. V states in part: ". . . nor shall private property be taken for public use, without just compensation . . . "
17. *Baker*, 39 Cal. 3d at 867, 705 P.2d at 868, 218 Cal. Rptr. at 295.
18. *Id.* at 868, 705 P.2d at 869, 218 Cal. Rptr. at 296.
19. Williams v. So. Pacific R.R. Co., 150 Cal. 624, 626, 89 P. 599, 599 (1907).
20. Phillips v. City of Pasadena, 27 Cal. 2d 104, 107-08, 162 P.2d 625, 626 (1945).
21. *Baker*, 39 Cal. 3d at 868, 705 P.2d at 869, 218 Cal. Rptr. at 296. *See supra* note 9.

party in continuing the nuisance.[22] The court held that since airport noise involves the ongoing use of offending structures, and can be physically abated, the nuisance is continuous in nature.[23] Therefore, the plaintiff could bring successive suits for damages.[24]

The court relied on *Spaulding v. Cameron*[25] to support this holding. In *Spaulding*, the California Supreme Court held that in doubtful cases the plaintiff may elect to treat a particular nuisance as either permanent or continuous.[26] One justification expressed by the *Spaulding* court for allowing the plaintiff an election was injustice created by statute of limitation problems.[27] The *Baker* court applied the election doctrine, and held that the plaintiff could elect to treat airport noise as a continuous nuisance to avoid the statute of limitations.[28]

The defendant argued that the election doctrine set forth in *Spaulding* should not apply in the present case because the *Spaulding* court had held that "privileged"[29] activity must be deemed a permanent nuisance.[30] Using operations of a public utility as an example of a clear permanent nuisance, the *Spaulding* court indicated that only one action for damages caused by a permanent nuisance should be

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22. *Baker*, 39 Cal. 3d at 868, 705 P.2d at 869, 218 Cal. Rptr. at 296.

23. The court indicated that the classification of permanent nuisance was reserved for more solid structures, such as buildings or railroads encroaching on a person's land. *Baker*, 39 Cal. 3d at 869-70, 705 P.2d at 870, 218 Cal. Rptr. at 297.

24. *Id.* at 868-73, 705 P.2d at 869-73, 218 Cal. Rptr. at 296-300.

25. 38 Cal. 2d 265, 239 P.2d 625 (1952).

26. *Id.* at 268, 239 P.2d at 629.

27. *Id.* The court stated that if the initial injury is slight and plaintiff delays suit until he has suffered substantial damage and thereafter the court determines the nuisance was permanent, the defendant may be able to bar the action by asserting the statute of limitations ran from the time of the initial injury. *Id.*

28. *Id.* at 873, 705 P.2d at 873, 218 Cal. Rptr. at 300.

29. Apparently, the majority defined privilege in this context to mean those cases in which the defendant is *allowed to continue* the nuisance. The defendant's activity is therefore "privileged." *See infra* notes 32-35 and accompanying text. However, the majority concluded that the plaintiff may still have a right to elect even if the defendant is privileged to continue operations. *See infra* notes 47-48 and accompanying text. The majority then indicated that the doctrine of election will not apply only in cases when the defendant is *absolutely* privileged to continue operations. An absolutely privileged activity is apparently one in which no further remedies remain available to the plaintiff, either because compensation has been paid or federal law preempts the area. *See infra* notes 36-41 and accompanying text. The dissent viewed the definition of "privilege" in a different context. The dissent held "privilege" to mean that the defendant's activity is not reasonably abateable. According to the dissent, activities that are not reasonably abateable must be deemed permanent. *See infra* notes 52-57 and accompanying text. Thus, while the majority concluded that certain operations which are privileged to continue are still subject to the doctrine of election, the dissent believed that a "privilege" to continue includes a "privilege" against the use of the doctrine of election.

