case, the trial would be entirely consistent and in accord with the exclusionary rule, not in opposition to it. The mere existence of improperly obtained evidence—the mere fact that evidence was obtained improperly—is unimportant insofar as the criminal trial is concerned unless that evidence is at least proffered at the trial.

We are, of course, not unaware that compromise agreements of one type or another—traditional plea bargains involving a plea of guilty or mutations of the sort evident here—are often the product or natural consequence of an adverse ruling on a suppression motion. We are not blind to the natural incentive of an accused to shoot first at suppressing the incriminating evidence gathered against him and, only failing that, to consent by one means or another to a verdict of guilty on a lesser charge. And thus we recognize the indirect effect that such a ruling may have upon the subsequent strategy employed by defendants.

[3] None of this, however, even if applicable in this case,[1] suffices to expand the exclusionary rule beyond what it is or to permit the review of convictions that are, themselves, untainted by the allegedly improper and inadmissible evidence. Notwithstanding the broad language of Maryland Rule 736 g.2, pertaining to the effect of a pretrial ruling on a suppression motion,[2] the validity of such a ruling is preserved for appellate review only if the evidence in question (or its fruits) is admitted at trial.

[4] We see no reason why this cannot be done in the context of a compromise agreement; and thus an accused is not necessarily put to the choice of abandoning his challenge to the obtention of critical evidence by entering into an agreement with the State. But to preserve his complaint, he must require the State to utilize the evidence which he has unsuccessfully challenged, and not absolve the prosecutor of that obligation by conceding the ultimate facts sought to be proved by the allegedly improper evidence.

JUDGMENT AFFIRMED; APPELLANT TO PAY THE COSTS.

1. There is nothing in this record to suggest such a causal connection; nor does appellant allege it in his brief.

2. "If the court grants a motion to suppress evidence, the evidence shall be excluded and shall not be offered by the State at trial, except that suppressed evidence may be used in accordance with law for impeachment purposes. If the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, in the exercise of its discretion, grants a hearing *de novo* on a renewal of the motion. *A pretrial ruling denying the motion to suppress is reviewable on a motion for a new trial or on appeal of a conviction.*" (Emphasis supplied.)

Fred S. MOY

v.

Ralph L. BELL et al.

No. 1499.

Court of Special Appeals of Maryland.

July 15, 1980.

Appeal was taken from a judgment of the Circuit Court, Anne Arundel County, Bruce C. Williams, J., which dismissed landowner's suit for damages caused by a nuisance on the ground that the statute of limitations was a bar to recovery. The Court of Special Appeals, Lowe, J., held that: (1) evidence supported trial court's finding that the nuisance was not temporary so as to be subject to successive actions for damages; (2) trial court properly applied limitations law; and (3) trial court did not abuse its discretion in granting motion to dismiss suit as barred by limitations.

Judgment affirmed.

1. Trial ⇐384

Upon deciding motion to dismiss, triai judge is compelled to view evidence solely for its legal sufficiency in light most favorable to plaintiff just as he would in jury case on motion for directed verdict, and he may not weigh testimony as though he was acting in his role as trier of fact. Maryland Rules, Rule 535.

2. Trial ⇐384

If defendants rest their case without putting on any evidence, immediately after denying motion to dismiss, judge as fact finder may weigh evidence to find which side preponderates and may draw whatever inference he chooses, whomever it favors, so long as it is legitimately perceived.

3. Trial ⇐384

If legal question is raised upon motion to dismiss which would end it if factually found to apply in plaintiff's own case, judge, while still in his judicial capacity rather than fact finder capacity, is charged with deciding appropriate facts necessary to deciding that legal issue. Maryland Rules, Rule 535.

4. Appeal and Error ⇐1008.1(8)

Because ultimate issue to be decided on motion to dismiss was applicability of statute of limitations, Court of Special Appeals could not set aside facts found by trial judge in relation thereto unless he was clearly in error. Maryland Rules, Rule 1086.

5. Limitation of Actions ⇐199(1)

Application of statute of limitations is strictly legal question and facts necessary to determine its application, such as when cause of action accrues or if cause of action accrues, must be made by judge in his judicial role.

