

1949

Michael Benjamin, Arthur O. Lloyd, Edward Davis,
Forrest H. Greene, and Weldon Nollkamper v. Bert
Lietz : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Skeen, Bayle & Russell; Attorneys for Defendant and Appellant;

Recommended Citation

Brief of Appellant, *Benjamin v. Lietz*, No. 7330 (Utah Supreme Court, 1949).
https://digitalcommons.law.byu.edu/uofu_sc1/1100

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

MICHAEL BENJAMIN, ARTHUR O.
LLOYD, EDWARD DAVIS, FOR-
REST H. GREENE, and WELDON
NOLLKAMPER,

Plaintiffs,

Case No. 7330

vs.

BERT LIETZ,

Defendant and Appellant.

BRIEF OF APPELLANT

SKEEN, BAYLE & RUSSELL,

Attorneys for Defendant and Appellant.

CLERK, SUPREME COURT, UTAH

FILED

I N D E X

	Page
I STATEMENT OF PLEADINGS	3
II STATEMENT OF EVIDENCE	5
III STATEMENT OF FINDINGS	10
IV ASSIGNMENT OF ERRORS	13
V POINTS ARGUED BY APPELLANT	16
(a) The complaint fails to state facts sufficient to constitute a cause of action	16
(b) Paragraph 2 of the decree enjoining the defendant from "starting the machinery located therein at any time on Sunday" is without authority under the Statutes of the State	19
(c) The ordinance pleaded states no cause of action....	19
(d) Conclusion No. 4 is erroneous and prejudicial for it puts it within the power of the plaintiffs to say whether the defendant may or may not do work in his shop during the forbidden time for it is for them to say whether they can hear a noise.....	22
(e) The finding of defendant guilty of contempt was without hearing and prejudicial	23

CASES AND AUTHORITIES

37 American Law Reports, para. 1, page 690	19
Broadbent vs. Gibson, 140 P. 2d 939	19
Gronlund vs. Salt Lake City, 194 P. 2d 464	19
Terrell vs. Wright, 87 Ark. 213, 112 SW 211	19

In the Supreme Court of the State of Utah

MICHAEL BENJAMIN, ARTHUR O. LLOYD, EDWARD DAVIS, FOR- REST H. GREENE, and WELDON NOLLKAMPER,	} Case No. 7330
<i>Plaintiffs,</i>	
vs.	
BERT LIETZ,	}
<i>Defendant and Appellant.</i>	

BRIEF OF APPELLANT

This is a suit instituted in the District Court for Salt Lake County by Michael Benjamin, Arthur O. Lloyd, Edward Davis, Forrest H. Greene and Weldon Nollkamper, seeking to enjoin the defendant Bert Lietz from operating the Sugar-house Planing Mill. The trial court granted an injunction and defendant appeals.

I

STATEMENT OF PLEADINGS

The original Complaint alleges generally the operation of the planing mill; that since 1943 the defendant has operated

the mill after 6:00 p. m., and on Sundays. That it caused loud and unusual noises; that in September of 1947, defendant "installed a woodworking machine on the outside of his building," which he operated between 6:00 p. m., and 10:30 p. m., which he had not made a practice of doing prior to 1943. That the plaintiffs were in lawful possession of property in the immediate locality of the mill and that the noises made by the mill were "so loud as to make normal conversation in the homes of the plaintiffs difficult and interferes with their peace, quiet and enjoyment of their respective homes," and that it interfered with their normal sleep. (Tr. 1-4).

Defendant answers denying that the noises were loud or unusual or that it made any noises except such as result from use of power saws and planing machinery necessary for the operation of the plant and affirmatively alleges that he installed the machinery under the direction of public officials. That the plant was established forty-four years ago by defendant's predecessors-in-interest; that the land in the immediate vicinity was vacant property, far removed from residential sections of Salt Lake City, and while in operation, the plaintiffs and their predecessors-in-interest erected dwelling houses near the planing mill. That as wood working machines wore out and became obsolete and demands for the products of the mill changed, it became necessary to remove machinery, install improved equipment, and during excessive demands for the products of the mill, to operate the same for long hours, and at times, continuously. Denies that the capacity of the mill has been materially increased or the hours extended since 1943. (Tr. 6-9).

