

1954

# Hollis E. Walker v. Levi G. Peterson : Additional Argument and Mathematical Computations by Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOLLIS E. WALKER,  
Plaintiff & Respondent

vs.

LEVI G. PETERSEN  
Defendant & Appellant.

)  
:  
)  
: Additional Argument  
) and Mathematical  
: Computations by  
) Appellant.  
Case No. 8218

To compute acceleration according to the rate provided for in Section 41-6-144 of Revised Statutes of Utah 1953 for deceleration, it would mean this: That if we were in a car ready to drive forward and then drove forward a distance of 148 feet, and during that time we accelerated it at the rate the statute calls for, of 14 feet per second per second, we would then be going the rate per hour that the same car would be going if he decided to then stop and consequently put on his brakes so as to decelerate it at the rate of 14 feet per second per second and was able to stop in a distance of 148 feet.

The reason why I wish to show this computation is this: The plaintiff slid his wheels and left tire marks of 148 feet prior to the impact. He then went forward an additional 42 feet and in addition knocked a Mercury automobile 72 feet back up the road. Now, if I compute his speed on an assumed basis of him actually stopping in 148 feet and not 190 feet which he traveled, and also not take into consideration the speed that would have to be <sup>add</sup> to it to carry him on another 42 feet and knock the Mercury 72 feet. Then with that information, it would be easier to determine if the speed of the plaintiff in his Cadillac car was a factor and proximate cause of the accident.

FILED

OCT - 9 1954

(11a)

Clerk, Supreme Court, Utah

Dr. Phillip J. Hart, the physicist at the State Agricultural College, has given me this formula:

a or acceleration - 14 feet per second per second.

s - distance to travel or 148 feet

v - velocity at 148 feet,

$$\text{FORMULA } V^2 = 2as$$

$$v = \sqrt{2as} = \sqrt{2(14)(148)} = \sqrt{4144}$$

to take the square root, we have:

$$\begin{array}{r} 64.3 \\ \hline \sqrt{4144.00} \\ 38 \\ \hline 124)544 \\ \quad )496 \\ \hline 1283)4800 \\ \quad )3849 \\ \hline \end{array}$$

Velocity then equals 64.3 feet per second at 148 feet and to then stop at the same rate if he decelerated, it would take 148 feet. Now 64.3 feet per second equals what speed in miles? At 60 miles per hour we travel one mile in 60 seconds or 5280 feet:

$$\begin{array}{r} 60)5280( 88 \text{ feet per second} \\ \quad 480 \\ \hline \quad 480 \end{array}$$

$$\frac{64.3}{88} \text{ of 60 miles} = 43.8 \text{ miles per hour.}$$

If the plaintiff had stopped at 148 feet without striking any object and did so in the requirements of the statute, his speed before commencing to stop was 43.8 miles per hour in a 40 mile zone.

Query: When the plaintiff stopped in 100 feet and knocked a Mercury car 72 feet, how fast was he going in this 40 mile zone?

Was that excessive speed a contributing cause of the accident?

Is it the law in this State:

"He who makes the left turn on these through highways, must take the responsibility irregardless of SPEED or any other circumstances."

Respectfully submitted,

Walter G. Mann  
Attorney for Defendant & Appellant.

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Case No. 8215

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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GLEN A. HATCH and EDITH E.  
HATCH,

*Plaintiffs and Appellants,*

— vs. —

W. S. HATCH COMPANY, a corpo-  
ration and WILLARD S. HATCH,

*Defendants and Respondents.*

Case No. 8215

---

BRIEF OF APPELLANTS

---

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

---

GLEN A. HATCH and EDITH E.  
HATCH,

*Plaintiffs and Appellants,*

— vs. —

W. S. HATCH COMPANY, a corpo-  
ration and WILLARD S. HATCH,

*Defendants and Respondents.*

Case No. 8215

---

BRIEF OF APPELLANTS

---

STATEMENT OF THE CASE

This is an action brought by the plaintiff, appellants herein, to enjoin or abate a private nuisance in the use by the defendants, respondents herein, of their lands adjoining plaintiff's property on the north and east thereof, and for other relief. This action was brought under

the authority of Section 78-38-1, Utah Code Annotated, 1953, which is as follows:

“78-38-1. ‘NUISANCE’ DEFINED - RIGHT OF ACTION FOR JUDGMENT. - Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance; and by the judgment the nuisance may be enjoined or[abated], and damages may also be recovered.”

The cause came on for trial before the Honorable Parley E. Norseth, Judge of the Second Judicial Court, sitting without a jury, at Davis County, State of Utah. The court entered findings of fact, conclusions of law and decree in favor of defendants and against plaintiffs, finding that no actionable nuisance existed, and dismissed plaintiffs’ complaint with prejudice. This appeal is taken from said decree.

The facts show that the plaintiffs are owners of certain residential and farm property located in Woods Cross, Davis County, Utah, approximately 610 feet South of the intersection of 5th South and 8th West Streets. The W. S. Hatch Co. is a corporation of the State of Utah, and W. S. Hatch is the president and manager of the said corporation. The corporation owns or leases land which adjoins the plaintiffs’ property on the north and east thereof. Up until about 1951, defendants’ only

had land that adjoined plaintiffs' property on the north, but at that time they leased the property which adjoins plaintiffs' property on the east from Phillips Petroleum Company, the owners thereof. Defendants conduct, both upon the leased property and their own property, a road and fuel oil and acid transportation and distribution business. Defendants run over 30 large units on this property and use it for the maintenance, repairing, servicing, cleaning, starting and storing of these large trucks, semi-trucks and trailers used for the transportation of oil and acid.

The plaintiffs complained that defendants, in the conduct of their business and in the maintenance, repairing, cleaning, starting and servicing of these trucks, have caused and are causing, both day and night, loud and unusual noises, to-wit: hammering metal upon metal parts of trucks, tires and other objects while maintaining equipment and making repairs, changing tires and for other purposes. It was also complained that defendants, in the cleaning and greasing of their equipment, cause loud noises like hissing and squealing over a prolonged period of time and that they cause loud noises in starting, testing, and warming up the engines of the various trucks and tractors; and that they drive the said trucks and tractors into and around the area without regard to the noise made thereby and idle the engines of the said trucks and tractors for prolonged periods of time with the throttle open so as to make a large amount of noise. Plaintiffs further complained that the lights used at night in the business are so located and are of such an

intensity that the light therefrom shines directly upon and into the premises of the plaintiffs, especially into the the bedroom of plaintiffs, resulting in loss of sleep because of the glare. It was further complained that the defendant's operation causes fumes of oil and exhaust to enter plaintiffs' property creating an extremely unpleasant condition and tending to make plaintiffs' home uninhabitable. Defendants were further complained of for the reason that they put old tires, batteries, stoves, metal and concrete refuse, etc., along the fence separating plaintiffs' and defendants' property, thus constituting an eyesore and fire hazard. Plaintiffs contended and do contend that each and all of the above conditions constituted actionable nuisances under Section 78-38-1, Utah Code Annotated, 1953, and also under the recognized law of nuisance as it exists in this state.

The facts show that plaintiffs' home was originally constructed about 80 years ago and that plaintiff Glen A. Hatch was born in the home and lived there until five or six years of age when he moved into the home now occupied by his brother, Willard S. Hatch, and that he lived in that home until he was married in 1917 when he moved back into his present home. The home was remodeled a time or two and very extensively remodeled in 1951. Plaintiffs' home and that home occupied by defendant Willard S. Hatch, have always been used solely for residential purposes.

When the plaintiffs moved into their home after their marriage in 1917, the property in the entire Woods

Cross area was used for residential and farming purposes with the exception of the railroad located in front of their residence and one industry consisting of a corrugated pipe and headgate business located at the northeast corner of Fifth South and Eighth West Streets about an eighth of a mile from plaintiffs' home. (R-5,6) There were also a small garage and two stores in the area. About 1925 the Wasatch Oil Company, predecessor in interest to the Phillips Petroleum Company, purchased the Hardesty Manufacturing Company building and sometime thereafter started their refining operations there. (R-7) Since that time other commercial construction has come into the area, consisting of the Phillips loading dock, warehouse and storage building; a new Phillips loading dock; the Mitchell Garage; the Droubay Garage; and the large expansion of the Phillips plant north of Fifth South Street. (R-8, et seq)

At the present time the area may be described thusly:

Proceeding east from the intersection of Fifth South and Eighth West Streets, on the north side of Fifth South Street, there are located the railroad station, the Hatch Brothers office building, formerly occupied as a bank, and six or seven residence and farms which are west of the present Farmers' State Bank Building which is just west of Highway 91. On the opposite side of the street proceeding west from Highway 91, there is a service garage at the intersection of Highway 91 and Fifth South, then nothing but residences and farms down to the Droubay garage, west of which are located a



residence, a building, part of the Phillips operation, and the Post Office Building, respectively. Proceeding west from the intersection of Fifth South and Eighth West on the south side of the street there are no businesses and property is used entirely for residential and farming purposes. This is true on both sides of Eighth West Street, south of plaintiffs' residence, for a quarter of a mile. At this point there is located a small display room for showing boats. Further, the area to the east of the property leased from Phillips by the defendants is all used for farming purposes, there being no business located east thereof up to the businesses located on Highway 91. The building north of the Willard S. Hatch residence occupied by W. S. Hatch Company and now used by said company as an office building was formerly a grocery and general store building. To the north of Fifth South Street on either side of Eighth West is the Phillips Petroleum operation. (Defendants' Exhibits 1 and 6, R-8, et seq)

The defendant Willard S. Hatch started his business in about 1937 or 1938 with one small unit that he parked in his barn or hay shed. He used this one unit a year or two, and then he acquired another one and entered into the business of transporting fuel oil. (R-179) At the end of 1951 he had acquired 23 pieces of equipment. In the year 1952 he acquired 13 additional units, and in 1953, 10 more, thereby doubling his equipment during the year of 1952 and 1953; in addition he follows the practice of leasing certain equipment. (R-138, 139) In 1952 and again in 1953, defendants substantially ex-



panded their work shop, which expansions were made after the acquisition by lease from the Phillips Petroleum Company of a large section of property behind the then existing operation. (R-190)

It was after this expansion commenced, that is, after 1951, that the defendants expanded their business until it became a 24 hour operation during the busy season, (R—17) the busy season starting along in April and continuing until November. (R-26) The increased number of trucks and equipment which frequented the defendants' premises and the increased work upon the equipment which resulted in a round-the-clock operation and in a greatly increased use of lights, running of engines, noise, etc., forced the plaintiffs to protest, first to the defendants and finally in a court of law.