30. *Baker*, 39 Cal. 3d at 870-71, 705 P.2d at 871-72, 218 Cal. Rptr. at 298-99.

allowed since the utility was entitled, through compensation, to continue operations indefinitely.[31]

The California Supreme Court relied on four factors to reject the defendant's argument that *Spaulding* had categorized privileged activities as permanent nuisances, thereby barring the plaintiff's right to elect. First, the court noted that the language in *Spaulding* relied on by the defendant was only dictum since *Spaulding* did not raise a question of privileged activity.[32] Second, the election discussion in *Spaulding* was based in part on *Phillips v. City of Pasadena*.[33] In *Phillips*, the court had refused to hold that a gate erected by the government which obstructed a road was, as a matter of law, a permanent nuisance. The *Phillips* court reasoned that although the government was privileged to erect the gate, the gate could still be removed at any time.[34] The *Baker* majority interpreted both *Spaulding* and *Phillips* to give the plaintiff a right to an election whenever the ability to physically abate the nuisance exists, regardless of whether the nuisance is subject to judicial abatement.[35]

A third factor articulated by the court in rejecting the defendant's argument was that the privilege discussed in *Spaulding* was absolute.[36] The majority reasoned that extensive regulation of airports under federal law[37] does not require airport operations to be absolutely privileged.[38] State law damage remedies remain available against an airport proprietor despite the fact that federal law prohibits interference

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31. *Spaulding*, 38 Cal. 2d at 267, 239 P.2d at 627-28. The court stated: "The clearest case of a permanent nuisance or trespass is one where the offending structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once." *Id.*

32. *Baker*, 39 Cal. 3d at 871, 705 P.2d at 871, 218 Cal. Rptr. at 298. *Spaulding*, 38 Cal. 2d at 270, 162 P.2d at 629. In *Spaulding*, the defendant, a private landowner, negligently maintained piles of dirt on his property, which caused mudslides on plaintiff's property. The trial court ordered the nuisance abated but also awarded prospective damages for permanent diminution in the value of plaintiff's property. See infra note 52.

33. 27 Cal. 2d 104, 162 P.2d 625 (1945).

34. *Id.* at 107-08, 162 P.2d at 626-27.

35. *Baker*, 39 Cal. 3d at 871, 705 P.2d at 871, 218 Cal. Rptr. at 298.

36. *Id.* at 872, 218 Cal. Rptr. at 299, 705 P.2d at 872.

37. Federal plenary power over aviation preempts local control over aircraft flights, but does not preempt efforts by airport proprietors to reduce airport noise. Greater Westchester Homeowners Assn. v. City of Los Angeles, 26 Cal. 3d 86, 94, 603 P.2d 1329, 1336, 160 Cal. Rptr. 733, 739 (1979). *See also* Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 582, 591, 394 P.2d 548, 544-45, 39 Cal. Rptr. 708, 714-15 (1964); Burbank v. Lockheed Air Terminal, 411 U.S. 624, 635-40 (1973).

38. *Baker*, 39 Cal. 3d at 872-73, 705 P.2d at 872-73, 218 Cal. Rptr. at 299-300.

with commercial flight schedules.[39] Furthermore, state regulations specify that an airport proprietor has a duty to abate airport noise.[40] Thus, the majority concluded that while federal law adds a "level of permanency" to the problem, federal law does not require that the nuisance be treated as permanent.[41]

The fourth factor relied on by the *Baker* court to dismiss the defendant's claim of privilege was based on public policy.[42] The majority reasoned that the purpose of nuisance law is to provide a means of recovery for harm suffered.[43] Defining a nuisance as permanent or continuous on the basis of the privileged nature of the activity alone creates an artificial distinction between two groups of plaintiffs. Consequently, applying the statute of limitations to a "privileged" continuing nuisance but not to a nonprivileged continuing nuisance requires the victim to "choose his or her tortfeasor wisely" in violation of the compensatory purpose of nuisance law.[44] The majority also refused to enlarge the category of permanent nuisances, stating that once a nuisance is classified as permanent, little incentive exists for the tortfeasor to take remedial actions to abate the nuisance.[45] This result would be inconsistent with the philosophy of tort law, which encourages innovation.[46]

The supreme court concluded that airport operations are the "quintessential continuing nuisance."[47] At the same time, the court held that the plaintiffs could elect to treat airport noise as either a continuous or permanent nuisance.[48]

b. *Dissenting Opinion*

The dissenting opinion, written by Justice Mosk,[49] disagreed both with the test articulated by the majority to determine whether a

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39. *See* Bennet, *supra* note 1, at 450-64.