Shortly before the case was called for trial, the plaintiff filed an amendment to the complaint setting up the ordinance of September 6, 1927, hereinafter quoted, and added the following paragraph:

"That the defendant's planing mill and plaintiffs' property adjacent thereto are located within the commercial district of Salt Lake City and have been since the enactment of such ordinance on September 1, 1927. That the defendant's plant since September 1, 1927, has been enlarged beyond capacity of 50 horse power in violation of the above alleged zoning ordinance, and the defendants have made installations of additional machinery and such alterations and additions of machinery have not been confined to the building located upon the premises at the time the zoning ordinances were passed, all in violation of said zoning ordinances, and such violation continues to this date, and the defendant threatens to continue such violation indefinitely in the future." (Tr. 32).

An answer to the amendment was filed denying that installations or additions to the mill were in violation of the zoning ordinance. (Tr. 35).

II STATEMENT OF EVIDENCE

The Sugarhouse Planing Mill was built by defendant's father about 1900 at 2032 South 10th East Street, in Salt Lake City, and operated by him until 1928. Defendant has operated it since 1928. (Tr. 57, 107 and 166).

Benjamin's wife inherited property at 2028 South 10th East Street and the Benjamins have lived there since 1934. Mrs. Benjamin is a sister of defendant. The Benjamin resi-

dence is about 20 or 25 feet due north of the mill. (Tr. 75, 76 and 107).

Plaintiff Lloyd has resided at 2021 South 10th East Street (rear) for about three years. His residence is across the street from the planing mill. (Tr. 98).

Plaintiff Greene has resided at 1997 Lincoln Street, about 150 yards Northwest of the planing mill, for about eight years. (Tr. 69 and 70).

The Merrill Appliance Company, Inc., is located at 967 East Twenty-First South Street about 100 feet from the planing mill. (Tr. 131 and 132).

During the years 1900 to 1944 the operations of the planing mill were enclosed in one building situated near the street. This building was about 45 or 50 feet long, East and West. (Tr. 76). In February of 1944 under War Production Board and City Building Permit a new cinder block building, about 30 feet North and South and 62 feet East and West, was erected West of the old building. (Tr. 58). In 1947 or 1948 (Tr. 61 and 86, a concrete slab was layed on the South and West of the cinder block building extending therefrom 9 feet on the South and 16 feet on the West. (Plaintiffs' Exhibit A).

The old building contained various machines used in the planing mill business. From time to time these machines were replaced by new machines because of obsolescence, efficiency, wearing out, etc. Some of the new machinery so installed was noiser, and some not as noisy, as the replaced machinery. (Tr. 146-149). The total aggregate horse-power

of the motors in the old building from prior to 1927 has been 125 horse-power. (Tr. 105-106).

In the new building is installed the following machinery:

- 5 horse-power hand pointer
- 2 horse-power bench cut off saw
- 50 horse-power re-saw
- 5 horse-power tenoner
- 7½ horse-power moulding machine
- 10 horse-power rip saw

On the cement slab is located the following machinery:

- Dust collector
- 30 horse-power planer
- 30 horse-power moulder
- 10 horse-power blower

the total aggregate power of the motors in the new building and on the cement slab is 149½ horse-power. (Tr. 117 and Plaintiff's Exhibit A).

The hand-pointer, bench cut off saw and moulding machine above referred to were old machines moved from the old building to the new building. All of the other machines were replacement items for machines discarded with the exception of the re-saw, dust collector, moulder and blower. The last four machines did not replace other machinery. (Tr. 150, 157, 161, 162, 163, 164 and Plaintiffs' Exhibit A). The blower was installed under the direction of the Salt Lake City fire marshal as a safety measure. (Tr. 143 and 144). The re-saw was installed on order of War Production Board. (Tr. 150). All changes in the plant, increases in horse-power and installation of additional machinery requiring permits from

Salt Lake City have been authorized by such permits. Tr. 144 and 145).

At all times since September 6, 1927 there has been in effect in Salt Lake City the following ordinances which plaintiffs pleaded:

"Sec. 6720. Commercial District.

(a) All buildings and premises may be used for any purpose permitted in Residential "A," "B," "B-2" and "B-3" districts and Business "A" district and also for any trade, industry or use except the following, which are hereby prohibited, subject to provisions of Section 6728 of this chapter and of paragraph (b) hereunder.