## STATEMENT OF POINTS

## POINT I

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT IN THAT SAID FINDINGS AND CONCLUSIONS WERE NOT BASED UPON THE EVIDENCE AND WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE.

## POINT II

THE TRIAL COURT ERRED IN FINDING THAT NO NUISANCE EXISTS OR EXISTED, WHICH ERROR WAS BASED UPON A MISCONCEPTION OF THE LAW AND A MISINTERPRETATION OF THE FACTS AS BROUGHT OUT BY THE EVIDENCE; AND THEREFORE THE TRIAL COURT FURTHER ERRED IN FAILING TO GRANT APPELLANTS INJUNCTIVE RELIEF.

## POINT III

IF THIS COURT SHOULD FIND AN ACTIONABLE NUISANCE DOES EXIST BUT FINDS FURTHER THAT APPELLANTS ARE NOT ENTITLED TO EQUITABLE RELIEF IN THE FORM OF AN INJUNCTION, IT IS RESPECTFULLY SUBMITTED THAT THE TRIAL COURT ERRED IN REJECTING CERTAIN EVIDENCE AS TO DAMAGES AND THE CASE SHOULD BE REMANDED TO THE LOWER COURT TO PERMIT A FINDING AS TO THE AMOUNT OF DAMAGES TO WHICH APPELLANTS ARE ENTITLED.

A. THE TRIAL COURT ERRED WHEN, AT PAGE 31 OF THE RECORD, IT SUSTAINED AN OBJECTION TO A QUESTION PUT BY APPELLANTS' COUNSEL TO APPELLANT GLEN A. HATCH, WHICH QUESTION WAS DESIGNED TO ELICIT TESTIMONY RELATIVE TO THE VALUE OF THE APPELLANTS' PROPERTY.

B. THE TRIAL COURT ERRED WHEN, AT PAGE 70 OF THE RECORD, IT SUSTAINED A MOTION TO STRIKE ALL OF THE TESTIMONY OF THE APPELLANTS' EXPERT WITNESS LARSON.

## ARGUMENT

## POINT I

THE TRIAL COURT ERRED IN MAKING ITS FINDINGS OF FACT IN THAT SAID FINDINGS AND CONCLUSIONS WERE NOT BASED UPON THE EVIDENCE AND WERE CONTRARY TO THE WEIGHT OF THE EVIDENCE.,

It is the appellants' contention that the findings of fact do not truly represent the situation as it exists or existed at the time of the trial. It is contended that said findings tend either to minimize absurdly or ignore totally certain facts which are, to say the least, pertinent to any inquiry into the existence of a nuisance. Further, there are other findings of fact couched in terms which misrepresent or distort the true situation with respect to facts which might otherwise inure to the benefit of appellants. With the actual facts as they exist, we find no fault, but we do feel that such a presentation as is done in the final findings of fact included in the record on appeal is erroneously prejudicial to the appellants. For that reason we wish to review said findings with the view of enlightening this court as to what we contend are the true facts as supported by the record.

With the first two Findings of Fact the appellants have no objection. Finding of Fact No. 3, which generally describes the nature of respondents' plant and equipment, is probably correct insofar as it goes, but appellants object that it is not complete and therefore misleading. It should be pointed out that while respondents have had a business on the property in question for six-

teen years, it was not until 1951 that it became expanded to the extent described in the said finding of fact. (R-145, 146 and 177 et seq.)

Finding of Fact No. 4 starts out by stating that within a five hundred foot radius of the Woods Cross intersection is one of the most highly industrialized areas of the state of Utah. This finding is unwarranted. It is true that the record shows that there are certain industries within a five hundred foot radius of the Woods Cross intersection, otherwise known as the intersection of Fifth South and Eighth West Streets or Onion Street. However, there is nothing in the record which indicates the relative industrialization of this particular section of the state as compared with other industrialized sections of the state of Utah, and such a finding is not based upon any evidence in the record.

Finding of Fact 4 also finds that the property belonging to appellants is located within the 500 foot radius from the Woods Cross intersection. By application of a ruler to defendants' Exhibit 1, it will be seen that the nearest part of the said property is over 575 feet from the center of the Woods Cross intersection and appellants' home is over 600 feet therefrom.

It is uncontested, continuing with the Finding of Fact No. 4, that Phillips operates certain loading racks north of appellants' property, though according to respondents' own Exhibit 1, the distance from appellants' home is closer to 440 feet than the 350 feet found in said finding of fact.

It was further found in Finding of Fact No. 4, that the area in which the appellants live is highly industrialized and has been so for the past 16 years. This finding of fact was not justified as a glance at defendant's Exhibit 6 and an examination of the record will show. In defendant's Exhibit 6, the land to the west, to the south and to the east with the exception of the respondents' intervening property, is all devoted to residential and agricultural uses. It is true that the railroad does run in front of appellants' property. However, west of the railroad opposite appellants' home and on either side of the railroad running south, the land is devoted exclusively to residential and agricultural uses. While it is true that there is some industrialization in the area now existing, the record does not sustain the statement that the present industrialization has existed for the last 16 years. Any intimations contained in the record regarding this indicate that the present industrialization is a fairly recent development with the exception of the Phillips plant.

The testimony and exhibits also show that the present industrialization is generously interlaced with agricultural and residential areas. ( Defendants' Exhibit 6)

Finding of Fact No. 5 states that the noises that are caused by the respondents in the pursuit of business are not unreasonable in view of the area in which they are located and are necessary to the conduct of business, and that the respondents have acted carefully and with due regard for the appellants and others. Further it was

found that the lights, both headlights and fixed lights, do not interfere unreasonably with the health, comfort and enjoyment of the appellants. It was further found that there are no floodlights at the west of the garage. It is contended that the findings of the court are not founded in justice nor based upon the testimony presented in the trial. The noises that are caused are unreasonable in terms of the suffering of appellants as hereinafter set forth, and the fact that they are necessary to the conduct of the business is not a defense if, to use the language of this court, the conduct is "unlawful, unwarranted or unreasonable." This is the standard recently emphasized in the case of *Cannon v. Neuburger*, (1954) .....Utah..... 268 P. 2nd. 425.

Finding of Fact No. 5 further finds that

"At all times [the defendents] have had due regard for the peace, quiet, and rest of the plaintiffs; that the plaintiffs are supersensitive to the defendants' activities and that this supersensitivity is occasioned by the animosity between the plaintiffs and the defendant, W. S. Hatch."

This finding of fact is wholly unfounded upon the record. The plaintiff, Glen Hatch, denied that he felt any enmity toward his brother and denied that he was supersensitive to the noise made by his brother's operation. (R-40) Looking at the record, the trial court could not have made the finding on animosity that it did without outside information which was not apparent in the



record. The record itself negatives any showing of animosity on the part of the appellants. There may be some suggestion to the effect that the partition suit brought by appellant Glen Hatch against his brother (R-39, 182) is indicative of certain animosity. This can hardly be sustained and is not a proper inference from such fact. Many brothers and sisters are involved in partition suits when it is impossible for them to reach an agreement as to the use of land or how to divide land, and the fact that such a suit is brought does not necessarily entail animosity on the part of the members of the family. To presume that because the appellants are disturbed by the noises created by respondents they are supersensitive is begging the question. It has been shown that the appellants in this case have been subjected to much harassment and constant annoyance which would cause any reasonable person to react as they have reacted. The testimony by the appellants and Mrs. Moss clearly show that they are not supersensitive when they complain of these things. (See summary on pages 16 through 22, *infra* of this brief) On the contrary, it is highly probable that the complaint of these matters was held off for a longer period of time than it otherwise might have been were it not for the fact that two of the opposing parties in this action are brothers. If there is any animosity and hard feeling, it appears to originate with the respondent W. S. Hatch who admitted that he had made certain implied threats when appellants complained to him regarding the noise. (R-192, 193) It is therefore contended that the finding by the trial court to the effect "that the



plaintiffs are supersensitive to the defendants' activities and that this supersensitiveness is occasioned by the animosity between the plaintiffs and the defendant W. S. Hatch" is completely without foundation and is based, so far as can be gathered by appellants, upon information obtained wholly apart from the record, which information is completely erroneous.

The finding that the respondents have at all times had due regard for the peace, quiet, and rest of appellants is not true unless they have done everything in their power to reduce, with all reasonably available facilities at their command, the noise and annoyances to the barest minimum. This they have not done. It is not enough that they reduce them to the extent that it is convenient for the respondents; they must reduce the noises to the very minimum which can be procured, even if it is necessary to spend more money in doing so than the appellants' property is worth. In this connection we cite the case of *Quinn vs. The American Spiral Spring and Manufacturing Co.*, 1928, 293 Pa. 152, 141 A. 855. 61 A.L.R. 918.

In that case the plaintiff bought a home in an industrial area. There was a vacant lot adjacent thereto. The defendant bought the vacant lot and built thereon a manufacturing plant, locating certain heavy machinery close to the plaintiff's property. The operation of the machinery caused damage to the plaintiff's home and to the liveability of the home. The trial court refused to grant injunctive relief. The appellate court said, in reversing the trial court;

“Defendants, however, gave no heed to plaintiff’s rights. When they purchased the rear lot, they were bound to know that while they could construct their proposed plant at that place, and could operate with the kind of machinery usual in the business, they were nevertheless required under the applicable legal principle above stated to so locate and install that which they intended to use as to do as little injury to the plaintiff and his dwelling as was reasonably possible, considering the use to which the machinery was to be put, and the needs of the business. That is where they failed in their legal duty. *Apparently they thought that as their business was a lawful one, which they were entitled to carry on at that place, no just complaint could be made if, also, they were careful in conducting their operations. Such is not the law.* [Emphasis added.]

“As already stated they were still in duty bound to so locate and install the heavy machinery as not to deprive plaintiff, when it was properly operated, of the degree of quiet he had a right to enjoy. *Collins vs. Wayne Iron Works*, 227 Pa. 326, 76 Atl. 24, 19 Ann. Cas. 991. This they did not do, though they knew, as everyone else does, that the noise and vibration could have been greatly minimized by placing the heavy machinery at the other side of their lot and that this could have been done without injury to any one. It can still be removed there with great benefit to plaintiff, at a cost to the defendant of some twelve thousand dollars and a ceasing of operations for a few months while the work is being done. Defendants contend that the machinery was placed in its present position because it was expected to result in a more economical use

of the plant, due to the fact that it is easier there to load and unload long heavy bars of steel and iron, than would result if no change was made; but this is no excuse for injury to the plaintiff. (Citing cases.)