40. CAL. GOV'T CODE §6546.1. This section reads in part: "In operating the airport, the separate public entity . . . shall not permit or authorize any activity in conjunction with the airport which results in an increase in the size of the noise impact area . . . . In addition, the entity shall diligently pursue all reasonable avenues available to insure that the adverse effects of noise are being mitigated to the greatest extent reasonably possible." *Id. See* CAL. ADMIN. CODE, tit. 21, R.5000-5080.5 (establishing airport noise standards).

41. *Baker*, 39 Cal. 3d at 873, 705 P.2d at 872-73, 218 Cal. Rptr. at 299-300.

42. *Id.* at 871-72, 705 P.2d at 871-72, 218 Cal. Rptr. at 299.

43. *Id.*

44. *Id.* The supreme court also noted that the "doctrine of election is designed to facilitate just and equitable recovery." *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 873, 705 P.2d at 871-72, 218 Cal. Rptr. at 299-300.

48. *Id.*

49. Justice Lucas joined Justice Mosk in dissent to the nuisance holding. *Id.*

nuisance is permanent or continuous and with the majority's interpretation of *Spaulding v. Cameron*.[50] While the majority stated that the test for classifying a nuisance as permanent or continuous depended upon the type of harm suffered,[51] the dissent stressed that the test for determining whether a nuisance is permanent depends upon whether the nuisance is "reasonably abateable."[52] Applying the reasonably abateable test to the facts of *Baker*, the dissent concluded that airport noise is a permanent nuisance.[53] The dissent relied on two factors in reaching this decision. First, injunctive relief was unavailable since the defendant was a public entity.[54] Second, the dissent argued that defining the nuisance as continuing would subject the public entity defendant to costly and vexatious litigation.[55]

The dissent also disagreed with the interpretation of the majority concerning the application of the *Spaulding* election doctrine to the facts in *Baker*. The dissent reasoned that the "privilege" alluded to in *Spaulding* applies to nuisances that are "not reasonably abateable." Since airport operations are not subject to injunctive relief, airport noise is not reasonably abateable, and therefore the plaintiffs are not free to treat the nuisance as continuing.[56] Justice Mosk further argued that the ability of the airport to employ measures to mitigate noise did not diminish the privilege because neither the state nor private

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50. 38 Cal. 2d 265, 239 P.2d 625 (1952).

51. *See supra* note 22 and accompanying text.

52. *Baker*, 39 Cal. 3d at 874, 705 P.2d at 873-74, 218 Cal. Rptr. at 300. The dissent cited *Spaulding v. Cameron* as authority. In *Spaulding*, the defendant's leveling operations created fills which washed onto plaintiff's land during rainstorms. The trial court found the fills created a threat of repetitious inundations of mud onto plaintiff's property. The plaintiff wished to recover past and future damages arguing the fill constituted a permanent nuisance. The defendant contended that future damages were not permissible because the nuisance could be abated. The lower court found permanent damage to plaintiff's property based on the continuing threat of future injury, but also found that the threat could be removed. On appeal, the supreme court stated that in "the present case, it cannot be said as a matter of law that the nuisance can or cannot be abated," and remanded the case to the trial court to determine if "the nuisance is in fact permanent." *Spaulding*, 38 Cal. 2d 265, 270, 239 P.2d 625, 629. *See generally* Sundell v. Town of New London, 409 A.2d 1315, 1320-21; Patz v. Farmegg Products, Inc., 196 N.W.2d 557, 562; Maloney v. Heftler Realty Co., 316 So.2d 594, 595; Rebel v. Big Tarkio Drainage Dist., 602 S.W.2d 787, 792-93 (jurisdictions which apply a reasonably abateable test).

53. *Baker*, 39 Cal. 3d at 875, 705 P. 2d at 875, 218 Cal. Rptr. at 302.