.....
46. Planing mill or woodworkings plant using in excess of 50 horsepower."

"Sec. 6720B: Stables, lumber yards, fuel yards, dyeing and cleaning establishments, public garage, mortuary, wholesale milk distributing stations, sheet metal works, machine shops, laundries, mattress factories, lumber mills, planing mills, or food products manufacture shall not be permitted in Commercial districts within one hundred feet of a dwelling or apartment house."

"Sec. 6728. Nonconforming use.

Any use of buildings or premises at the time of the passage of the Zoning Ordinance on September 1, 1927, may be continued, although such use does not conform to the provisions hereof. In the case of a building such use may be extended throughout the building, provided that no structural alterations are made therein, except those required by law or ordinance. Providing no structural alterations are made, a nonconforming use may be changed to any use permitted in a district where such nonconforming use would be permitted. Any nonconforming use changed

to a more restricted use or to a conforming use shall not thereafter be changed back to a less restricted use.

No non-conforming building which has been damaged by fire, explosion, act of God or act of the public enemy, to the extent of more than sixty (60) per cent of its assessed value, shall be restored except in conformity with the regulations of this ordinance.

Any nonconforming use building, existing in any residential district at the time of the passage of the Zoning Ordinance, September 1, 1927, may be reconstructed or replaced to conform with all requirements for a Residential "B-3" district, including all required yard spaces." (Tr. 31, 32, 35 and 168).

The Utah Power & Light Company furnishes power for the Sugarhouse Planing Mill. According to its accounts the Demand Kilowatt (kilowatt demand rating on a 15-minute basis each month) for every month in the year 1947 was less than 35. (Tr. 123). In 1948 some months were above 35 and some months were below. (Tr. 123 and Plaintiffs' Exhibit B). The average Demand KW of the months in 1948 was 36.6. (Plaintiffs' Exhibit B). A kilowatt is equal to 1000 watts and 745.7 watts is equal to one horse-power. 35 kilowatts equals approximately 50 horse-power. (Tr. 121 and 122).

Defendant's father, prior to 1927, and defendant, since, with a crew of several men, worked in the planing mill at night. (Tr. 119). Plaintiffs testified that until 1943 the operations of the planing mill were quietly conducted and did not bother them. (Tr. 70, 71, 77 and 78). In 1942 and in 1943 defendant made boxes for the government resulting in loud noises caused by men hammering nails and boards.

Men were employed at night to carry on this work. (Tr. 70, 71, 79 and 82). In the latter part of 1943 the noise was increased by the filing and the use of band saws. (Tr. 79 and 80). Benjamin described it as a very piercing noise. (Tr. 80). The plaintiffs testified the noise could be heard in the Benjamin house with the doors and windows closed. However, the noise did not bother the occupants of the Merrill Appliance Company, Inc. situated next South of the planing mill. (Tr. 131 and 132). Plaintiffs complained of the planer in the fall of 1947 or spring of 1948. (Tr. 73). Plaintiffs' chief complaint was of the noise occurring on week-day nights. (Tr. 90, 91, 100, 104 and 112). Plaintiffs did not complain of noise occurring on Sunday, except for the operation of the blower. (Tr. 113).

III

STATEMENT OF FINDINGS

Upon the pleadings and evidence as hereinabove abstracted, the court made findings of fact to the effect that in 1943, the defendant commenced running the machinery after 6:00 P.M. and on Sundays, and that he employed from five to thirty men. That the defendant operated the mill until 10:30 or 11:00 practically every night. (Tr. 39-40).

That toward the end of the year of 1944 defendant erected a cinder block building about 30 x 60 feet and a cement "apron" along the side of his building. That he constructed "a huge blower and dust collector," located on the

outside of the building. That the planer, blower and dust collector "make loud, unusual and penetrating noises which can be heard distinctly in the homes of all of the plaintiffs; that said noises are so loud as to disturb the plaintiffs in their enjoyment of their premises," all of which had never before existed. (Tr. 40).