6. Appeal and Error ⇐927(3)

Where ultimate issue to be decided on motion to dismiss was applicability of statute of limitations, Court of Special Appeals would not review evidence in light most favorable to appellant to determine whether there was any evidence from which fact finder could have reached a conclusion contrary to the court's; rather, review must decide if there was any evidence, however slight, to support limitations-related factual findings of the judge. Maryland Rules, Rule 1086.

7. Appeal and Error ⇐1008.1(8)

In action against adjoining property owners for damages caused by nuisance consisting of seasonal surface water flooding of landowner's property, evidence that there was a "possibility" of abatement by public authority with storm water drains without evidence that the county could so abate the problem was not so compelling as to render clearly erroneous trial court's failure to conclude that the county was likely to abate the nuisance so as to render it "temporary" and therefore subject to successive actions for damages for each invasion of the property. Code, Courts and Judicial Proceedings, § 5–101.

8. Injunction ⇐22

Injunction may be denied solely on ground of impossibility of enforcement.

9. Nuisance ⇐33

In suit against adjoining property owners for damages caused by nuisance consisting of flooding of landowner's property with seasonal surface water, wherein landowner sought to show that the nuisance was "temporary" and therefore subject to successive actions for statute of limitations purposes, evidence of landowner's own recognition of the unlikelihood of obtaining injunctive relief and absence of evidence that diversion of the waters was caused by intentional misconduct or that it could be compulsorily abated without disproportionate and excessive economic hardships upon adjoining landowners supported trial court's determination that the nuisance could not be enjoined.

10. Nuisance ⇐29

Privilege of abatement must be exercised within reasonable time after knowledge of the nuisance is acquired or should have been acquired by person entitled to abate; if there is insufficient delay to allow resort to legal process, reason for the privilege fails and the privilege with it.

11. Nuisance ⇐49(5)

In action against adjoining property owners for damages caused by nuisance consisting of seasonal surface water flooding of landowner's property, wherein landowner sought to prove that the nuisance was temporary and therefore subject to successive actions for damages for statute of limitations purposes, evidence did not support landowner's contention that the nuisance was "temporary" because it could be abated by raising or grading of landowner's lot. Code, Courts and Judicial Proceedings, § 5–101.

12. Nuisance ⇐49(5)

While permanency of the nuisance is prerequisite for diminution damages, diminished value is not a prerequisite element of proof of permanency.

13. Nuisance ⇐49(5)

In action for damages caused by nuisance consisting of seasonal surface water flooding of landowner's property, wherein landowner sought to prove that the nuisance was "temporary" and therefore subject to successive actions for damages for statute of limitations purposes, fact that landowner did not sue for or seek to prove diminution of the market value of her land did not prove that the nuisance was not permanent. Code, Courts and Judicial Proceedings, § 5–101.

Terrell N. Roberts, Hyattsville, for appellant.

Michael J. Budow, Chevy Chase, with whom were Richard E. Schimel and Clancy & Pfeifer, Chevy Chase, for appellee, John M. Dixon.

James P. Nolan, Annapolis, with whom were Serio, Carmody, Nichols & Childs, Annapolis, on the brief for appellees, Ralph L. and Virginia M. Bell.

Frank R. Weathersbee, Annapolis, on the brief for appellees, John and Mary Jane Hardwick.

Argued before LOWE and WILNER, JJ., and GETTY, JAMES S., Specially Assigned Judge.

LOWE, Judge.

In *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 404 A.2d 1064 (1979), the United States Court of Appeals for the Fourth Circuit asked the Maryland Court of Appeals to explain the effect of the statute of limitations (Md.Code, Cts. & Jud.Proc. Art., § 5–101) upon a suit for damages caused by a nuisance. An appeal from the Circuit Court for Anne Arundel County asks us to explain that explanation.

A number of building lots in a subdivision in Anne Arundel County were established upon very low, poorly drained land. Since 1966 appellant has owned one of these sites which had been improved with a house that she has occupied since 1968. Adjacent lots were subsequently owned by appellees Ralph and Virginia Bell (Bell) and John and Mary Jane Hardwick (Hardwick). In late 1973 and early 1974 the Bells built a house upon their excavated site. A year later the Hardwicks did the same.

