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Glen A. Hatch and Edith E. Hatch v. W. S. Hatch Co and Willard S. Hatch : Brief of Respondents

Utah Supreme Court

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Case No. 8215

U. S. SUPREME COURT
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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.

BRIEF OF RESPONDENTS

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Supreme Court, Utah

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IN THE SUPREME COURT of the STATE OF UTAH

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ration, and WILLARD S. HATCH,

Defendants and Respondents.

Case No. 8215

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

This is a suit wherein plaintiffs seek to enjoin the operation of defendants' trucking business because, it is alleged, the noises incident to the repairing and greasing of trucks, changing of tires and running of motors constitute an actionable nuisance. Glen A. Hatch and Williard S. Hatch are brothers and in possession of ad-

joining property situated in Woods Cross, Davis County, Utah, which locale, with its Phillips Petroleum Refinery, is one of the most highly industrialized areas in the state.

The case was tried before the Honorable Parley E. Norseth, sitting without a jury, and after presentation of both plaintiffs' and defendants' evidence and a thorough view of both parties' premises, the court found as a matter of fact that no actionable nuisance existed. During the trial court's inspection of defendants' garage and repair shop the several operations of greasing, tire changing, pounding on tanks and driving a diesel tractor around the yard were demonstrated to the court. In all fairness and justice to both plaintiffs and defendants, the court reached the conclusion that the noises were not unreasonably loud and in view of the industrialized character of the area could not be said to constitute a nuisance as they might affect plaintiffs. (Finding of Fact No. 5, R. 14)

Plaintiffs have attempted to exculpate the far greater sources of noise in the neighborhood (Onion Street traffic and mainline Union Pacific Railroad) and have ignored the many practices and devices employed by W. S. Hatch Co. to cut down all unnecessary disturbance. Plaintiffs have been entirely unreasonable in their demands. Their demeanor on the witness stand and tone of voice in testifying, particularly that of Edith E. Hatch, amply supports the finding of the trial court that they

are “supersensitive to the defendants’ activities and that this supersensitiveness is occasioned by the animosity between the plaintiffs and the defendant, Williard S. Hatch.” (Finding of Fact No. 5, R. 14)

STATEMENT OF FACTS

*See Footnote

Appellants’ brief contends that the findings of fact drawn by counsel for the respondents (after the trial court published its memorandum decision) do not truly represent the situation as it exists; that the actual facts have been either misrepresented and distorted or absurdly minimized or ignored.

From a study of their brief, it is apparent that it is not the findings of evidentiary facts with which appellants disagree, but the conclusions as to their ultimate classification. The trial court concluded that the area was in fact industrial and that the noises and lights complained of were within the bounds of reason.

It is significant that plaintiffs produced no photographs, or exhibits whatsoever, to illustrate the area involved. The traffic count of trains and trucks which pass by their house as revealed by defendants’ Exhibits Nos. 7 and 8, and the photographs produced by the defendants show the true character of plaintiffs’ property.

*Note: The judgment roll is designated as “R” and the transcript of testimony as “T”, inasmuch as the clerk has not stamped the entire record by number.

This being a case seeking equitable relief, it is proper for this court to review the evidence and determine its weight. But as this court stated in the recent Siberian Elm case (Cannon -vs- Neuberger et ux. Utah, March 1954, 268 P2d 425):

“However, much consideration must be given to the trial court’s findings, inasmuch as the presiding judge saw and heard the witnesses, had a better opportunity to determine their knowledge of the fact testified to, *to observe their demeanor indicating interest prejudice, etc., and particularly inasmuch as he went upon the premises in question, and made first hand observation of conditions existing.* Kinsman v. Utah Gas and Coke Co., 53 Utah 10, 177 P. 418. Kubby v. Hammond, 68 Ariz. 17, 198 P2d 134. Erickson v. Hudson, 70 Wyo. 317, 249 P2d 523. Smith v. Smith, Utah 262 P2d 284.” (Emphasis added).

Never in the history of this court has there been a reversal of a trial court’s determination upon the facts that a nuisance is found not to exist. This is rightly so, because the existence of a nuisance depends upon the particular circumstances of each case which must be weighed and evaluated by the fact finder. The location of the property with respect to other industries, the characterization of the area, the utility of the defendants’ conduct, its lawfulness and reasonable operation as compared to the type and gravity of harm to the plaintiff, all must be considered.

“ the question whether the excessive noises constitute a nuisance or not would necessarily have to be determined as a question of fact and not one of law.” Twenty Second Corporation of Church of Jesus Christ of Latter Day Saints -vs- Oregon Short Line Railroad Co., 36 Utah 238, 252, 103 P 243, 140 Am. St. Rep. 819, 23 L.R.A., N.S. 860.

As digested and summarized below the record in this case fully supports the findings of fact that no legal nuisance exists.