That

"Since 1943 the defendant has increased the installed horsepower capacity of his said plant; that during the entire year of 1947 the defendant used more than fifty horsepower of electricity each month and said plant has a rated horsepower capacity in excess of fifty horsepower. That during most of 1948, including the time when the defendant was under a restraining order issued by the above entitled court, the defendant used more than fifty horsepower of electricity in said plant." (Tr. 40).

all of which increased the noise emanating from the said mill.

That the defendant's employees caused loud and unusual noises, and in addition to the operation of the planing mill, that the defendant made noises in the manufacture of wooden boxes. (Tr. 41).

That the operation of the outside machinery including the *blower* and *dust collector* caused *dust and shavings* to blow about the neighborhood which did not result before the installation of the outside machinery. That the defendant prior to 1943 did not operate the machinery after 6:00 p.m. The court finds that the plaintiffs occupy their property as residents and that the noise interferes with the enjoyment of the property. (Tr. 41).

That the ordinances hereinbefore set out were enacted on September 6, 1927, and that the defendant's planing mill is within the commercial district of Salt Lake City, and "that the defendant's plant since September 1, 1947, has been enlarged beyond the capacity of 50 horse-power in violation of the above zoning ordinance." (Tr. 42 and 43).

The court draws the following conclusions:

1. That defendant should be enjoined from operating his plant "after 6:00 p. m. on any day" and "for any purpose on any Sunday." (Tr. 44).

2. That defendant should be enjoined from utilizing at any time more than fifty horsepower of electrical energy. (Tr. 44).

3. That defendant should be enjoined from operating any outside machinery. (Tr. 44).

4. "That the defendant should be permitted to go to his shop himself at any time of day or at any time during the night, but he should be enjoined from engaging in any type of work on his premises after 6:00 p. m. at night and until 7:30 the following morning and all day on Sundays if such work will create any noise which will disturb the peace and quiet of the neighborhood, *or which can be heard by the plaintiffs in their homes.*" (Tr. 44).

5. "That no employees other than the defendant should be placed in said building except for nightwatchman or the doing of work which will cause no noise between the hours of 6:00 p. m. at night and the following morning at 7:30

a. m., and all day on Sunday, and the defendant should be enjoined from operating his plant at all and from starting said machinery for any purpose or from operating his saw filer or his machines to any extent whatsoever, either for the working of machinery or for the setting of said machine for the doing of work the following day between the hours of 6:00 p. m. and 7:00 a. m. of the following morning and all day on Sunday." (Tr. 44).

The decree specifically enjoins the defendant from operating or permitting the operation of his machinery between 6:00 p. m. and 7:00 a. m., and all day on Sunday, from causing to be used at any time more than fifty horse power of electrical energy or any type or kind of energy, from operating any type of power driven machinery on the outside of the building and specifically a 30-inch planer, the blower and dust collector and all machinery located on the concrete apron and finally the court finds the defendant guilty of contempt. (Tr. 46 and 47).

IV

ASSIGNMENTS OF ERRORS

1. THE COURT ERRED IN MAKING AND ENTERING A JUDGMENT IN FAVOR OF THE PLAINTIFFS AND AGAINST THE DEFENDANT GRANTING THE PLAINTIFFS ANY RELIEF WHATSOEVER FOR THE REASON THAT THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

2. THE COURT ERRED IN MAKING ITS FINDING OF FACT NO. 4 TO THE EFFECT THAT THE INCREASE IN CONSUMPTION OF HORSE-POWER SUBSTANTIALLY INCREASED THE NOISE EMANATING FROM THE PLANING MILL FOR THE REASON THAT THERE IS NO COMPETENT EVIDENCE TO SUPPORT SUCH FINDING. (Tr. 40 and 41).

3. THE COURT ERRED IN MAKING ITS FINDING OF FACT NO. 7 TO THE EFFECT THAT DEFENDANT HAD NEVER OPERATED THE PLANING MILL AFTER 6:00 P. M. PRIOR TO 1943, FOR THE REASON THAT THE EVIDENCE DOES NOT SUPPORT SUCH FINDING AND IS CONTRARY THERETO. (Tr. 41 and 42).

4. THE COURT ERRED IN MAKING ITS FINDING OF FACT NO. 12 TO THE EFFECT THAT THE DEFENDANT'S PLANING MILL HAS BEEN ENLARGED BEYOND THE CAPACITY OF 50 HORSE-POWER, IN VIOLATION OF ORDINANCE NO. 6720, FOR THE REASON THAT SAID ORDINANCE DOES NOT APPLY TO DEFENDANT'S PLANING MILL. (Tr. 43).