“As defendants are only required to rearrange the heavy machinery, it is a matter of no moment, though evidently the court below thought otherwise, that they will lose more money in righting the wrong done than the plaintiff’s property is worth. This they should have considered before they did the injury; the improper location of the machinery was their own act, uninfluenced by the plaintiff, and they have no right to put upon him any loss by reason thereof. 14 *R.C.L.* 359, 360. Besides, ‘where justice is properly administered, rights are never measured by their mere money value, neither are wrongs tolerated because it may be to the advantage of the powerful to impose upon the weak . . . . The rule is [always] the same: “So use your own so as not to injure another.” ’ ’ ”

We contend that the trial court did not use this standard when he made Finding of Fact No. 5 and therefore erred in said Finding of Fact. Let us look at what exists in the way of annoying activities.

The testimony shows the following:

Mr. Glen A. Hatch testified that the grease guns make a noise like a series of firing guns, series of loud noises and that when the gun is disconnected from the trucks it usually gives a loud squeal or noise that you

can hear all over the country, and the greasing goes on practically every night and every day, and that the respondents do this greasing whenever it pleases them. (R-19) That they do their steam cleaning of trucks on the outside of the shop building where there isn't any cover, just south of the garage, causing a loud hissing of steam constantly for hours at a time, sometimes during the night time. (R-19, 20) That the defendants in the changing of tires do a lot of pounding that goes on for various lengths of time—sometimes an hour, and that they tune the diesel motors and let them run for long periods of time causing a constant throb and vibration that fills appellants' home with noises and the odors of the exhaust. The motors of the trucks run from an hour or two to a few minutes and the motors are speeded up and shut off and speeded up and shut off and this occurs at all hours of the day and night. (R-20, 21)

That the operation prior to the acquisition of the Phillips property wasn't bothersome but has been since said acquisition because of the increase in the number of units and business and the increased use of the garage in night work; that the respondents use the shop for night work every night in the week during the summer season and fall, generally all night during the busy season. (R-21)

That the items of equipment operated by respondent are 25 or 30 feet long, some being smaller, and have capacities anywhere from 1500 to 3000 gallons, and

some of the larger ones carry a load of 4500 gallons.  
(R-22)

That appellants cannot sit on their patio in peace and quiet without hearing the motors or pounding of tires, even hearing them in their home when the doors are closed and also being able to hear racing motors and pounding. That if you sit down and listen to a diesel motor throb for an hour it will certainly disturb you and make you very nervous; it disturbs your sleep and rest and causes you to become nervous and worry when and how long it is going to keep up, when it is going to start and when it is going to stop. It is on your mind constantly when you are inside the house or out and you know any minute one of the big motors will start up and buzz around the yard. (R-22, 23) That the lights are on inside the shop building all night and shine directly into appellants home through the window; that they are very disturbing, making the home interior light up, and as the light shines through the moving trees it causes a moving shadow on the walls of the home; that the lights appear as spotlights. (R-24)

That the trucks are turned around at a rapid speed, faster than necessary, and with no regard to the noise made; that they seem to start earlier in the morning on Sunday than other days and work all day greasing trucks, changing tires and tuning motors, as well as on Sunday nights. (R- 25, 26) At times they have the motors of three or four trucks running at the same time from an hour to two hours both day and night, disturbing the

appellants even with the doors and windows of their home closed. (R-28, 29)

That the respondents stacked everything they could gather up it seemed like — junk of every manner and description which spilled over on to the appellants' property and was placed along the fence line between the appellants' and respondents' property; that this was cleaned up within just a few days prior to the trial of the case. (R-27, 28)

The plaintiff Edith B. Hatch testified that the defendants started with a small business which appellants did not expect would grow into what it is now; that they did not object because there wasn't interference with their living then but as it grew on which it had done the past two years, that was when the noise and the trouble started; it has doubled or more in the last two years, the increase being both night and day, and started with the acquisition of the Phillips property. (R-74, 75, 76)

That prior to the last two years they operated the garage very little during the night time—not enough to interfere with appellants; that the business is now practically a 24-hour business night and day; that the noise of the trucks, the hammering, steaming and cleaning of the trucks and other noises disturb her; that the noises can be heard in any part of their home whether it is closed or open, summer or winter; that when they are busier, the noise and disturbance is more; it is more in the summer than winter. (R-76) That the doors to the work shop are open during the warm weather, closed in



the cold, but you can still hear the noises with the doors closed; that the noises that emit from the operation are clearly audible in her bedroom, very much so, so much so that she can't sleep at night; that there is the running of the motors continuously and the hammering at night time, it being exactly the same as in the day time, there being no regard to night or day time. (R-77) That they operate on Sundays from six o'clock in the morning and all evening, there being continuous noise causing nothing but confusion with noise, such continuous noise being very wearing — "it hurts." (R-77)

There are fumes all the time and the lights from the shop keep her bedroom bright at night, bright enough so that she can look over to her clock across the room and read exactly the time of day; that the lights reflect on the mirror on the wall, causing two walls to light up bright. It usually bothers her sleep, but outside the home the whole yard is lit up at night; that the noise causes her to get up and walk around—to go back to bed—try to get some rest—get up again and wonder how long the noise is going to last. "You don't know — you hope it isn't but it goes on." (R-78)

That they do not have any intention of selling their home; that it was built for them to live in and they expect to live there and that is what they want; that it had been home to appellants, that they had raised their family there, that she had worked for 36 years for her home and did not wish to give it up, and that it would be impossible to continue living there as a home under the present conditions; that you can't have your rest disturbed all the



time—you can't take it; it breaks your health; you have got to have your rest whether it is me or anyone else. (R-80) That the constant noise and sound and fumes and light coming from the respondents' operation cause her to become nervous and upset. (R-82)

Mrs. Ezra Moss testified that she visited the Glen A. Hatch home quite frequently and that she was last in their home about two weeks prior to the trial, arriving about eight o'clock in the evening. That as soon as you drive up the lane the lights are always on in some garage and you can see very plainly the garage and that there is work going on in it; that you would describe the lights as flood lights it was so bright; that it appears that the lights are on the outside the way they reflect the light to you but that she had not been close to the building and did not know whether they were inside or outside the building. (R-90, 91) That she could hear the noise from the operation before coming into the living room of the appellants' home, the noise she notices being a continual pound, pound, pound, but she did not know what was being pounded and that even in the living room with the windows closed, you still noticed the "pound, pound, pound, until you finally say, what in the world is the pounding, that is the sensation you have." (R-91, 92) That she stayed until after midnight, about 12:30, and the situation was practically the same when she left—they were still working, the lights were still on. That the living room is in the west portion of the home; that on other occasions when she visited the home the condition has been similar; that she has heard the noise of ma-

chinery and vibration and the noise of the machinery that is going on "back there." That if you stay in the home long it would annoy you and on a visit was very noticeable. (R-92)

Mr. Frank Hughes, a witness for the respondents, testified that in the shop building there are seven lights in the south stall, two big lights and others in the middle stall and eight lights in the north stall, they being 150 to 200 watts each. (R-116, 117) This is a total of nineteen lights and would mean a total of 2850 watts if the lights were 150 watts each or 3800 watts if 200 watts each, which lights are shining upon appellants' home throughout the night.

There is no question that these things cause great annoyance. Do they constitute a nuisance? Yes. The respondents can do a great deal to eliminate most of the noise in order to alleviate the torment of the appellants without permanently closing down the operation. It may cost some money and time, but the appellants are entitled to the proper enjoyment of their home. We refer again to *Quinn v. The American Spiral Spring and Manufacturing Co.*, supra, wherein it was said that defendant had the duty to so locate his equipment that it protected plaintiff to the maximum that he was entitled to be protected. We contend that this is also the law in this jurisdiction. Even assuming that appellants be held to be living in the heart of an industrial district, which, in fact, we most certainly deny, they are still entitled to a standard of quiet consistent with the most quiet operation of

adjoining activities as is possible. The most quiet operation possible can be obtained by more than just telling the employees of respondents to be quiet while on duty at night. At the very least, an order should be issued (a) designating certain areas of restricted operation during certain hours, (b) ordering the moving or changing of the location of the building or buildings which are causing part of the nuisance, (c) imposing certain restrictions upon the use of lights and the direction in which they may face, and others at the discretion of the court, all of which would not be inconsistent in the slightest with the equitable rights of the parties.

The testimony in the record shows that after this suit was instituted but prior to the trial thereof, the respondents removed certain tires and trash which lined the fence between the appellants' and the respondents' property. (R-27). This led the court to make Finding of Fact No. 6 to the effect that the tires and trash are removed and that the property in question, that is, the respondents' property, is as sightly as can be expected when considering the nature of the respondents' operation. The permanence of any such neatness, it is contended, should be insured by the issuance of an injunction including provisions for continuing such neatness, inasmuch as it required the initiation of a court action to secure even this concession.

Finding of Fact No. 7 states that the respondents do not load oils and acids on their property, to which finding we offer no objection. It also finds that the

respondents' business compels night operations which are conducted as carefully as possible so as not to disturb the appellants, and do not create unnecessary noise. This, we contend, is an unjustified finding of fact, inasmuch as there is no showing that the respondents could not conduct their night operations, if such operations are necessary, at a further extremity of either their property or the property leased from Phillips Petroleum Company and further, so move the position and location of their shop so as to minimize the nuisance to appellants. The discussion of the *Quinn* case, *supra*, is applicable here, as this finding of fact is really a corollary of Finding of Fact No. 5. We, therefore, take exception to Finding of Fact No. 7 for the grounds mentioned in the discussion of Finding of Fact No. 5 as well as the ones mentioned herein.

Finding of Fact Number 8 states that appellants have watched respondents' business grow and yet have taken no steps to impose any kind of legal restraint upon said growth and that, further and notwithstanding these facts, appellants extensively remodeled their home in 1951, knowing that they were in an industrial area. Appellants take exception to this finding of fact for two reasons: (1) that the area is no more a highly industrialized one than it is highly agricultural and residential one, and (2) that the finding of fact is incomplete in that it leaves out certain very pertinent details and leaves an undesirable implication with regard to certain other half-stated facts. It is true that the respondents' business has been a growing one, but the fact is that it had grown

as much in the two years preceding the trial of the case as in all the time before that. (R-145, 146 and 190) Prior to 1951 it no doubt constituted an annoyance to plaintiffs, but no complaint was made, probably because one brother will not complain legally of the other unless forced to the limit. But increased annoyances to the appellants from the use of the tremendously increased facilities and equipments of respondents, plus the round-the-clock operation, came to constitute a nuisance which appellants could not permit to continue and hence this action to enjoin.