According to appellant, that excavation of appellees' lots soon brought on her problems.

> "In late 1973 and early 1974, surface water began to flood Appellant's lots. Water flowed over the septic drain fields in Appellant's yard, and she began to experience problems with her septic system. Initially the toilet would not flush. She found that emptying the tank seemed to remedy the problem. However, as the ground later became more and more saturated with water, fluids from the septic began to back up through the toilet and bathtub, forcing Appellant to have the tank emptied more frequently. A few years [sic] later, during a period in 1974 when the ground was completely saturated, the septic ceased to operate altogether and Appellant and her family had to use facilities in other homes. At same time, water also flowed under the house, which sat above ground on masonary [sic] piers. Water flowed under the house directly from [the Bell] lots . . . ; after the Hardwicks al-

tered their land, [an adjoining vacant] lot . . . began to collect water during the rainy season, and when it reached saturation, it spilled over onto Appellant's land and flowed under her house and onto the front yard. At times water collected to a depth of 7½ inches next to Appellant's front door step. Recurrent flooding under Appellant's house caused the wood structure to rot.

To keep the water off of her property so that she could use her backyard, Appellant filled in portions of her backyard. This reduced the flow of water onto the rear of her lots. Nevertheless all four lots—52 through 55—collectively continue to obstruct the natural flow of surface water, causing the water to run to the east and north side of Appellant's lots.

In December 1976, the Bells sold lots 54 and 55 to John Dixon, Appellee. Since Dixon's ownership of the land, the land continues to obstruct the natural flow of surface water and cause water buildup on Appellant's land."

Appellant first sued the Bells on September 26, 1977, subsequently joining the Hardwicks March 9, 1978 and on May 3, 1978 joined the Dixons. Essentially, the declaration (as amended five times) sought damages for, and injunctive relief from, the injurious results of wrongful diversions of surface water. Dixon's demurrer to the final damages count was sustained without leave to amend as to him and, at the conclusion of the trial, Dixon was dismissed when appellant elected not to pursue an injunction but "limited the relief requested to damages", conceding that in light of that election,

". . . I have no further claim against [D]ixon." [1]

The trial judge then heard arguments of counsel on the motions to dismiss by appellees Bell and Hardwick, after which he granted them on the ground that the statute of limitations was a bar to recovery. He added:

". . . I think that even if it were not a bar, that the—the damages that have been alleged have not really been shown to be the direct result of—of any surface water flowing from the Bell or Hardwick property, anymore than there's surface flow going the other way. I think there's a low point on the property line, by the testimony of the engineer, and that this water comes from three directions to get there, and it's all going to have to go down somehow or other by cooperation of the various property owners in there to get it out of the center of the property and out to a street in some direction. It's obviously going to cost some money, but it's going to cause a problem until somebody does that as a cooperative effect [sic]. Because I don't think it's a practical thing to try to take right angle turns at property lines and have the very little percentage of decline that would be possible in this relatively flat area. So I think you, from the testimony, it appears that the best solution is to go out the middle line out to the intersection of the street, even though that might entail getting an easement from somebody. But there's only one other lot down, that goes all the way out to Cedar Road. I don't know who owns that—42—but that can get all the way out that way. But I don't see that this whole problem can be solved without a cooperative effort. But I will grant the motion of—the motion of the defendant to dismiss on the grounds that the statute of limitations is a bar."

It seems the judge was not convinced that a nuisance was caused by appellees but decided even if it was, appellant had waited too long to seek redress.

Appellant's relatively short question on appeal,

"[w]hether seasonal surface water flooding of Appellant's land caused by raising adjoining land to construct private home

1. We will grant Mr. Dixon's motion to dismiss the appeal as to him since appellant has limited this argument here to a single question relating only to the reason given by the trial judge for dismissing the other two appellees. The failure to comply with Md. Rule 1031 c 5 waives appellant's appeal as to Dixon. *Ricker v. Abrams*, 263 Md. 509, 283 A.2d 583 (1971).

sites, was a permanent or temporary nuisance?",

raises interesting tangential legal issues in the light of *Goldstein, supra*, which limits, but does not resolve, issues necessary to the answer of appellant's question. It would appear that no purpose would be served by this Court resolving those issues since the trial judge, who was the factfinder, had already factually decided the case. Appellees contend that even if the limitations holding was not correct, the error is harmless in light of the factual findings of the trial judge.