5. THE COURT ERRED IN MAKING ITS CONCLUSION OF LAW NO. 1 TO THE EFFECT THAT DEFENDANT SHOULD BE ENJOINED FROM OPERATING HIS PLANT AT ANY TIME AFTER 6:00 P. M. ON ANY DAY AND AT ANY TIME ON SUNDAY FOR THE REASON THAT SUCH CONCLUSION IS CONTRARY TO THE LAW. (Tr. 44).

6. THE COURT ERRED IN MAKING ITS CONCLUSION OF LAW NO. 2 TO THE EFFECT THAT THE DEFENDANT SHOULD BE ENJOINED FROM UTILIZING AT ANY TIME MORE THAN 50 HORSE-POWER OF ELECTRICAL ENERGY IN HIS MILL FOR THE REASON THAT SUCH CONCLUSION IS CONTRARY TO LAW. (Tr. 44).

7. THE COURT ERRED IN DRAWING CONCLUSION OF LAW NO. 4 AS FOLLOWS, TO-WIT: "THAT THE DEFENDANT . . . SHOULD BE ENJOINED FROM ENGAGING IN ANY TYPE OF WORK . . . AFTER 6:00 P. M. AT NIGHT AND UNTIL 7:30 THE FOLLOWING MORNING AND ALL DAY ON SUNDAYS IF SUCH WORK WILL CREATE ANY NOISE WHICH WILL DISTURB THE PEACE AND QUIET OF THE NEIGHBORHOOD, OR WHICH CAN BE HEARD BY THE PLAINTIFFS IN THEIR HOMES," FOR THE REASON THAT SUCH IS WITHOUT AUTHORITY OF LAW. (Tr. 44).

8. THE COURT ERRED IN MAKING ITS DECREE ENJOINING THE DEFENDANT FROM OPERATING HIS PLANING MILL AT ANY TIME PRIOR TO 7:30 A. M., AND AFTER 6:00 P. M. ON ANY DAY AND AT ANY TIME ON SUNDAYS FOR THE REASON THAT IT IS WITHOUT AUTHORITY OF LAW. (Tr. 46).

9. THE COURT ERRED IN MAKING ITS DECREE ENJOINING DEFENDANT FROM USING OR CAUSING TO BE USED AT ANY TIME MORE THAN 50 HORSE-

POWER OF ELECTRICAL ENERGY FOR THE REASON THAT SUCH IS CONTRARY TO LAW. (Tr. 46).

10. THE COURT ERRED IN MAKING AND ENTERING JUDGMENT ENJOINING THE DEFENDANT FROM OPERATING POWER MACHINERY LOCATED OUTSIDE OF THE BUILDING AND PARTICULARLY FROM OPERATING A PLANER AND A BLOWER FOR THE REASON THAT THE SAID BLOWER WAS INSTALLED UNDER THE ORDINANCE AND DIRECTIONS OF SALT LAKE CITY. (Tr. 46 and 47).

11. THE COURT ERRED IN ADJUDGING AND DECREETING THE DEFENDANT GUILTY OF CONTEMPT OF COURT FOR THE REASON THAT HE WAS NOT TRIED FOR CONTEMPT. (Tr. 47).

V

POINTS ARGUED BY APPELLANT

(a) THE COMPLAINT FAILS TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

The defendant is in trouble with the law because he likes to work. His father before him liked to work. They liked to work in their own mill in their own way and do their work when called for. For nearly half a century, the father and then the son owned and operated a planing mill at 2032 South 10th East Street, beginning when it was in harmony with the time to work and when there was no one in the immediate

neighborhood who wanted to sleep while the defendant and his father wanted to work. Times have changed. Work by the defendant, at least in his own shop, on his own time, and in his own way must cease at 6:00 in the evening and must not begin before 7:30 in the morning, and work of any character must not be done on Sunday. At least, that is what the court has said in this case. Baseball may go on. Sleepers are not molested by the assembling of noisy crowds at the games. Garages may do their work day or night and Sundays. Pool halls, etc., apparently are not banned, but the sawing and planing of lumber, which is music to the ears of this defendant, is outlawed.