Appellants wish to call attention to a well established principle concerning nuisances, as set forth in 39 American Jurisprudence 472, Nuisances, Sec. 197:

“As a rule, it is no justification for maintaining a nuisance that the party complaining of it came voluntarily within its reach. Thus, according to the weight of authority the fact that a person voluntarily comes to a nuisance by moving into the sphere of its injurious effect, or by purchasing adjoining property or erecting a residence or building in the vicinity after the nuisance is created, does not prevent him from recovering damages for injuries sustained therefrom, or deprive him of the right to enjoin its maintenance, *especially where by reason of changes in the structure or business complained of, the annoyance has since been increased* . . . But while priority of occupation is not conclusive as to the existence of a nuisance, it is to be considered with all the evidence, and the inference drawn from all the facts proved, in determining whether the use of the property is unreasonable.” (emphasis added).

“But the fact that one purchases a home in a manufacturing district with property adjoining that may be improved for manufacturing purposes does not prevent his insisting that any such improvement shall be made with due regard to his rights as a dweller in a manufacturing district.”

The case of *Benjamin et al v. Lietz*, 1949, 116 Utah 476, 211 P. 2d 449 supports the general rule stated in American Jurisprudence, supra, with respect to the effect of expansion of business. In this case, it was the increased use of a planing mill in a residential section after 6:00 at night and all day Sunday that caused an injunction to issue. This resulted from the increased use of the business and not the mere use of the business, in and of itself lawful, which had been going on for many, many years prior to the initiation of the law suit.

Further it should be recalled that the appellant Glen A. Hatch was born and partly raised in the house he now calls his home, the property concerned in this litigation. Moreover, he was married and moved back into said home in 1917. (R-2, 3) The refinery now owned by the Phillips Petroleum Corporation was started by its predecessor, Wasatch Oil Co., in or around 1931 (*Wasatch Oil Co. v. Wade*, 1936, 92 Utah 50, 63 P. 2d 1070). At the time when appellants moved into their present home, the entire area around, with minor exceptions, was devoted to farming and agricultural pursuits. (R-3) Since the installation of the oil refinery and subsequent expansion thereof, there has grown up some trucking industry in the area. But if priority of occupation is to have signi-



ficance, as respondents contend and the findings of fact imply, then the equities should lie with appellants.

If we follow the contentions of the respondents to their logical conclusion, it may be seen that there is a danger of giving industry more power than is granted to the sovereign by the Constitution. If industry moves into an area and maintains itself quietly for a number of years, then, if respondents' contentions are valid, it may operate any lawful business therein, without regard for the surrounding area. If people have remodeled or improved their homes or property (and where do we draw the line at what constitutes remodeling or improving?) then they would be estopped from complaining at any expansion the industry might make, even though extensive depreciation to their property was involved. The sovereign, in taking property by eminent domain, is required by the Fifth and Fourteenth Amendments to the Constitution of the United States to pay for the damage to the remaining property as well as for the property taken. Such would not be required of private industry, should we accept respondents's position.

It is respectfully submitted that this Finding of Fact be rewritten to exclude those facts not justified from the testimony and to include all the facts pertinent to the case and not just those pertinent to respondents' theory of the case.

Finding of Fact number ten finds that respondents did not cause or threaten to cause unreasonable noise, but did everything possible to minimize the noise. This



was an unwarranted finding from the testimony. We call the court's attention again to *Quinn v. American Spiral Spring and Manufacturing Company*, (1928), 293 Pa. 152, 141 A. 855, 61 ALR 918, wherein much was required of the defendants in order to assure the plaintiff of the most peace and quiet which he could expect under the circumstances. In the present case, the extent of the respondents' attempts to maintain quiet has been limited to ordering Defendants' employees to keep doors closed (R-184) and not operating at night "more than we have to" (R-183). There is some suggestion that a certain lane was abandoned and more property leased to minimize noises, (R-182, et seq.), but it had been shown earlier in the record that this was the result of the expansion of the business and came before appellants made any real complaint to the conduct of the business. (R-17) In other words, respondents have moved their operation only when it suited the dictates of their business and without regard for appellants except as they might benefit incidentally. The fact that they did not benefit is shown by the record in this suit. It is respectfully submitted that this finding of fact is not complete and is misleading and therefore is not sufficient to justify denying the issuance of an order to abate that part of the respondents' operation which is a nuisance.

Finding of Fact Number 11 is objected to on the same grounds as Finding of Fact Number 10. No. 11 finds that the respondents' operation is lawfully conducted with due consideration for the appellants, and that noises, odors and lights are maintained at a minimum

consistent with the respondents' operation, and further that the maintenance and operation of the respondents' business is not a nuisance to the plaintiffs nor does it interfere with the plaintiffs' enjoyment of their property. It is contended that the finding that there is no nuisance is a conclusion of law and is improperly found here as a finding of fact. It is further contended that, even accepting, arguendo, the contention that respondents conduct their business with a minimum of noise under present conditions, it does not follow, per se, that there is no nuisance. We again refer the court to *Quinn v. American Spiral and Manufacturing Company*, supra, wherein it was said that just because disturbances are at a minimum under present conditions was no reason for saying that no nuisance existed but that the final test was the minimum disturbance that could be made with the most favorable conditions, from the point of view of the offended party, without stopping defendants' operation altogether. We also refer to the discussion and cases cited in the next succeeding part of this argument.

Finding of Fact number 12 is to the effect that no damages were shown with respect to the property of the appellants or to their persons. We respectfully contend this to be the result of an error committed by the trial court in excluding this evidence. We will discuss this more fully in the third part of this argument.

The thirteenth and final finding of fact is to the effect that the appellants' location in an industrialized area has subjected them to noises, odors and lights and similar annoyances from the refinery, railroads, trucks

and small businesses, other than respondents', in the neighborhood. To a certain extent this is true, but it is not these other incidental noises that are the subject of appellants' complaint. To help justify this finding respondents may point to the testimony of the witness E. B. Rawlins to the effect that he has lived in the next house south from the home of the appellants and that he has heard certain noises from the various activities in the neighborhood, but that nevertheless he has made no complaint thereof. This testimony was elicited by the respondents, no doubt to show that disturbances other than those produced by defendants do exist in the neighborhood. This appellants did not deny. Appellants further elaborate to say that if the only disturbances they had to contend with were the ones discussed by Mr. Rawlins in his testimony, this action would never have been instituted. Unfortunately, appellants must put up with much more than Mr. Rawlins and the difference lies wholly with the respondents' operation which immediately adjoins the property of the appellants, but is several hundred feet from the home of Mr. Rawlins, with an orchard intervening. Respondents think it strange that if appellants complain of the disturbances from respondents' operation they don't complain of the disturbances from other businesses in the neighborhood. It is not strange at all. The other businesses do not create the disturbance to appellants any more than they do to Mr. Rawlins, but the same cannot be said of respondents' business as shown by testimony elicited by and from appellants during the trial.

It can be seen from the foregoing discussion that there are several findings of fact which are not supported by the testimony. It is respectfully requested that the court re-examine the record in the light of what has been said hereinabove to determine whether the findings of fact should be sustained or overruled and other findings substituted therefor. It is a well established rule that upon an appeal in a case where equitable relief has been sought, the appellate court may review not only the application of the rules of law, but may weigh the evidence with a view to examining the findings of fact in the lower court. We respectfully contend that the substantial weight of the evidence is contrary to the findings of the trial court, and that an actionable nuisance does obtain in this case as shown by the record.

It is therefore respectfully submitted that the findings of fact in this particular case should be along the lines or substantially like the ones hereafter suggested:

1. That the plaintiffs are the owners and in possession of the real property, including the improvements thereon, particularly described in plaintiffs' complaint; that said property is located in Woods Cross, Davis County, Utah, and adjacent to what is commonly called "Onion Street".

2. That the defendant W. S. Hatch Company is a Utah corporation engaged in transportation of oils and acids by means of tank trucks and trailers and has 20 to 50 employees, depending upon the season of the year; that the defendant Willard S. Hatch is the President and

Manager of W. S. Hatch Company and is the owner of the real property adjacent to and immediately north of the real property of the plaintiffs described in plaintiffs' complaint; that the plaintiff, Glen A. Hatch and the defendant Willard S. Hatch are brothers.

3. That more than 16 years prior to this case, the defendant Willard S. Hatch commenced an oil distribution business which steadily expanded through the ensuing years until at the present time defendants conduct a large oil and acid transportation and distribution business on the premises of the defendant W. S. Hatch; that a garage and service building is located on the premises of the defendant W. S. Hatch at a point approximating 225 feet northeasterly from plaintiffs' home; that said garage and service building is used in the maintenance, repairing and servicing and cleaning of the tank trucks, semi-trailers, trailers and other equipment owned and maintained by the defendant in their transportation and distribution business; that the defendant W. S. Hatch Company at all times since about June, 1950 has had under lease property belonging to Phillips Petroleum Company and located adjacent to and immediately east of the said garage and real property of the defendant W. S. Hatch; that since the acquisition of the aforementioned Phillips Petroleum property the defendants' operation has materially increased, the equipment belonging to said defendants having been doubled since that time and substantial improvements having been made upon the real property of defendant; that during



the busy season of the year defendant's operation continues unabated for 24 hours a day, and all day Sunday; that the said real property including the leased property is also used for parking and storing equipment belonging to the defendants.