54. *Id.* at 874, 705 P.2d at 874, 218 Cal. Rptr. at 301. *See Greater Westchester Homeowners Assn.*, 26 Cal. 3d at 94, 603 P.2d at 1332, 160 Cal. Rptr. at 736. The court states: "Commercial flights which are conducted in strict compliance with federal regulations may not be enjoined as nuisances, both because of the continuing public interest in air transportation, and because of the likelihood of direct conflict with federal law." *See also supra* note 37.

55. *Baker*, 39 Cal. 3d at 876, 705 P.2d at 875, 218 Cal. Rptr. at 302. *See* Krueger v. Mitchell, 332 N.W.2d 733, 741 (Wis. 1983) (successive actions against an airport would result in vexatious litigation). *See also supra* note 31 (unfair to subject public utilities to successive suits).

56. *Baker*, 39 Cal. 3d at 875-76, 705 P.2d at 874-75, 218 Cal. Rptr. at 301-02.

parties may force an airport proprietor to exercise noise abatement policies.[57]

II. Legal Background

A. *Inverse Condemnation*

Both the California and United States Constitutions contain provisions requiring compensation for the taking of private property for public use.[58] A compensable taking occurs when a private party is substantially deprived of the beneficial use of property by a public entity for a public purpose.[59] Normally, an official taking of private property occurs when a governmental body exercises its eminent domain power in a condemnation proceeding. When a person is deprived of property and a formal condemnation proceeding has not been instituted, however, the injured party may bring a suit for inverse condemnation to compel payment of just compensation.[60] The principles guiding inverse condemnation and eminent domain actions are interrelated and the judicial development of inverse condemnation can be found in opinions dealing with eminent domain.[61]

California case law indicates that authority for an inverse condemnation suit is found in the California Constitution. In *Rose v. State*,[62] a suit for inverse condemnation was allowed against the state despite the absence of legislative authority for the action.[63] The *Rose* court held that article 1, section 19 of the California Constitution, which

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57. *Id. See* San Diego Unified Port Dist. v. Gianturco, 651 F.2d 1306, 1316-19, *cert. denied* 455 U.S. 1000 (1982) (state may not direct an airport proprietor to exercise noise abatement power). *See generally* Bennet, *supra* note 1, 464-69; Werlich & Krinsky, *The Aviation Noise Abatement Controversy: Magnificent Laws, Noisy Machines, and the Legal Liability Shuffle,* 15 Loyola L.A.L. Rev. 69, 83-91 (1981); Comment, *The 1980 Airport Noise Act: Noise Abatement or Just More Noise?,* 14 U.C.D. L. Rev. 1049 (1981).

58. *See supra* note 16.

59. Fountain v. Metro Atlanta Rapid Transit Authority, 678 F.2d 1038, 1043 (1982).

60. Sutfin v. State of California, 261 Cal. App. 2d 50, 54-55, 67 Cal. Rptr. 665, 668 (1968).

61. *See* Rose v. State of California, 19 Cal. 2d 713, 719-23, 123 P.2d 505, 510-12 (1942); *see also* Van Alstyne, *Statutory Modification of Inverse Condemnation,* 19 Stan. L. Rev. 727 (1967). Federal and state courts are split over whether eminent domain power is required before liability in inverse condemnation attaches. The following authorities have held that statutory eminent domain power is required: Jacobsen v. Tahoe Regional Planning Agency, 566 F.2d 1353, 1358, *rev'd. on other grounds,* Western Int'l Hotels v. Tahoe Regional Planning Agency, 387 F. Supp. 429, 439 (1975); Gregory v. City of New York, 346 F. Supp. 140, 143 (1972); Ex parte Carter, 395 So.2d 65, 67 (1980); Collopy v. Wildlife Commission, 625 P.2d 994, 1005 (Colo. 1981); 3 Nichols on Eminent Domain §8.1 (4), p. 8-39 (3d ed. 1981). Authorities supporting the opposite view include the following: *Fountain,* 678 F.2d at 1045 (1982); Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1085-96 (1978).

62. 19 Cal. 2d 713, 123 P.2d 505.