Authority for the violent restriction and limitation on the right to work, imposed by this judgment must be found in the law if this judgment is sustained.

We, therefore, turn to the pleadings in this case for the purpose of finding, if we can, an allegation of fact upon which to base such restrictions upon the use of property as are imposed by the court. The original complaint does not justify or support the decree entered.

It is alleged the defendant in the war years, worked day and night making boxes for the Army. During the time the demands of war existed, no one complained of day and night work. The government wanted the boxes, and the defendant made them. The allegations, therefore, respecting that work, are in no sense a justification for the entry of a decree enjoining the defendant from beginning work before 7:30 in the morning or continuing it after 6:00 in the even-

ing. The time of beginning and ending work, as so fixed, is entirely arbitrary. There is nothing in the pleading whatsoever justifying that arbitrary time. There is nothing in the pleading and nothing in the law which in any sense justifies an injunction forbidding the defendant from entering his own place of business during those hours and taking with him men necessary to do the work.. The extent to which the court went in restricting the defendant is emphasized by conclusion No. 4 that defendant should be enjoined from engaging in any type of work on his premises "after 6:00 p. m. at night and until 7:30 the following morning and all day on Sundays if such work will create any noise which will disturb the peace and quiet of the neighborhood, *or which can be heard by the plaintiffs in their homes.*" That is the spirit of the findings and judgment and would form the basis of a contempt proceeding were the defendant to give way to his feeling and work when he felt he ought to work. One may search the rather prolix complaint in vain for anything that even suggests a restriction.

Even though the pleading contained allegations to the effect that it was the desire of the plaintiffs to be shielded from noises of that kind from 6:00 p.m. to 7:30 the following morning, it would have no support in the law. Possibly, aside from statutes and aside from ordinances, noises would justify interposition of a court, still nothing is made to appear by this pleading to justify such a judgment. A planing mill means lumber will be sawed and planed. Necessarily, that means noise, but unless machinery is running smoothly and unnecessary vibration eliminated, the planing mill is not efficient and

must necessarily fail. Something out of the ordinary must be alleged and proved to justify such restrictions and the restrictions must be reasonable.

Terrell vs. Wright, 87 Ark. 213, 1125 S.W. 211.

After reviewing many cases, it is stated in Note II of the Annotation, Bartel vs. Ridgefield Lumber Company reported in 37 ALR 683, at page 690, paragraph 1, the following:

"The right absolutely to enjoin the operation of a saw or planing mill in a manner constituting it a nuisance has been recognized, but the injunctions actually issued as to such mills generally have been of a restricted character. Courts interfere by injunction against such establishments with great caution, and only in cases where the facts are weighty and important, and the injury complained of is of a serious and permanent character."

(b) PARAGRAPH 2 OF THE DECREE ENJOINING THE DEFENDANT FROM "STARTING THE MACHINERY LOCATED THEREIN AT ANY TIME ON SUNDAY" IS WITHOUT AUTHORITY UNDER THE STATUTES OF THE STATE.

Broadbent vs. Gibson, 140 P 2d 939.

or under the ordinances of Salt Lake City.

Gronlund vs. Salt Lake City, 194 P 2d 464.

The Decree is arbitrary and unreasonable.

(c) THE ORDINANCE PLEADED STATES NO CAUSE OF ACTION.

The pleader evidently assumed that a mill with a potential horse-power, in excess of fifty, was unlawful. The ordinance justifies no such inference. A mill existing on Septem-

ber 1, 1927, could be continued in harmony with the ordinance in the manner in which it existed at the time the ordinance was adopted. This mill had a power plant in excess of 50 horse power at that time. As to what horse-power was being used is not made to appear. Machines wore out, became obsolete and were replaced with other machines. Complaint was made as to shavings and dust, and at the instance of the city, a dust collector was installed and the receptacle for the dust was placed outside of the building. In fact, the old building, like machinery, became unsuitable for use, and a cinder block room was added in the rear. Nothing, however, was done except under the direction and supervision of the city. There is added to the amendment to the Complaint, a paragraph no doubt intended to bring the defendant under and subject to the ordinance. The pleader says:

“That the defendant’s plant since September 1, 1927, has been enlarged beyond the capacity of 50 horse power in violation of the above alleged zoning ordinance.” (Tr. 32).