4. That the area in which plaintiffs live is devoted to residential and agricultural, and industrial purposes; that the industry which immediately surrounds plaintiffs' home consists of a railroad which runs North and South at a distance of 195 feet to the West of said house with a siding which runs parallel with said railroad at a distance of 175 feet to the west of said house and defendants business which bounds plaintiffs on the North and East; that to the north of the Woods Cross intersection, and over 700 feet from Plaintiffs' property, the Phillips Petroleum Company operates and maintains a large bulk plant, a refinery and "cat cracker" having a crude oil capacity of from 10,000 to 12,000 barrels a day; that Phillips Petroleum Company also owns, operates and maintains two racks for loading tank trucks with road oil, diesel fuel and light fuel oils and that said facilities (except for an intervening lot approximating 50 feet in width) are adjacent to defendants' place of business and immediately North thereof; that from the plaintiffs' home to the said loading racks is approximately 440 feet and that from 47 to 100 tank trucks a day are loaded at such racks; that some trucks from this loading platform travel along Onion Street but not enough to be a real annoyance; that during a 24 hour period, normally about 42



trains travel North or South past plaintiff's home; that each of said trains whistles for the Woods Cross crossing; that at the point where Onion Street intersects the railroad tracks said tracks are equipped with bells and flashing lights for warning traffic; that the total elapsed time that trains are in a position to bother residents in the area does not exceed two hours a day, spread out over a twenty-four hour period; that there are other garages besides respondents in the area but that they operate off Fifth South Street rather than Eighth West Street, the nearest one being 495 feet from plaintiffs' home; that the portion of Onion Street adjacent to and immediately in front of plaintiffs' home is traveled both day and night by an average of only 5 plus trucks per hour; that the area across from the railroad tracks to the West and on either side of said tracks to the South from plaintiffs' property and to the South of Plaintiffs' property and to the East of plaintiffs' property, excluding that property owned or leased by defendants, and the property interlacing the industrial plants within a 500 foot radius of the Woods Cross intersection is devoted to agricultural uses; that all of these many activities characterize the area in which the property of the plaintiffs is located as residential, agricultural and industrial, and that this characterization has been relatively recent, the area formerly being primarily agricultural and residential.

5. That the tires, tubes, old lumber, batteries, etc., of which plaintiffs complain were removed from the

property of said defendants only after this suit was instituted, and that defendants have given plaintiffs no cause to complain in this regard from that time up to the time of the trial; that it required the institution of a law suit to secure removal of said trash.

6. That the nature of the defendants' business is such that during the busy season which extends from April until November, it is operated for 24 hours a day during which time the servicing and repairing of motor vehicles and other routine items are carried on regardless of the time of day or night.

7. That the plaintiffs have observed the carrying on of defendants' business on a relatively small scale for a number of years without legal complaint because said conduct did not hamper plaintiffs' enjoyment of their home and property; that the increased use of defendants' property has caused much discomfort to plaintiffs; that plaintiffs extensively remodeled their home in 1951 with the view of making it more liveable; that defendants' operations have doubled since that time.

8. That the operation and maintenance of the business of the defendants referred to in plaintiffs' complaint is performed in a lawful, but otherwise annoying manner; that said annoyances could be reduced and in many cases eliminated by defendants moving their shop position and restricting the use of the equipment to the area furthest away from plaintiffs' home; that as the property stands and is being used, it constitutes an unreasonable and unwarranted use of the property with respect to plaintiffs' rights as landowners.

9. That the home of plaintiffs in its present location has been subjected to noises, odors and lights originating from some of the industries in the area, but these minor annoyances have not been of the proximity, severity or continuous nature that those originating with defendants have been.

10. That since 1951 defendants' increased use of the property adjoining plaintiffs has doubled, causing plaintiff much annoyance, mental anguish, discomfiture and a lessening of enjoyment by plaintiffs of their home; that said annoyances consist of high power lights in almost constant use which glare upon plaintiffs' home, of hammering and pounding and squealing and hissing which creates loud and unusual noises, of running of motors and engines at all hours, causing noise, vibration and obnoxious fumes to enter plaintiffs' property; that such use by defendants of their property is unreasonable and unwarranted under all the circumstances.

## POINT II

THE TRIAL COURT ERRED IN FINDING THAT NO NUISANCE EXISTS OR EXISTED, WHICH ERROR WAS BASED UPON A MISCONCEPTION OF THE LAW AND A MISINTERPRETATION OF THE FACTS AS BROUGHT OUT BY THE EVIDENCE; AND THEREFORE THE TRIAL COURT FURTHER ERRED IN FAILING TO GRANT APPELLANTS INJUNCTIVE RELIEF.

The law of nuisance is one largely of balancing the equities and degrees of annoyance in favor of both

parties. There are two types of nuisances; nuisances per se and nuisances per accidens. Nuisances per se are those nuisances or activities which, regardless of location or care of operation, are always the subject of injunctive relief; and to plead and prove that such an activity exists is sufficient in and of itself to entitle the pleader to relief. It is not contended that the nuisance complained of herein falls into this category.

Nuisances per accidens are those nuisances which occur not because the activity claimed to be a nuisance is unlawful, but because the manner in which it is conducted or the location wherein it is conducted or some other factor which may or may not be inherent therein is sufficient to make the activity a nuisance to the pleader. This is the type of nuisance that is complained of here.

The word "nuisance" as used in cases, legal texts and encyclopedias is often a misused term. Sometimes it is meant as a mere annoyance and the term then is divided into two groups which are said to be "actionable nuisances" or "non-actionable nuisances". At other times, the word "nuisance" as used in a legal sense means that annoyance or interference for which there is some legal or equitable remedy. As used hereinafter, the latter use of the word shall be maintained. It should be borne in mind, however, that some of the citations will not observe the same niceties of expression.

In Utah, the courts have evolved some modification of the doctrine, so well known at Common Law, that

one should “so use his own so as not to injure another.” Any modification that has occurred, however, has been limited to the balance of the equities. What constitutes balancing the equities? This court, as late as the case of *Cannon v. Neuberger*, 1954, 268 P. 2d 425, has maintained a standard that no person may have an injunction for the abatement of a nuisance, unless the use of the land or activity to be enjoined is “*unlawful, unreasonable or unwarranted.*”

But what constitutes such unlawful, unreasonable or unwarranted activity? Is it sufficient to say that if the activity is lawful and conducted in accordance with good business operating procedure there can be no nuisance? We respectfully contend that such is not the case. We wish to call attention to the discussion of this and a related problem in 61 ALR 924 at 932. The annotation discusses the various views regarding the comparative injury doctrine and quotes from the case of *Brede v. Minnesota Crushed Stone Co.*, (1919), 143 Minn. 324 173 NW 805, 6 ALR 1092 as follows:

“If the injury complained of is caused by the operation of a lawful business, carried on in a district given over to kindred classes of business, and the injury is only such as naturally flows from the operation of the business of that character, an injunction will not be granted if it would entail a serious injury to the defendant or to the public as compared to the injury complained of by the plaintiff. This is commonly referred to as the ‘comparative injury doctrine’. The cases in which this doctrine has been given effect are



collected in the note to *Bristol v. Palmer*, 31 LRA (N.S.) 881-893 and in 20 R. C. L. 480. Other authorities adopt the ancient doctrine that the rights of habitation are superior to the rights of trade, and, whenever they conflict, the rights of trade must yield to the primary or natural right. They hold that, if a lawful business is conducted in such a manner as to offend or interfere materially with ordinary physical comfort, measured not by the standards of delicate sensibilities and fastidious habits, but by the standards of ordinary people, a permanent injunction should be granted. The cases so holding are also collected in the note to *Bristol v. Palmer*, 31 LRA (NS) 888, and it is said that this doctrine is supported by the greater weight of authority. We are of the opinion that the latter is a better doctrine, and that ordinarily it should be applied in determining whether an injunction should be granted or denied in cases such as this."

In *American Smelting and Refining Co. v. Godfrey*, 1907, CCA. 8th Cir., 158 F. 225, certain farmers located close to the refining plants of the defendants sued to enjoin the operation of the smelters and refining plants on the ground that their operation was doing very serious damage to a widespread agricultural area in the Salt Lake valley. This claim of damage was largely substantiated but the defendant claimed that their industry was an important and significant one in the state of Utah, that they hired a number of people and contributed substantially to the economy of the state. They contended that to enjoin them would cause much more harm to the public than failure to enjoin would cause to the plaintiffs.



The court did not agree with this contention, but said further:

“However that may be, we do not think the fact that an actual injury resulting from the violation of a right is small, and the interest to be affected by an injunction is large, should weigh against the interposition of preventative power in equity, when it is clear that on one hand a right is violated and on the other a wrong committed.”

An injunction was issued in this case which made provision for certain remedies to be introduced into the operation of Defendants' plants.

A later case evidently reflects another attempt to enjoin the same industry. *Anderson v. American Smelting and Refining Co.*, 1919, D.C. Utah, 265 F. 928. This case involved a question of fact as to whether the defendant smelters issued so much sulphur dioxide into the atmosphere that it was harmful to the crops. The court discusses this fact at great length and points out the scientific developments in the industry which have diminished such emissions since the *Godfrey* case, supra, was handed down. Judge Tillman D. Johnson, then District Judge, came to the conclusion that, while he did not want to completely enjoin the operation of the defendant smelters, he felt that more could be done to cut down on the emission of harmful gases. Judge Johnson required defendants to explore the possibility of reducing further the sulfurous emissions and should they fail to do so he said he would enjoin the entire operation.

This attitude on the part of the courts has continued down to the present day and manifests itself again in the case of *Shaw v. Salt Lake County*, 1950, Utah, 224 P. 2d 1037. In that case the county operated a gravel pit and rock crusher adjacent to the premises of plaintiffs. Upon suit to enjoin the operation of the gravel pit, it was contended that the public good outweighed private rights in this case. This court, finding that the gravel pit would be just as effective if located elsewhere, affirmed the trial court's ruling that the County move to a new location, saying that public good did not outweigh private rights in such a case.

These cases show that to protect a right that has been invaded, courts will go to great lengths even when the right protected is of a lesser pecuniary value than the right enjoined.

Appellants have shown what the facts are surrounding this particular case and have shown the standards which the courts use in determining whether a given activity is a nuisance and what can be done to minimize a nuisance. There can be no doubt but what the activities of the respondents constitute a grave annoyance to the appellants, and this the respondents only incidentally try to deny. Rather than deny the existence of the factors which, singly and collectively, make up the nuisance, they rely upon certain defenses or justifications as follows:

(a) Respondents' business is conducted in a lawful, modern and efficient manner;

(b) The noises caused by respondents are necessarily incident to the operation of their business;

(c) The business is conducted in an industrial area, and appellants' home is in the same area; and

(d) The appellants were aware of respondents' business as early as 1937, and yet, notwithstanding that fact and the fact that there are other businesses and industries in the area, they extensively remodeled their house in 1951.

Taking these defenses one by one, we can start with the defense that because respondents conduct their business in a lawful, modern and efficient manner, they can cause these annoyances to appellants with impunity. The case of *Benjamin et al v. Lietz*, (1949) 116 Utah 476, 211 P. 2d 449 is a good answer to this contention.