63. *Id.* at 725, 123 P.2d at 513.

protects individuals from an uncompensated taking of property, is self-executing. The failure of the legislature to act could not take away the right granted in the Constitution.[64] Similarly, in *Holtz v. San Fransisco Bay Area Rapid Transit Dist.*,[65] the California Supreme Court explicitly stated that the authority for prosecution of an inverse condemnation action derives from article I, section 19 of the California Constitution.[66]

In *Sutfin v. State of California*,[67] the plaintiff alleged that the construction of a highway by the state caused flooding which damaged the plaintiff's automobiles.[68] The state contended that the legislature authorized the state to condemn only real, not personal property, and therefore the damaged automobiles were not taken for public use.[69] The court rejected the defense of the state, reasoning that liability in inverse condemnation is based on the state constitution rather than on statute.[70] The court further stated that in many inverse condemnation suits the government does not intentionally exercise condemnation powers, and therefore a taking for public use does not depend upon whether the defendant is authorized by statute to exercise affirmative eminent domain powers.[71]

B. Nuisance

Nuisance is statutorily defined as the nontrespassory invasion of another person's interest in the private use and enjoyment of land.[72] Early cases presumed that a nuisance would be abated, and therefore plaintiffs were not allowed to recover for future damages.[73] The remedy for these "continuous" nuisances was either a suit for injunctive relief or successive actions for damages as new injuries occurred. The concept of "permanent" nuisance arose as a solution for determining damages in cases in which an injunction was inappropriate or successive actions would be undesirable to either the plaintiff or the defen-

64. *Id.*
65. 17 Cal. 3d 648, 552 P.2d 430, 131 Cal. Rptr. 646 (1976).
66. *Id.* at 652, 552 P.2d at 433, 131 Cal. Rptr. at 649.
67. 261 Cal. App. 2d 50, 67 Cal. Rptr. 665 (1968).
68. *Id.* at 52, 67 Cal. Rptr. at 666.
69. *Id.* at 55, 67 Cal. Rptr. at 666-67.
70. *Id.*
71. *Id. See also Fountain*, 678 F.2d at 1044. The court in *Fountain* stated that allowing the lack of eminent domain power to be a defense would undermine the force of the just compensation clause, because states could take property without paying compensation simply by denying public entities eminent domain powers.
72. CAL. CIV. CODE §3479.
73. *Spaulding*, 38 Cal. 2d at 267, 239 P.2d at 625.

dant.[74] The classification of a nuisance as permanent allowed a plaintiff to recover all past and anticipated future damages in one action.[75] Generally, courts classify a nuisance as permanent if injuries are unalterable in character[76] or if the nuisance will presumably continue indefinitely.[77] On the other hand, most courts classify a nuisance as continuous if the nuisance may be discontinued at any time.[78] Thus, both the type of harm suffered and the ability to reasonably abate the nuisance are factors in categorizing nuisances.

As the doctrine of permanent nuisance developed, a new problem arose. The simple distinctions drawn by the classifications of nuisances as permanent or continuous proved inadequate to some authorities when the offending activity was "legally privileged" to continue.[79] Legally privileged activity was interpreted to mean operations condoned by statute or carried on following an exercise of eminent domain power.[80] The suggested solution to the problem created by a legally privileged activity was to subject the nuisance to one suit for all past and future damages, which in effect mandated classification as a permanent nuisance.[81]

A more difficult problem arose on the issue of whether "equitably privileged" conduct should result in treatment as a permanent nuisance.[82] Equitably privileged activity encompasses activity in which an injunction would be improper even though the conduct is not condoned by statute or done through an exercise of eminent domain power.[83] The court in *Spaulding* implicitly recognized the problem created by equitably privileged activity. The court first stated that a public utility is a clear permanent nuisance because the utility has a right to continue operations after compensating the landowner. The *Spaulding* court then stated that the problem becomes more difficult when the defendant is not privileged to continue the nuisance but abatement of the nuisance is impractical.[84] The *Spaulding* court did