Since our conclusion, after addressing the legal issue, will bring us to a comparable result, it is unfortunate that we cannot arrive more quickly by taking the factual path. The Court of Appeals has made it clear, however, that we may not.

[1, 2] Our system of jurisprudence, much like our language, is affected more by exceptions than by rules. Upon deciding a motion to dismiss under Md. Rule 535, the trial judge is compelled to view the evidence solely for its legal sufficiency in the light most favorable to the plaintiff just as he would in a jury case on motion for directed verdict. *Isen v. Phoenix Assurance Co.*, 259 Md. 564, 571, 270 A.2d 476 (1970). He may not weigh the testimony as though he was acting in his role as the trier of fact, *Hooton v. Kenneth B. Mumaw P. & H. Co.*, 271 Md. 565, 572, 318 A.2d 514 (1974). However, if the defendants rest their case without putting on any evidence, immediately after denying the motion to dismiss, the judge as factfinder may weigh the evidence to find which side preponderates, and may draw whatever inference he chooses, whomever it favors, so long as it is legitimately perceived.

[3, 4] There is, however, an exception, even upon motion to dismiss. If there is a legal question raised, which would end it if factually found to apply in the plaintiff's own case, the judge, while still in his judicial capacity, is charged with deciding the appropriate facts necessary to deciding that legal issue. Here, when the motion to dismiss was offered raising the statute of limitations as a bar, the trial judge sat in both seats simultaneously. Our review on appeal then must carefully differentiate the purposes for which the facts were found. Because the ultimate issue to be decided on the motion was the applicability of the statute of limitations, we may not set aside the facts found by the trial judge in relation thereto unless he was clearly in error. Md. Rule 1086.

[5, 6] Appellant has focused her entire appeal to convince us that the nuisance causing the damage was temporary (despite having labelled it permanent in her first amended declaration) because

> "where the nuisance sued upon is only temporary, successive actions may be brought for damages for each invasion of the plaintiff's land until the period of prescription has elapsed, but recovery may only be had for damages actually sustained, other than permanent reduction in the market value of the property, within three years of the filing of the action." *Goldstein, supra* at 690, n. 4, 404 A.2d at 1072.

See also *Aberdeen v. Bradford*, 94 Md. 670, 51 A. 614 (1902). Perhaps because the question of permanency for some purpose unrelated to limitations is essentially a factual one, appellant argued upon the premise that our standard of review of the court's factual conclusion for limitations purposes was the same as upon reviewing a motion to dismiss, *i. e.*, whether a prima facie case had been established when the evidence is reviewed in a light most favorable to her. Mrs. Moy stated in her brief that:

> "If the lower court had correctly viewed all of the evidence and inferences in Appellant's favor, it would have concluded that change of the natural flow of surface water itself was not permanent."

But as we have pointed out the standard is quite the contrary in this case where the determination of permanency also determines whether the statute of limitations applies. The application of a statute of limitations is strictly a legal question and it is apparent that the facts necessary to de-

termine its application, such as when a cause of action accrues,[2] if a cause of action accrues, etc., must be made by the judge in his judicial role. See *Harig v. Johns-Manville Products*, 284 Md. 70, 74–75, 394 A.2d 299 (1978); *Waldman v. Rohrbaugh*, 241 Md. 137, 145, 215 A.2d 825 (1966). The obvious significance of that conclusion is that we do not review the evidence in the light most favorable to appellant to determine whether there was any evidence from which a factfinder could have reached a conclusion contrary to the court's; rather, our review must decide if there was any evidence, however slight, to support the limitations-related factual findings of the judge.