In that case, this court affirmed the lower court's granting of an injunction, enjoining the operation of a planing mill business during certain hours on week days and all day on Sunday. The defendant owned and operated a planing mill at 2032 South 10th East Street in Salt Lake City. The planing mill had existed since approximately 1900. Prior to 1944 or 1945, the planing mill was enclosed in a frame building, but in 1944 or 1945, the defendant erected a cinder block building some 30 feet wide by 60 feet long, immediately to the rear of the frame building and adjoining it. In 1947 the defendant constructed a concrete apron extending along the south and west sides of the building, and placed thereon certain equipment and machinery used in connection with the planing mill. Enclosed within the new building was some of the machinery theretofore used in the frame building,

some machinery which replaced machinery from the old frame building, and some new machinery not designed as replacement for existing machinery but rather as additional machinery. The potential horsepower of machinery installed prior to 1943 was 125, and the present potential at the time of trial was 149½. The expansion of the mill began in 1943 when the defendant received certain government contracts for boxes during the war.

Plaintiffs were residents near the planing mill, some of whom were property owners, and others not. They complained of increased activity in and around the planing mill of recent years, commencing with 1943, both during daylight hours and extending into the night, and all day Sundays, which interfered with their property enjoyment, rest and peace of mind.

The Court held that prior to 1943, the defendant had not made a practice of operating after 6:00 o'clock P.M., and when he did operate after that hour that it was only done in a manner that did not disturb nearby residents. The situation was similar all day on Sundays. The Court further found that after 1943 the operation of the planing mill during the evening and night hours and on Sundays resulted in loud and unusual noises at hours when the mill had not theretofore been used; that these noises were of sufficient intensity to make normal conversations difficult for plaintiffs in their homes and interfered with sleep and caused plaintiffs considerable discomfort.

This court approved the lower Court's findings upon

the evidence, and in answer to the defendant's contention that the plaintiffs failed to state a cause of action in their complaint, stated at page 479:

“Appellant takes the position that the plaintiffs failed to state a cause of action in their complaint. This contention is without merit. The complaint in substance follows the complaint tested in *Thompson v. Anderson*, 107 Utah 331, 153 P. 2d 665, which was held to be sufficient in that case. That appellant's business was a ‘lawful business’ in no way affects this holding, since a lawful business may be operated so as to constitute a nuisance. *Thompson v. Anderson*, *supra*; and *Brough v. Ute Stampede Ass'n.*, 105 Utah 446, 142 P. 2d 670.”

The case of *Thompson v. Anderson*, 1944, 107 Utah 331, 153 P. 2d 665, referred to in the *Benjamin* case, *supra*, also supports the rule that lawfulness of operation is not a defense. In that case the defendant-appellant complained that their demurrer to the complaint should not have been overruled because, to use this court's summarization of the contention and its answer thereto, (page 334)

“there is no complaint that defendant's business is not a lawful business, and that the sounds which annoy the plaintiffs are not unusual and not the ordinary sounds emanating from such a business as defendant is conducting. But even sounds normally inherent in the nature of a business may under some circumstances constitute a nuisance. In *Brough v. Ute Stampede Ass'n.*, 105 Utah 446, 142 P. 2d 670 at 674, it was not alleged or shown

that the noises of which complaint was made were any but the usual noises attendant upon a carnival. The projected business was lawful, had in fact been specially licensed by the city council in past years, and yet we affirmed the judgment enjoining the holding of the carnival in front of the plaintiff's property."

In this same vein, we wish to cite 39 Am. Jur. 323, "Nuisances", Para. 43:

"A business which is lawful in itself may become a nuisance, either because of the locality in which it is carried on or because it is conducted in an improper manner.

"The owner of property has a right to conduct thereon any lawful business not per se a nuisance, as long as the business is so conducted that it will not unreasonably inconvenience a neighbor in the reasonable enjoyment of his property. But every business, however lawful, must be conducted with due regard to the rights of others, and no one has a right to erect and maintain a nuisance to the injury of his neighbor even in the pursuit of a lawful trade, or to conduct a business on his own land in such a way as will be injurious or offensive to those residing in the vicinity or those traveling on an adjoining highway.

"A trade or business lawful in itself becomes a nuisance when from the situation, its inherent qualities or the manner in which it is conducted, it causes a material injury to the property of another, interferes with his comfort and enjoyment, injures the health of those living in the vicinity, or interferes with their ordinary physical comfort, measured by the habits and feelings of ordinary people. It is not necessary that life or health



be endangered; it is sufficient if the business produces that which is offensive to the senses, and which renders the enjoyment of life and property uncomfortable. The mere fact, however, that a business is objectionable to others, or that property in the immediate neighborhood may be adversely affected by it, is not sufficient ground for an injunction. *All persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them.* By such care and improved methods and appliances, many occupations that formerly were regarded as nuisances because of their annoyance to the senses may now be carried on in even populous neighborhoods without offense to anyone. However, proof of negligence is not essential in cases of this kind; and a person carrying on a business may be liable for maintaining a nuisance although he uses the most approved methods and appliances in conducting it, and although the annoyances complained of are ordinary incidents of such a business when properly conducted.” (Emphasis added.)

And in 39 *Am. Jur.* 327, *Par.* 45, it is said:

“The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person. But, on the other hand, it does not allow anyone, whatever his circumstances or conditions may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by lawful and useful business carried on his vicinity.”

And *Page 341, Par. 58*:

“As in other cases, the fact that a business causing the nuisance is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and necessary incident of it, does not constitute a defense.”

It may be seen from these excerpts and citations that the defense of performance in a lawful, modern and efficient manner is not a valid one if other conditions which cause annoyance exist.

Coming to the second defense, that the noises caused by the respondents are necessarily incident to the operation of their business, it may be seen that much that was said with respect to the other defense will also be applicable here. Especially is this true of *Thompson v. Anderson*, supra, where it was said that “even sounds normally inherent in the nature of a business may under some circumstances constitute a nuisance,” citing *Brough v. Ute Stampede Ass’n.*, 1943, 105 Utah 446, 142 P. 2d 670.

In the *Brough* case the defendant for some years past had run, adjacent to plaintiff’s property, a carnival which had been specially licensed by the city council. The trial court granted an injunction against the operation of the carnival, and this court affirmed, in effect saying that the fact that a business is lawful and that the noises which emanate therefrom are necessarily incident to the business and normal therein is of no consequence if there indeed is so much annoyance as to constitute a nuisance.

To the same effect is the case of *Roukovina v. Island Farm Creamery Co.*, 1924, 160 Minn. 335, 200 N.W. 350, 38 A.L.R. 1502, in which case the plaintiff resided in a residential district that abutted on an alley to the rear of a business street upon which a creamery was being conducted. The creamery had been established many years before the plaintiff purchased the property. Nevertheless, the Court enjoined the loading of milk trucks and the operation of an ice crushing machine, unless muffled, during the hours ordinarily devoted to sleep. On page 351 of the Northwest Reporter, Vol. 200, it is said:

“The contention is also that, since defendant is conducting a lawful and useful business no more noisily than is ordinarily incident to its proper conduct, and at such period of the night as is absolutely necessary in that business, no injunction should issue, especially since plaintiff acquired his building long after defendant was established there. The contentions urged are all to be considered. It is true that the character of the business sought to be interfered with, its extensiveness, its usefulness to the public, the noises, odors, and disturbances necessarily attending its conduct, the condition and use of the surrounding property, the relative hardship as between the parties to the litigation, and who was first upon the ground, are to be given due weight by the chancellor. But still, where it is found that a nuisance within the definition of the cited statute exists and seriously interfered with another’s enjoyment of life and property, it should be abated; especially so where, as here, the superior rights of habitation over business or trade rights invoke relief.”

Thus it can be seen that just because the noises are normal to and necessary incidental to the business is no excuse for maintaining a nuisance.

The respondents also claim that because they are located in an industrial area it is sufficient justification for maintaining a nuisance with respect to the property of the appellants. First we should like to point out that the record and testimony do not support the contention that this is an industrial neighborhood any more than it is a residential or agricultural neighborhood. Neither type of land use has attained sufficient priority in the area to be able to dominate the other. However that may be, we contend that the law is such that it is no defense to a charge of maintaining a nuisance that there are other similar annoyances in the neighborhood or that the area is an industrial one. Perhaps the leading Utah case in support of this contention is *Ludlow v. Colorado Animal By-Products Co.*, 1943, 104 Utah 221, 137 P. 2d 347. In that case it was contended that the odors emitted from defendant's animal by-products plant did not constitute a nuisance due to the fact that the plant was located in an industrial rather than an agricultural district. The defendant in that case pointed out that within a radius of several miles from the plant there were in existence, or had been in existence, factories and industries which rendered the area an industrial rather than an agricultural one, pointing out the existence of (1) a sugar factory; (2) a pea vinery; (3) two railroads; (4) a flour mill; (5) an alfalfa feed mill; (6) beet storage and load-

ing chutes adjoining each railroad; (7) wool loading platforms; (8) a local brickyard; (9) livestock feeding yards; and (10) livestock loading pens on both railroads.

Defendants also claimed that there were other smells and odors that were obnoxious in the area, and that the smells caused by the defendant's plant were mere incidents of the industrial area.

However, the court said, at pages 229 and 230:

"We also must reject the argument that the existence of some of the facilities pointed out by counsel for defendants, made the region an industrial rather than an agricultural area; although in view of what we have said, the fact that a region actually may be industrial does not justify the creation with impunity of odors or stench to an excessive degree which unreasonably annoy others in the legitimate use of their properties or in their occupations, especially when such conditions depreciate the value of other properties in such area. The evidence shows that the sugar factory, pea vinery, stock-feeding yards and loading platforms are essential to the marketing of agricultural products and livestock. The region consists principally of farms on which there are homes and other buildings characteristic of rural life. In most instances the farmers and livestock raisers reside on their farms."

The court further held that the fact that an industry might serve a useful purpose or produce commercial commodities did not warrant its location at a place which merely suited the convenience of the owner or operator



in utter disregard for the effect it has on the value or enjoyment of other properties; and that the fact that there might already exist conditions that are obnoxious in the area did not create a license for the establishment of other or more offensive conditions.

On page 230 of the Utah report of the case the court states:

“When an industry is of such a character that it produces foul odors, those who are responsible for its operation have the duty to place it where it will not result in injury to the property of others. The mere fact that there may already exist in the area a condition which may be obnoxious to some persons, does not create a license for establishment of other more offensive conditions.”

In *Quinn v. The American Spiral Spring and Manufacturing Co.*, (1928), 293 Pa. 152, 141 A. 855, 61 A.L.R. 98, the court granted an injunction to prevent a manufacturer from continuing his business as it then stood without making drastic changes in its construction in order to save the plaintiff's home and his enjoyment thereof. This was done in spite of the fact that plaintiff lived in the heart of an industrial and manufacturing area.