Industrialization of The Area

Within a radius of 500 feet of the center of Woods Cross (intersection of 5th South Street, which is numbered from Bountiful and Onion Street; See Defendants' Exhibit No. 1) is one of the most highly industrialized areas in the state of Utah. Within that area are the main line tracks on the Union Pacific Railroad, (T. 33); side tracks for switching and for unloading all kinds of products from cement and lumber to oil, (T. 34); the bulk of the refinery of Phillips Petroleum Co., including a tremendous “cat cracker”; the loading docks, garages and storage tanks of Phillips, (T. 35); the heavily traveled Onion Street carrying a tremendous load of vehicles; the old abandoned building of a creamery, (T. 34); two street and railroad intersections; each equipped with bells and flashing lights for warning traffic, (T. 37); and the Droubay, Mitchell (T. 36) and W. S. Hatch Co. garages for servicing tankers, trucks, trailers and

semi-trailers. To the east a few hundred feet and crossing plaintiffs' property, will shortly be located the new express freeway, carrying the heavy traffic between Ogden and Salt Lake City (T. 46).

Defendants' Exhibit No. 6, (an aerial photograph) shows the Union Pacific tracks running from Salt Lake (upper left hand corner) to Ogden (lower right hand corner). The Phillips Refinery and loading docks, and the mainline Denver and Rio Grande tracks to the west (T. 13) are also shown. Located in the general area is a new General Motors plant, and the new terminal of the Sinclair Refining Co. (T. 37). Mr. Glen Hatch was asked on cross examination:

Q. "Isn't it a fact then, Mr. Hatch, that your home is surrounded on three sides virtually by industrial use?"

A. "Well if you want to call that railroad industrial use, and this leased property up here, (pointing to W. S. Hatch Co.'s parking lot), Yes." (T. 36)

This is the area. No fair-minded person visiting Woods Cross would say it was not highly industrialized. The trial court visited it and from his view, concluded such to be the fact. (Memorandum Decision, paragraph 3, R. 9; Findings of Fact, paragraph 4, R. 13).

Defendants have never claimed that this industrialization constitutes an absolute defense as a matter of law in the instant case, but it does have an important

bearing on what is considered a reasonable amount of noise and a reasonable use of property. The finding is more than adequately supported by the record.

Phillips Petroleum Refinery and Loading Racks

Defendants' Exhibit No. 1 shows the location of the Phillips Petroleum Co. refinery and its loading racks for trucks on the northwest and southeast corners respectively of the intersection of 5th South Street with Onion Street.

Mr. K. J. Haslam testified (T. 168) that he is District Traffic Manager of Phillips Petroleum Co. and has been an employee of the company for over five years; that the rack for loading trucks hauling gasoline, diesel fuel and light fuel oils is north of and almost adjacent to the W. S. Hatch Co. place of business; that there are two loading racks, a new one being recently completed, (T. 172). These loading racks are located 440 feet from plaintiffs' house (Def's. Ex. No. 1). Mr. Haslam testified that Phillips has closed its refineries at Pocatello, Idaho and Spokane, Washington, and has compensated for these shutdowns by increasing the capacity of its catalytic cracking unit at Woods Cross to a possible 10,000 to 12,000 barrels of crude oil a day, (T. 174).

The significance of this output is that 90 to 95 per cent of the products moving by truck out of the entire Phillips Refinery is loaded at these racks, (T. 173). In

the summertime approximately 100 trucks in 24 hours are loaded out of the area, (T. 173). The loading racks operate around the clock during weekdays and special loads are often taken on Sundays, (T. 173).

Defendant's Exhibit No. 3 is a photograph of the Phillips loading racks. The intervening weed patch is property belonging to the plaintiffs, (T. 43).

Onion Street Traffic

The presence of the Phillips Refinery and particularly the loading racks makes the area a hub for the truck transportation of the refinery's products. From plaintiffs' house to the center of Onion Street is 72 feet, (T. 129, Defs'. Ex. No. 1). W. T. Cannon testified that he made a survey of all traffic, trucks, trains and automobiles passing in front of plaintiffs' house, and this survey has been compiled in bar graph form as defendants' Exhibit No. 7. The survey was taken for all 24 hours of the day and night, but different periods of time were covered on different days and even different months of the summer of 1953, (T. 131). It is representative of the large volume of traffic traversing Onion Street.

The traffic survey in front of plaintiffs' house shows that in an average 24 hour day, 904 automobiles and 124 double gear shift trucks passed the house. Each truck, its owner, the direction in which it was proceeding and the time of day (or night) are shown on Defendants' Exhibit No. 8. All of these trucks were required to either

stop for stopsigns or for the railroad crossing signals, and those trucks loaded and proceeding southerly would be accelerating in a low gear when they passed within 72 feet of plaintiffs' premises. Such acceleration is much noisier than the idling or normal running of a motor.