74. *Id.* at 267-69, 239 P.2d at 225-26.
75. *Id.*
76. *Williams*, 150 Cal. at 626, 89 P. at 599.
77. *Phillips*, 27 Cal. 2d at 107, 162 P.2d at 625.
78. *Spaulding*, 38 Cal. 2d 265, 239 P.2d 625 (1952).
79. *See* McCormick, *Damages for Anticipated Injury to Land*, 37 HARV. L. REV. 574, 585-87 (1924); *Spaulding*, 38 Cal.2d at 267, 239 P.2d at 625.
80. *See* McCormick, *supra* note 79, at 585-89.
81. *Id. See also Spaulding*, 38 Cal. 2d at 267, 239 P.2d at 625.
82. *See* McCormick, *supra* note 79 at 587-89.
83. *Id.*
84. *Spaulding*, 38 Cal. 2d at 267-68, 239 P.2d at 627-28. The court said:
The clearest case of a permanent nuisance or trespass is the one where the offending

recognize, however, that an attempt to categorically classify this type of nuisance as permanent may lead to serious injustice due to difficulties in determining future damages,[85] the risk of res judicata,[86] and statute of limitation problems.[87] As a result, the court in *Spaulding* held that in doubtful cases the plaintiff may elect to treat the nuisance as either permanent or continuous.[88]

Various California courts have wrestled with the question of whether election should be allowed in all cases. One view favors a policy of allowing plaintiffs to recover for injury regardless of whether the activity is legally or equitably privileged.[89] A second view indicates that an election should be denied when the activity is legally or equitably privileged, thereby protecting defendants from repeated lawsuits.[90] In *Kafka v. Bozio*,[91] the defendant's building encroached on the plaintiff's land. The supreme court indicated that the plaintiff had an election to treat a nuisance as permanent or continuous even if the nuisance was permanent in character and intended by the defendant to be of indefinite duration.[92] But in *Williams v. Southern Pacific R.R. Co.*,[93] the supreme court did not allow the plaintiff to characterize railroad tracks as a continuous nuisance in order to avoid the statute of limitations.[94] Although no California case has specifically dealt with

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> structure or condition is maintained as a necessary part of the operations of a public utility. Since such conditions are ordinarily of indefinite duration and since the utility by making compensation is entitled to continue them, it is appropriate that only one action should be allowed to recover for all the damages inflicted. It would be unfair to the utility to subject it to successive suits and unfair to the injured party if he were not allowed to recover all of his probable damages at once. A more difficult problem is presented, however, if the defendant is not privileged to continue the nuisance or trespass but its abatement is impractical or the plaintiff is willing that it continue if he can secure full compensation for both past and anticipated future injuries.

Id.

85. *Id.*

86. *Id.* at 268, 239 P.2d at 628. The court stated: ". . . if the plaintiff assumes [the nuisance] is not permanent and sues only for past damages, he may be met with the plea of res judicata in a later action for additional injury if the court then decides the nuisance was permanent in character from its inception." *Id.*

87. *See supra* note 27.

88. *Spaulding*, 38 Cal. 2d at 268, 239 P.2d at 268.

89. *See infra* notes 105-06 and accompanying text.

90. *See* McCormick, *supra* note 79, at 585-601. At least one commentator has suggested that all legally and equitably privileged nuisances be deemed permanent, but also the lapse of time, other than prescriptive rights, should never bar the plaintiff's cause of action for the nuisance. *Id. See also supra* note 55.

91. 191 Cal. 746, 218 P. 753 (1923).

92. *Id.* at 752, 218 P. at 755-56.

93. 150 Cal. 624, 89 P. 599 (1907). The *Kafka* court indicated that the election doctrine should be applied liberally. In *Kafka*, however, the offending structure was permanent in nature as a result of the defendant's wrongful conduct. *Id.*

94. *Id.* at 627-28, 89 P.2d at 600.

whether airport operations not subject to judicial abatement should be classified as either permanent or continuous, two cases have indirectly addressed the issue. In *Nestle v. City of Santa Monica*,[95] the supreme court in dictum stated that the plaintiff may be able to show airport noise was a continuous nuisance.[96] Additionally, in *City and County of San Fransisco v. Small Claims Court*,[97] the appellate court stated that plaintiffs may elect to file successive actions for nuisance in small claims courts against an airport.[98]