The New Mexico court has fairly recently made a statement to the same effect, when it said:



“And it is also clear that it is no justification for maintaining a nuisance that other persons maintain similar nuisances or tolerate acts amounting to a nuisance in the vicinity. See 39 Am. Jur., 300, Sec. 18.” *Barrett v. Lopez*, 1953, N.M., 262 P. 2d 981.

This principle has been set forth in the citation from 39 Am. Jur., 323, Nuisances, Sec. 43, supra, and also in 17 ALR 2d 1280:

“Par. 8. EXISTENCE OF SIMILAR CONDITIONS IN THE AREA.

“Generally, the creating or maintaining of a nuisance is not justified or excused by the fact that other persons maintained similar nuisances in the vicinity. Hence, even though the area in which the rendering or bone boiling is carried on is predominantly industrial, or occupied by other establishments of equal objection, it has been held that such facts do not justify the creation of a nuisance within the area by such animal rendering.” (citing cases, including *Ludlow v. Colorado Animal By-Products Co.*)

39 Am. Jur., 325, Nuisances Par. 44:

“It has been said that in the eye of the law no place can be convenient for the carrying on of a business which is a nuisance and causes substantial injury to the property of another. But the locality and surroundings are to be taken into consideration in determining whether a business or an industry is so conducted as to constitute a nuisance as a matter of fact.

39 *Am. Jur.* 326:

“That a neighborhood is devoted to some extent to industry does not authorize one to conduct his business in such a manner as to interfere with the right of property owners to the clean comfort of their residences. One constructing a manufacturing plant adjoining a home located in a manufacturing district must so locate and install that which he intends to use so as to do as little injury to the adjoining dwelling and its owner as is reasonably possible, considering the use to which his machinery is to be put and the needs of the business.”

It can be seen from the foregoing citations that the fact that a business is conducted in an industrial area adjacent to a residence is no excuse for justification for causing undue, unreasonable or unwarranted interference with those who are entitled to enjoy the residence as a home.

It is said that the appellants were aware of the respondents' business as early as 1937; and yet, notwithstanding the fact there are other businesses and industries in the area, they extensively remodeled their home in 1951. First of all we wish to emphasize the fact that it is not the mere existence of respondents' business which constitutes the alleged nuisance; it is the expansion of that business, which is all out of proportion to the conduct of the business in 1937 until 1951, that brings about this claim. It is the expansion of the business from 1951 that has caused the great amount of annoyance and discomfort to the plaintiffs. However, we contend that,

even accepting defendants' contention that plaintiffs "moved into the nuisance," this is no defense if, in fact, the defendants are conducting a nuisance. We cite from the annotation beginning 167 A.L.R. 1364 concerning "coming to a nuisance" as a defense or operation as an estoppel. At page 1366 the annotation says:

"Some courts have expressed the view that while priority of occupation is no defense, it is a factor which may be considered in determining the character of the locality leading to the determination of the reasonableness of the defendant's use of his property. A number of courts have emphasized the fact of the priority of the objectionable condition without specifically determining the singular conclusiveness of this factor as a defense; but it is apparent that where it is found that a thing, business, or occupation is not a nuisance because, in view of the locality or surroundings, it constitutes a reasonable use of the property, the question of whether the complainant came to the nuisance, or the nuisance came to the complainant is of no importance.

## II. VIEW THAT PRIORITY OF NUISANCE IS NO DEFENSE: MAJORITY RULE

### a. IN GENERAL: Actions by individuals affected

While there are a few cases which support a contrary view it has been held or recognized in an overwhelming majority of cases that where property is so utilized as to constitute a public

or private nuisance, the fact that an individual thereafter purchases or occupies property in an area affected by the nuisance will not defeat his right to its abatement or the recovery of damages due to its continuance since the fact that the complainant 'came to a nuisance' does not constitute a defense or an estoppel nor justify the continued operation of the nuisance."

It would therefore seem that even should the appellants be held to have "moved into a nuisance" that it is still no defense. We respectfully submit, however, that such was not the case and that the nuisance moved to the appellants, they having lived there since 1917, some 20 years prior to respondents' first steps in the business.

Noise in and of itself may be a nuisance. *39 Am. Jur.*, 330 Para. 47:

"Generally, noise is not a nuisance, per se, but it may be of such a character as to constitute a nuisance in fact, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation." (Citing many cases in foot note.)

And at page 331:

"Noises which injure the health of persons residing in the vicinity are regarded as nuisances, and so are noises of such character and intensity as unreasonably interfere with the comfort and enjoyment of private property, although no actual physical injury to the health of the complaining party or his family is shown."

"No one is entitled to absolute quiet in the enjoyment of his property; he may only insist upon a degree of quietness consistent with the standard of comfort prevailing in the locality in

which he dwells. The location and the surroundings must be considered, since noise which amounts to a nuisance in one locality may be entirely proper in another. The character and magnitude of the industry or business complained of, and the manner in which it is conducted must also be taken into consideration, and so must the character and volume of the noise, the time and duration of its occurrence, the number of people affected by it, and all the facts and circumstances of the case."

The time when a noise is made must be taken into consideration. 39 *Am. Jur.*, page 334. Par. 51:

"*Time when made.* — The time when a noise is made is to be taken into consideration in determining whether or not it is a nuisance. Thus, noises made at night during the usual hours of sleep may be a nuisance, although the same or greater noises during the day would not be. And noises made on Sunday may constitute a nuisance although they would not be such if made on week day."

See also *Kobielski v. Belle Isle East Side Creamery Company*, 222 Mich. 656, 193 N.W. 214, 31 A.L.R. 183, where the noise of a creamery in a residential district at night was restrained after giving reasonable time to avoid the nuisance.

Fumes alone may constitute a nuisance. See 39 *Am. Jur.*, 335, Par. 53:

"Every person has the right to have the air diffused over his premises, whether located in the city or country, in its natural state and free from artificial impurities. However, by air in its natural state and free from artificial impurities is meant pure air consistent with the locality and

character of the community. \* \* \* and any business although in itself lawful, which necessarily impregnates large volumes of the atmosphere with disagreeable, unwholesome, or offensive matter, may become a nuisance to those occupying adjacent property, in case it is so near, and the atmosphere is contaminated to such an extent as substantially to impair the comfort or enjoyment of adjacent occupants.”

Page 340, Par. 58:

“Noxious fumes, gases, or vapors may constitute an actionable nuisance, although produced in carrying on a lawful business, where they result in material injury to neighboring property or interfere with its comfortable use and enjoyment.”

And, Page 341, Par. 58:

“As in other cases, the fact that a business causing the nuisance is carried on in a careful and prudent manner, and that nothing is done by those managing it that is not a reasonable and necessary incident of it, does not constitute a defense.”

The casting of light on another’s premises may constitute a nuisance. See 5 *A.L.R.* 2d 706 :

“The private nuisance light cases, considered as a whole, seem to warrant the generalization that if the intensity of light shining from adjoining land is strong enough to seriously disturb a person of ordinary sensibilities, or interfere with an occupation which is no more than ordinarily susceptible to light, it is a nuisance; if not, there is no cause of action. The courts will not afford



protection to hypersensitive individuals or industries. This is particularly well brought out in *Akers v. Marsh* (1901) 19 App. DC 28, *infra*, Par. 2, and *Amphitheaters, Inc. v. Portland Meadows* (1948), Ore., 198 P. 2d 847, 5 A.L.R. 2d 690, *infra*. Par. 3.”

And see also the case of *Green v. Spinning*, Mo., 48 S W2d 51 at page 711 of the above A.L.R. annotation.

Further, it has been held that parking lots can easily become nuisances because of night lighting and the illumination from headlights or motor vehicles patronizing them. See page 713 of said annotation.

We have been assuming, *arguendo*, that appellants are located in an industrial area. We wish it to be remembered that we do not subscribe to this idea. The area in which appellants live was once entirely agricultural and was so when appellants acquired their home. Since that time some industry has grown up in and around the neighborhood of appellants. This, however, does not give respondents or any others the right, in the name of business or industry, to preempt the land of residents of long standing in the community.

Due to the fact that the operations were more or less limited and no night operations were carried on and that the parties were brothers, appellants made no legal protest prior to 1951. It is contended, however, that the conduct of the business since that time has constituted a nuisance, and it was at about that time that said nuisance

began to make itself seriously felt. As in *Bejamin v. Lietz*, (1949), 106 Utah 476, 211 P. 2d 449, it is the expansion of the business to which appellants object, and to the resulting nighttime and Sabbath activity and the annoyances which result therefrom. It is contended that in the expansion of the business respondents had regard only for their own operation and the expediency thereof, and they did not regard the rights of the appellants except as such rights may have been incidentally affected by said expedience. The garage or "shop", as referred to in the transcript of proceedings, was expanded so that it was necessary in its use that lights must shine upon and into the home of the appellants, and the trucks and engines must necessarily be driven in areas which are closer to appellants' home than is in fact necessary. The location of the shop also makes any outdoor work carried on more convenient if it is done in an area much closer to appellants' home than might otherwise be necessary if the shop were located elsewhere, resulting in the bulk of outdoor work being done in said area. Much could be done to meet a satisfactory standard of quiet, even if it should mean some expense to the respondents. As was said in *Quinn v. American Spiral Spring and Manufacturing Co.*, supra, the defendants should have considered these things before they established the various locations of their improvements.

### POINT III

IF THIS COURT SHOULD FIND AN ACTIONABLE  
NUISANCE DOES EXIST BUT FINDS FURTHER THAT

APPELLANTS ARE NOT ENTITLED TO EQUITABLE RELIEF IN THE FORM OF AN INJUNCTION, IT IS RESPECTFULLY SUBMITTED THAT THE TRIAL COURT ERRED IN REJECTING CERTAIN EVIDENCE AS TO DAMAGES AND THE CASE SHOULD BE REMANDED TO THE LOWER COURT TO PERMIT A FINDING AS TO THE AMOUNT OF DAMAGES TO WHICH APPELLANTS ARE ENTITLED.

A. THE TRIAL COURT ERRED WHEN, AT PAGE 31 OF THE RECORD, IT SUSTAINED AN OBJECTION TO A QUESTION PUT BY APPELLANTS' COUNSEL TO APPELLANT GLEN A. HATCH, WHICH QUESTION WAS DESIGNATED TO ELICIT TESTIMONY RELATIVE TO THE VALUE OF THE APPELLANTS' PROPERTY.