Union Pacific Railroad

The record shows that from plaintiffs' house to the first rail of the mainline Union Pacific tracks is 195 feet. It is 280 feet from plaintiffs' house to defendants' garage (Defs'. Ex. No. 1). The traffic survey indicated that during a 24 hour period there were a total of 42 trains going north and south in front of plaintiffs' house, (T. 134), one between midnight and 1:00 A.M., another before 2:00 A.M. and three between 2:00 A.M. and 3:00 A.M., etc., (T. 134). These trains create such a great rumble and roar that while a long freight train is passing plaintiffs' house it is impossible for two persons to carry on an ordinary conversation. It is the great noise of the trains and truck traffic that primarily prompted the trial court to state in paragraph 6 of its Memorandum Decision:

“And it is the opinion of the court further that to enjoin the defendants permanently in their business activity would be highly unequitable and would in fact destroy defendants' business, *and even if this was done, it would not diminish to any appreciable degree the noises, confusion and smells which emanate and exist in this immediate vicinity.*” (Emphasis added)

Mrs. Glen Hatch admitted that the trains could wake her up at all hours of the night and that the truck traffic was noisy and bothersome, (T. 42). In addition to the passenger and freight trains going by, there were two periods during the 24-hours of the survey when there was switching in and out of the Phillips Petroleum Company. All trains set in motion the crossing signal and bells, (T. 155). All of the trains whistled for the crossing, however, Mrs. Hatch stated that the diesels have changed their whistles, (T. 88). They now have more the sound of a horn.

Other Garages in the Area

Defendants' Exhibit No. 2 is a photograph of the Mitchell Garage, which is about 495 feet from plaintiffs' house. The exhibit illustrates the use of surrounding property for the parking and storing of trucks and trailers. It is undisputed that the Mitchell and Droubay Garages perform the same type of servicing and repair functions as performed by the defendant, W. S. Hatch Co. Plaintiffs claim they are not bothered so much by the noises coming from these garages but this does not detract from the fact that surrounding the Phillips loading dock, there is a cluster of garages designed to facilitate the road transportation of both light fuel oils and heavy black road oils. Regarding the many sources of noise, Judge Norseth stated:

“The court is not in a position to determine from the evidence in this case, or from the physical factors which are in evidence in the im-

mediate vicinity of the plaintiffs' home, (referring to his view of the premises) who is responsible for the noises and smells which emanate and exist. It is the opinion of the court that each of the businesses referred to in paragraph 3 (railroad, Phillips loading dock and refinery and Droubay and Mitchell garages) contributes to the noises and smells which exist." (R. 10)

Necessity of Operating Defendant Company's Business at Night

In its operation the defendant company owns approximately 45 pieces of equipment consisting of 20 diesel tractors and/or trucks and 25 trailers and/or semi-trailers, (T. 137-8, 9). In the summer season the company employs between 40 and 45 men and at other seasons the employees may get as low as 20 in number, (T. 179-180).

Plaintiffs primarily complained of the noises which were created by the repairing and servicing of W. S. Hatch Co.'s trucks. They did state that the lights from defendant company's garage at night were bothersome, but only passing mention was made of any odors. In substance this case involves an alleged nuisance by reason of noise. The defendants are aware that unnecessary loud noises, particularly during the nighttime, can be disturbing. In *Benjamin vs. Lietz*, 116 Utah 476, 211 P2d 449, the high whining sound of a powerful planing mill at 2032 South 10th East was enjoined during sleeping hours by the trial court and the decision was affirmed. The opinion states that the evidence showed the noises were of sufficient intensity to make normal conversations dif-

ficult in plaintiffs' homes. In *Thompson vs. Anderson*, 107 Utah 331, 153 P 2d 665, the Supreme Court affirmed an injunction which forbade the operation of a power saw, the noise of sound equipment and amplifiers, a large vacuum cleaner and loud talking and slamming of doors during the nighttime. The nuisance occurred at No. 28 South 4th East, Salt Lake City, in the heart of a residential area. (The address is taken from respondent's brief filed in the Supreme Court of Utah and found in Volume 556 of Abstracts and Briefs).

Therefore, defendants were very careful to explain to the trial court why it was absolutely necessary that defendant company's trucks be repaired and serviced during nighttime and the measures taken to keep all noises to a minimum at night.