—the issue—

The factors to be considered in determining whether a nuisance is permanent or temporary was obviously a parenthetical reference in *Goldstein, supra* at 682–683, 404 A.2d 1064. The Fourth Circuit, in certifying its question to the Court of Appeals had presupposed the nuisance in that case to have been permanent. The Court of Appeals made it clear that in acting on that presupposition, it was not to be interpreted as having determined that the nuisance there was permanent. It stated that

> ". . . the nuisance here alleged may not be of permanent duration, but may be abated. . . . [A]lso . . . it . . . is subject to abatement through the injunctive process by the State Department of Health and Mental Hygiene and the Public Service Commission. *See Baltimore Gas & Elec. v. Department*, 284 Md. 216, 395 A.2d 1174 (1979), and Maryland Code (1957, 1978 Cum.Supp.) Art. 43, §§ 701 and 703." *Id.* at 683, 404 A.2d at 1069.

This observation was in accord with the encyclopedic distinction indicating that the difference between a permanent and a temporary nuisance[3] is that a temporary one can be abated, while a permanent nuisance will be presumed by its character and circumstance to continue indefinitely. 66 C.J.S. *Nuisances* § 5 (1950); 58 Am.Jur.2d *Nuisances* §§ 117, 118 (1971). Recognizing, however, that any nuisance man creates, man can abate, it seems clear that the question being considered in *Goldstein* is not the possibility of abatement but rather its likelihood. That nuance is recognized expressly in the encyclopedias cited, and borne out in *Goldstein's* allusion to the State departments' authority (and impliedly their responsibility) to abate nuisances of the type in *Goldstein* by injunctive power statutorily granted.

Applying the wrong standard of review, appellant here initially argues that the evidence "in a light most favorable" to her indicates that the nuisance was temporary because it could be

1) enjoined by a court,
2) abated by appellant by raising or grading her lot, or
3) abated by the county with storm water drains.

[7] As to appellant's third contention, there was no evidence whatsoever that the county was considering storm drains of any type, let alone something that would alleviate appellant's problem, only that the possibility existed that the county *could* do so. The possibility of abatement by public authority without evidence thereof would hardly suffice by her standard of review. It clearly is not so compelling that we must hold the trial judge's factual finding was clearly in error for not having concluded that the county was likely to abate the nuisance.

2. The trial judge found that the cause of action accrued when Mrs. Moy was damaged in late 1973 and early 1974 since she was at that time aware of the cause of the damage. The original action here was filed in September of 1977 which the judge found well beyond the three year limitations period. Md.Code, Cts. & Jud. Proc. Art., § 5–101.

3. The distinction appears to be another archaic judicial distinction of limited purpose which might best be abolished. Unfortunately for Mrs. Moy, the Court of Appeals does not agree. See *Goldstein v. Potomac Elec. Power Co.*, 285 Md. 673, 404 A.2d 1064 (1979).

[8, 9] Her first contention, that the nuisance could be abated by injunction, is belied by her own election at trial. In electing to go forward on her damages claim and discarding injunctive relief, she said:

> "I'm not sure that an injunction really would—would do much good. I think that there's no assurance that it would really be—could be enforced and there would be a lot of associated problems with that, whereas the remedy that was selected by our expert would be a way of alleviating Mrs. Moy's problems and at the same time not causing any surface water to anybody else."

In addition to her own recognition of the unlikelihood of obtaining injunctive relief because of its unenforceability,[4] we note that the evidence does not show that the diversion was caused by intentional misconduct, or that it could be compulsorily abated without disproportionate and excessive economic hardship upon appellees, who inferentially would be compelled to remove the very landfills upon which their homes were built. Prosser *Torts* (4th ed. 1971) at 603–604 points out that

> ". . . even where there is an existing nuisance and present harm, the equity court may in its discretion deny the injunction where the balance of the equities involved is in favor of the defendant. It may take into consideration the relative economic hardship which will result to the parties from the granting or denial of the injunction, the good faith or intentional misconduct of each, and the interest of the general public in the continuation of the defendant's enterprise." (Footnotes omitted).

It would appear in the absence of evidence in the case of some solution other than reexcavating to its former dishlike surface, injunctive relief would have been denied even if a nuisance was found to exist. Surely the judge who has the injunction question before him when hearing the evidence, is best able to consider the likelihood of its being enjoined. But see *Turner v. Wash. Sanitary Comm.*, 221 Md. 494, 506, 158 A.2d 125 (1960).