At page 31 of the transcript, counsel for the plaintiff asked the plaintiff if he had formed an opinion as to the value of the property he owned as it was now with the nuisance continuing at all times. The court sustained an objection to the question on the ground that there was no foundation laid for an answer from the witness. It was then pointed out to the court that the witness was an owner of the property in question and had been for several years. In addition to this it had been shown that he was on the loan committee of a bank in the area and that he had had occasion to pass upon the values of property in the area with the view of lending money to the owners and that he had done this work for 15 years. In addition, he had testified, and it was undisputed, that he had lived on the property since 1917 (R-2). All these factors are sufficient to make the plaintiff qualified to testify as to the value.

It is a rule of law, followed by most of the courts of the United States, that an owner, especially one who has lived on the property for a number of years, is competent to give testimony as to the value of the property. As said in *Kinter v. United States*, 1946, 172 A.L.R. 232, 156 F. 2d 5:

“The owner may, because of his personal knowledge of the property, the uses to which it may be put, the condition of the improvements erected thereon, testify as to its market value.”

Many cases may be cited in support of this doctrine, some of which will show that Utah subscribes to this doctrine. Among said cases are *Salt Lake & R. R. Co. v. Schramm*, 1920, 56 Utah 53, 189 P. 90; *Long Beach City High School District v. Stewart*, 1947, 30 Cal. 2d 763, 185 P. 2d 585, 173 A.L.R. 249; *Spring Valley Waterworks v. Drinkhouse*, 1891, 92 Cal. 528, 28 P. 681.

Under this well established doctrine, then, it is shown that plaintiff Glen Hatch was entitled to testify as to the value of the property in question, and to rule otherwise constituted reversible error.

B. THE TRIAL COURT ERRED WHEN, AT PAGE 70 OF THE RECORD, IT SUSTAINED A MOTION TO STRIKE ALL OF THE TESTIMONY OF THE APPELLANTS' EXPERT WITNESS LARSON.

Witness Charles A. Larson was called by the appellants and through questioning testified that his business

was that of selling and buying real estate and constructing homes. He had been in the real estate business about four years and had been constructing homes for 13 or 14 years on his own account. (R-47) These activities had been almost exclusively confined to the Bountiful area, wherein the property in question is located. (R-48) He held at the time of trial a real estate broker's license, a city real estate license and a state contractor's license. (R-48) He has sold businesses, farms and homes in the area. (R-48) He has sold property in the area of the Glen Hatch home about half a mile to the south, and in addition receives reports of other sales in the area through the Real Estate Board. (R-56, 57) He is acquainted with the Glen Hatch home and the general area surrounding it, including the industrial development therein. (R-48) He had investigated the area and the said Hatch home prior to testifying at the trial. (R-49)

After the above qualifications of the witness Larson were brought out, counsel began to question the witness regarding certain measures of damage. The witness stated that he placed a replacement value on appellants' home, regardless of the location and surroundings, based upon a replacement cost of the home less a consideration of age and usage thereof. In other words, it was an estimate of the market value of appellants' home in a fair location, which value was placed at \$37,200.00. (R-49, 50)

Then the witness was asked to place a market valuation upon the appellant's home considering the railroad, the Phillips Petroleum refinery and businesses, the

Mitchell garage, the storage and loading racks of the Phillips Petroleum Company and other businesses, but excluding the W. S. Hatch Company business. The value placed by him thereon taking into consideration just those circumstances was \$25,000.00. (R-50 to 53)

The witness was then asked what value he would place upon the appellants' property for residential purposes if there was conducted next to appellants' property a business and in the conducting of that business and in the maintenance, repairing, cleaning, starting and servicing of trucks, their trucks, semi-trucks and trailers, the operators thereof have caused and are causing, both day and night, loud and unusual noises, by hammering with sledge hammers and other objects upon truck tires and other metal objects; in maintaining, repairing and changing tires and for other purposes, a good portion of this repair work taking place in the building that serves as a garage at a distance of about 230 feet from the appellants' property and by the cleaning and greasing of trucks, cause loud hissing of steam and loud and unusual noises, by the using of compressed air in grease guns, and by the starting and testing and warming up of motors, and by driving trucks into the area and out, and by racing motors, sometimes running them for long periods of time, and by starting of motors, and having the operation on practically a 24-hour basis where it is run night and day, and with lights on the garage building and in the area, lighting up the entire area and the back yard of the appellants' home, and shining in the windows of



the bedroom, and the operation of the trucks in the rear of the business causes fumes to permeate the appellants' home, and assuming that this business operation will continue indefinitely and permanently, and that the noises created can be heard throughout the appellants' home, and that they disturb the sleep and the rest of the occupants. (R-53, 54) The witness placed a value under those circumstances of \$12,000 or \$13,000, (R-55) and further stated that it is hard to say in a situation like that whether you can find a buyer at any price. (R-56)

Upon cross-examination the witness was forced by the insistence of the cross-examiner, to give certain valuations which he had not previously considered. But upon his basic testimony as to the three different values he remained steadfast because those had been based upon observation. (R-60 et seq.) He had made a valuation of the property without the industry about it, then had made one with all the industry taken into consideration excluding the respondents' premises, and then made a valuation taking them all into consideration. Respondents contend that because he put a particular value upon the damage contributed by defendant's property, he should be able to do so with every other property in the area. Such is not the case unless he is allowed the opportunity to examine the area again with those particular factors in mind, as he had done to prepare himself to testify before trial with respect to breaking down the effect of the defendants' operations upon plaintiffs' property separately from the others.

In *Ludlow v. Colorado Animal By-Products Co.* (1943), 104 Utah 221, 137 P. 2d 347, the court clearly approves the measure of damages which was brought out by the questioning of the witness Larson. In that case it was said, at page 235 of the Utah Reporter:

“It appears to be the view of appellant that the rule of diminution of market value was not properly applied. It is claimed that witnesses for plaintiffs made valuations from which they computed depreciation on some theory of absence of the plant structure and without reference to other existing industries, activities and facilities. However, at least one witness indicated he took into consideration the surrounding conditions, and he based depreciation solely on the odors emanating from defendant’s plant. It appears that the trial court based depreciation on the frequent recurrence of stench, not on any assumption that the building and other physical structures of appellant as located constituted a nuisance. The findings and conclusions of the court indicate that in assessing damages the trial judge used the proper criterion—the difference in market value of each tract with its improvements without the stench nuisance existing, as compared with the value as affected by such odors.”

It appears patent upon the face of the record that the witness had the requisite qualifications to testify as to value.

2 *Jones on Evidence* (4th Ed.) 726, Opinions and Conclusions, Sec. 386 states:

“A witness is qualified to testify to the value

of land if he has had an opportunity to form a correct opinion as to its value. Testimony may be given by real estate agents, assessors or other public officers, or persons who are shown to have been engaged in private business of such a character as to give them special or peculiar knowledge of the subject. Nor is it essential that the witness should have bought or sold land in the vicinity; his knowledge may have been gained by having dealt in similar property at another place. Again it is not necessary that he should have known of actual sales of such tracts as the one in question, or that his knowledge of sales should have been personal, or that it should have been derived from the buyer or seller of the land sold. The essentials are: 'First, a knowledge of the intrinsic properties of the thing; secondly, a knowledge of the state of the market.' and in determining the qualifications of a witness, much must be left to the discretion of the trial judge; and this has also been held to be true as to the form and adequacy of the questions asked of the witness."

When he attempted to testify as to value it was objected that no proper foundation had been laid. The court said he would hear the answer. (R-50, 51) Thenceforth, Mr. Larson's entire testimony was heard by the court.

The essence of Mr. Larson's testimony, as brought out by the plaintiff, was to establish the value of appellants' property as a residence under three different sets of facts. First, the value of the property and home without any industrial surroundings. Second, the value of the home and property considering all the industrial

developments in the area with the exception of respondents' property. Third, the value of the home and property considering all the industrial development in the area. In the course of the questioning it was objected that the witness had no knowledge of industrial values. Such an objection was immaterial because the witness was testifying as to the value of residential property only, on which he was qualified to form an opinion.

At the close of this testimony, respondents made a motion to strike the entire evidence of the witness Larson on the grounds that "basically there is no foundation for his testimony. That it's so confusing that nobody could determine what he might mean by values." (R-70) Upon inquiry by counsel for the plaintiffs as to what prompted the court to grant the motion, the court replied:

"I don't think you have qualified him for one thing. I think there isn't a differentiation between the W. S. Hatch Company and the other industries in that area on which a value of depreciation could be placed. I'm going to grant the motion to strike. You can take your exception. . ."  
(R-70, 71)

It can be seen thereby that although the court had permitted the witness to testify when his qualifications were known, he later changed his mind and threw out the entire evidence. It is contended that this is gross abus of discretion in that the ground for such action was an apparent belief, arrived at independently from any

testimony in the case, that what the witness said was not worthy of belief. Further, the remark quoted was contrary to the law cited in the *Ludlow* case, *supra*. It was the judge's opinion that such a distinction could not be made and, therefore, the testimony should be stricken. But the witness was a qualified expert and the judge was not. While there is some discretion allowed the judge as to what part of a witness' testimony he may believe, he cannot strike it from the record on the ground that he does not believe it, because to do so would raise his opinion over the rules of evidence and the opinion of experts, which results the rules were made to prevent.

It is therefore respectfully contended that the trial court erred in granting the motion to strike, that the testimony should have remained a matter of record, that the appellants are entitled to some relief, and that if this court declines to authorize injunctive relief, the case should be remanded to the trial court for a new trial to determine the amount of damages to which appellants are entitled.

## CONCLUSION

We have reviewed the facts as found by the trial court and we have shown that those facts were either unwarranted or were misleading. We have done this by referring to the record and analyzing the complete situation surrounding each particular finding of fact. We have then recommended certain modifications to those findings of fact which we respectfully submit should be substituted therefor.

Under these changed findings of fact, we sincerely believe that a case of nuisance has been established; that the activities of the respondents upon their property are unreasonable and unwarranted in view of the condition of the neighborhood and in view of their neighbors, the appellants in this action. We believe that this nuisance is the type for which an injunction should issue, if not to enjoin the entire business, at least to alter it materially to the benefit of the appellants.

We have shown that there exists an actionable nuisance and should the court believe that no injunctive relief should be had in this particular case, we contend that there should be relief in the form of damages and that the case should be remanded for a hearing of that issue.

Respectfully submitted,

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Received copies of this Brief, this \_\_\_\_\_ day of  
\_\_\_\_\_, 1954.

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