III. Legal Ramifications

A. Inverse Condemnation

Because inverse condemnation and eminent domain are closely related doctrines, many courts hold that lack of eminent domain power is a valid defense to an inverse condemnation suit.[99] Other authorities argue that allowing the lack of eminent domain power to be a defense to inverse condemnation undermines the force of the just compensation clause by permitting government to escape liability simply by denying public agencies eminent domain powers.[100] *Baker* reaffirms a view implicit in prior California cases by holding that the lack of eminent domain power is not a defense to an inverse condemnation claim.[101] Furthermore, the supreme court for the first time specified that the source of an inverse condemnation action is the California Constitution.[102] By clarifying the constitutional basis of an inverse condemnation claim, *Baker* opens the door to broad application of the inverse condemnation theory to other public entities besides airports that lack eminent domain power.

B. Nuisance

The *Baker* majority specifically states that the sole test for distinguishing between permanent and continuous nuisances depends upon the type of harm suffered. This is contrary to cases which indicated that the ability to abate the nuisance was also a major factor

95. 6 Cal. 3d 920, 496 P.2d 480, 101 Cal. Rptr. 568 (1972).
96. *Id.* at 937, 496 P.2d at 492, 101 Cal. Rptr. at 580.
97. 141 Cal. App. 3d 470, 190 Cal. Rptr. 340 (1983).
98. *Id.* at 478, 190 Cal. Rptr. at 345.
99. *See supra* note 61.
100. *See Fountain*, 678 F.2d at 1044.
101. *See supra* note 17 and accompanying text.
102. *See supra* note 16 and accompanying text.

in classifying a nuisance as permanent.[103] Thus, the category of permanent nuisances seems to be limited to those nuisances which cannot physically, rather than judicially, be abated.

Baker further holds that plaintiffs may elect to treat airport operations as either continuous or permanent nuisances, thereby allowing plaintiffs to elect whether to bring successive lawsuits against airport proprietors. In so holding, the court indicates that plaintiffs may utilize the election doctrine to avoid statute of limitation problems, or other inequities, even if the defendant is authorized to continue the nuisance. As a result, the category of permanent nuisances is further restricted.[104]

Because of difficulties in placing activities not subject to judicial abatement within the traditional classifications of permanent or continuous nuisances, courts often decide the issue by balancing competing policies underlying traditional nuisance priciples and the doctrine of election.[105] The holding of the California Supreme Court in *Baker* reflects a policy decision to allow plaintiffs an opportunity to recover for injuries.[106] The *Baker* holding may subject the public entity defendant, who cannot be judicially restricted from operating, to multiple litigation and increased costs of doing business. The time and monetary costs involved in filing successive actions may, however, discourage plaintiffs from pursuing successive actions.

Conclusion

In *Baker v. Burbank-Glendale-Pasadena Airport Authority*, the California Supreme Court encountered two legal theories commonly used to remedy damage caused by airport noise: inverse condemnation and nuisance. The court held that eminent domain powers are not a prerequisite to liability for inverse condemnation. The court further held that a plaintiff may elect to treat airport operations as either a continuous or permanent nuisance, thereby allowing plaintiffs to bring successive lawsuits against airport proprietors. In so

103. *See supra* notes 74-98 and accompanying text.
104. *See supra* note 23.
105. *See supra* notes 91-98 and accompanying text.
106. *See supra* notes 84-89 and accompanying text. *But see Kreuger*, 332 N.W.2d 733 (Wis. 1983). The court in *Krueger* made a different policy determination. The *Krueger* court opted to protect the defendant airport from repeated and vexatious lawsuits. The court indicated that successive actions would disrupt air commerce, an area controlled extensively by federal law. The *Baker* court, however, held that because nuisance liability is vested in the proprietor, federal aviation planning would not be disrupted. The court also pointed out that successive suits cannot be used to close airports or force changes in flight patterns and schedules. *Baker*, 39 Cal. 3d at 872-73, 705 P.2d at 872-73, 218 Cal. Rptr. at 299-300.

holding, the court stipulated that the test for classifying a nuisance as permanent or continuous depended upon the type of harm suffered, without regard to the interest of the defendant in continuing the activity.

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