[10] Finally, appellant contends that she could have abated the nuisance herself by raising and grading her lot. Even if likely, this would have been at her own risk in further diverting the water to some other hapless owner. The privilege of abatement must be exercised within a reasonable time after knowledge of the nuisance is acquired, or should have been acquired, by the person entitled to abate. Prosser at 605. If there has been a sufficient delay to allow a resort to legal process, the reason for the privilege fails and the privilege with it. *Ibid.*

[11] Furthermore, we look at the evidence and find that appellant had begun to attempt such self-help but abandoned her attempt to abate by raising and grading her land, inferentially indicating the impracticability or ineffectiveness of self-help. Again, the evidence is not compelling that she could have abated by raising and grading; rather it negates that contention. The expert testimony of what would have had to be done showed the cost to be so substantial that she sought the remedy of damages before the likelihood of completion was feasible.

[12, 13] This brings us to the type of damages sought by appellant, *i. e.*, the septic system costs, the cost of raising her house, and repair of wood rot. Since she did not sue for, or seek to prove, diminution of the market value of her land, she argues that the nuisance could not be permanent. While permanency of the nuisance is prerequisite for diminution damages, diminished value is not a prerequisite element of proof of permanency. That contention is specious.

We conclude from our review of the record that the trial judge was not clearly in error in his factual findings on the limitations issue; that he properly applied the limitations law; and, that his discretion as exercised (in granting the motion to dismiss as barred by limitations) was not abused.

4. An injunction may be denied solely on the ground of impossibility of enforcement. *Bank v. Bank*, 180 Md. 254, 263–264, 23 A.2d 700 (1942).

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANT.

Charles Olin SCHMITT

v.

STATE of Maryland.

No. 1578.

Court of Special Appeals of Maryland.

July 15, 1980.

Defendant was convicted in the Circuit Court, Prince George's County, Howard S. Chasanow, J., of burglary and grand larceny, and he appealed. The Court of Special Appeals, Liss, J., held that defendant, who suffered prejudice due to delay of eight months and eight days partially attributable to the State between time of his arrest and time of trial, and who diligently asserted his right to a speedy trial, was denied his right to a speedy trial by reason of such delay and thus trial judge should have granted his motion to dismiss the indictment.

Reversed.

1. Criminal Law ⇐577.10(1)

When period of delay between a defendant's arrest and trial is of constitutional dimension, trial court is to balance length of delay, reason for delay, assertion of speedy trial right, and prejudice to defendant to determine whether defendant has been deprived of his right to a speedy trial. U.S.C.A.Const. Amend. 6.

2. Criminal Law ⇐577.15(3)

Delay of eight months and eight days between defendant's arrest and his trial was of constitutional dimension sufficient for trial court to determine whether defendant had been deprived of his right to a speedy trial. U.S.C.A.Const. Amend. 6.

3. Criminal Law ⇐577.16(10)

In determining whether a defendant has been denied his right to a speedy trial, court must ascertain whether delay has been caused by the State or the defense and what blame, if any, is associated with reason for the delay; different weight must be assigned to different reasons for delay. U.S.C.A.Const. Amend. 6.

4. Criminal Law ⇐577.12(1)

Period of delay between defendant's arrest and trial attributable to orderly processing of defendant's case was not chargeable to the State. U.S.C.A.Const. Amend. 6.

5. Criminal Law ⇐577.12(1)

Delay between defendant's arrest and his trial attributable to absence of complaining witness, who required back surgery, was chargeable against the State where the State made no effort to reach a stipulation with defense counsel as to a proffer of what such witness' testimony would have been had she been called as a witness. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐577.12(1)

Delay between defendant's arrest and his trial due to fact that State's attorney handling defendant's case was trying another case and no other judge was available to hear the matter was attributable to the State. U.S.C.A.Const. Amend. 6.

7. Criminal Law ⇐577.12(1)

Period between defendant's arrest and his trial attributable to postponement due to absence of State's essential witness on scheduled trial date allegedly due to witness' reluctance to change his vacation schedule was to be weighed heavily against the State where it was understood by the parties that the case would be dismissed if not tried on such date. U.S.C.A.Const. Amend. 6.

8. Criminal Law ⇐577.16(8)

When length of delay between indictment and trial is of constitutional dimen-