No facts were pleaded. The fair interpretation of this sentence is that any power plant, in excess of 50 horse-power, is violative of the ordinance.

Further,

“ . . . and the defendants have made installations of additional machinery and such alterations and additions of machinery have not been confined to the building located upon the premises at the time the zoning ordinances were passed, all in violation of said zoning ordinances.” (Tr. 32).

That again does not bring the defendant under the ordinance to the extent that the decree limiting the available power at the plant is in violation of the ordinance. Furthermore, the ordinance reads:

“planing mill or woodworkings plant using in excess of 50 horsepower.” (Tr. 31).

The potential available horse-power is not the criterion. It is the use of the horse-power only which would bring the defendant within the ordinance. In 1948, apparently the defendant used about 1½ horse-power more than 50 horse-power at one time. The record is not clear as to whether that continued for any appreciable length of time. But, there is still lacking any evidence to the effect that the defendant did not use in excess of 50 horse-power prior to September 1, 1927. He had it available for use, and there is no pretense on the part of the plaintiffs that the defendant did not use in excess of 50 horse-power in this plant prior to the date of the ordinance.

Clearly the burden was upon the plaintiffs to allege and prove the horse-power used by defendants prior to September 1, 1927, and the horse-power used subsequent thereto. There was neither pleading nor proof of the former essential fact. The potential horse-power prior to September 1, 1927, as disclosed by the power of the various machines, was 125. The potential horse-power at the time of the trial was 150. The actual horse-power used before September 1, 1927, is not made to appear, and the maximum used horse-power since that time, as above observed, is slightly in excess of 50. The plaintiffs'

case was therefore incomplete as predicated upon the ordinance and even though it appeared that the defendant had in fact used 1½ horse-power in excess of 50 or the power used before 1927, the limitation of the injunction of the court should be as to the excess power only. It would have nothing whatsoever to do with the hours of work, much less justify the practical closing of the shop except during the specified hours.

(d) CONCLUSION NO. 4 IS ERRONEOUS AND PREJUDICIAL FOR IT PUTS IT WITHIN THE POWER OF THE PLAINTIFFS TO SAY WHETHER THE DEFENDANT MAY OR MAY NOT DO WORK IN HIS SHOP DURING THE FORBIDDEN TIME FOR IT IS FOR THEM TO SAY WHETHER THEY CAN HEAR A NOISE.

Whether that kind of conclusion would mean that the noise must be loud enough for all of the plaintiffs to hear a noise at the same time, or whether the defendant would be in contempt of court if noise is heard by one of the plaintiffs only is not clear. The mere statement indicates the ridiculous basis for determining whether the defendant is in contempt of court. The conclusion is equally ridiculous insofar as it applies to Sunday work. There is no statute or ordinance in any respect justifying this conclusion.

The decree itself is without support in the pleadings, in the evidence, in the findings, or in the law. Specifically the limitation of hours from 7:30 a. m. to 6:00 p. m. is arbitrary, unreasonable and without authority of law.

There is no law or evidence justifying the injunction barring Sunday work.

The ordinance does not justify a limitation to 50 horsepower.

The blower was installed at the instance of the city and hence its use is not subject to injunction under the ordinance.

(e) THE FINDING OF DEFENDANT GUILTY
OF CONTEMPT WAS WITHOUT HEARING AND
PREJUDICIAL.

After the complaint was filed pending the trial of the case, it was stipulated that the defendant would not operate the planing mill between 7:00 p. m. and 7:00 a. m. and on Sundays between 7:00 p. m. and 9:00 a. m. (Tr. 15).

On July 31, 1948, an order was issued requiring the defendant to appear and show cause why he should not be punished for contempt. (Tr. 23). There was no hearing upon the order, to show cause at any time, notwithstanding which the court found him guilty of contempt. It is true no punishment was imposed but it was a warning that punishment would be imposed if the defendant made a noise which "could be heard by the plaintiffs in their homes."

In conclusion, it is submitted that the judgment is erroneous, far beyond any support in the pleadings in the evidence or in the findings of fact and that the judgment should be reversed with directions to dismiss the case.

Respectfully submitted,

SKEEN, BAYLE & RUSSELL,

Attorneys for Defendant and Appellant.