Mr. Haslam, District Traffic Manager for Phillips, testified that the defendant company is a common carrier chiefly concerned with the transportation of "black oils" used for road paving; that approximately 50% of its business is hauling road oil used for road repairs and new construction; that the business is seasonal because such paving can only be accomplished in warm weather. Mr. Haslam stated that in the summertime, refineries such as Utah Oil Refining Co. and Phillips Petroleum Co. are hard-pressed to obtain sufficient transportation equipment to haul the black oils; that these companies contract for the sale of road oil f.o.b. destination and then place the order with common carriers such as W. S. Hatch Co.

for delivery, (T. 169). At the peak of the hot weather season, shippers and road building contractors and everyone involved in road construction have to contend with the shortage of equipment because it is physically impossible for any truck operator to keep on hand sufficient equipment for the reason that the idle factor is so great over the winter; that it is extremely important that all available equipment be used to the maximum during the road building season, (T. 169, 170).

Then Mr. Haslam was asked this question :

- “Q. Now, as a traffic man, what would you say about the necessity of dispatching of trucks during all hours of the night, where the haul is into an area like eastern Nevada or southern Utah or southern Idaho, and the delivery is to a road contractor?
- A. The trucks have to be dispatched on a 24-hour basis. Otherwise the service of the operator would be of no value, no practical value, beyond a very short radius. Source of the supply for instance. For instance assuming we have a road job around Twin Falls, or possibly Boise or some other place in Idaho, and there is a tremendous volume of asphalt moves to those areas out of Salt Lake-Woods Cross region, *the time of delivery on that job determines the time that the truck has to be dispatched from here*, making proper allowance for loading time, reasonable delays en route, weather conditions, and everything considered, so that it arrives there at the proper time, and that time isn't set by just the contractor's whim or just because

he happens to want it there at a particular time, those road jobs are supervised by State Road Engineers, or city, or whoever may be doing the work, and they tell us, when they place their order, just exactly when they want that truck to be there, and if it isn't there he has a crew of men sitting around, sometimes at a cost of possibly in excess of \$100.00 an hour while he is waiting for that truck to show up. In addition to his expense the State Engineer is on the job and whoever else may be involved." (T. 170, 171)

The fact that W. S. Hatch Company must dispatch some of its trucks at night is best illustrated by a typical haul made by it to Wilkins, Nevada, in the summer of 1953, (T. 140). It is 215 miles from Salt Lake City to Wilkins, Nevada, and requires approximately 7 hours driving time for the truck to cover the distance. At this location a 25-mile stretch of road was being constructed with a plant-mix asphalt surface 36 feet wide, (T. 140). Deliveries of road oil were made from 5:00 A.M. to 12:00 noon. In dispatching its trucks to Wilkins, Nevada, W. S. Hatch Company was required to schedule one hour for filling the truck at the loading rack of the refinery and 7 hours driving time to the point of delivery (T. 141). At this job as at all such jobs it was imperative that the delivery of road oil not delay the construction crew in the paving operation; that the oil be hot (between 180° and 380°) at delivery, (T. 142). For these reasons the oil is hauled in specially insulated tanks and cannot be stock-

piled at the construction site. Defendants' Exhibits No. 9 and No. 10 are dispatch sheets for October 20 and July 17, 1953, respectively. They typify such delivery.

The defendant company's operation requires the servicing and maintenance of its trucks on a 24-hour basis. Frank C. Hughes, a witness for the defendants and a mechanic for W. S. Hatch Co., testified that he had worked all shifts for the defendant company. Mr. Hughes said:

“Q. Now suppose you take the peak of the season, when road oil is being hauled heavily, in the middle of the summer, will you tell the court just what the shift lineup is and how many employees work, and when, in the shop?

A. Well, at our peak this year we had three men on dayshift, three men on afternoon or swing, whichever you want to call it, *and then we had one man on graveyard.*

Q. You only have one man on graveyard then, even in the peak season?

A. Yes.” (T.100)

* * *

A. Well, the major repair is done only in the daytime. Because on major repair you never know exactly what the job is until we get it completely tore down, and the position we're in out there, we've got so many different trucks, so many different models, we can't have a stockroom, you know, to cover everything, so when we get it torn down the day-

shift buys the parts, and the fellows that tear it down is on the dayshift and they usually put it back together.” (R. 101)

Method of Operation

There is no dispute in the record, nor is there any claim by plaintiffs that defendant company does anything more than make minor necessary repairs at night and that it employs only one man at the peak of the season to work graveyard shift (from midnight till 8:00 A.M.) This man takes care of necessary greasing, tire changes and minor repairs, (T. 101). In this connection Mr. Hughes said that it is the mechanic's duty to check over all trucks after they return from a trip and have them in good, safe running order and “on the line” for the driver when the latter reports for work, (T. 99). Trucks are often brought in from one haul at 10:00 or 11:00 P.M. and taken out on another trip at 3:00 or 4:00 A.M. When a truck driver returns from a trip he hits all tires with a bar to see whether there are any flats. He checks the oil, water, lights and tires, (T. 99). This is normally done while the truck is being fueled at the fuel pumps just north of the garage. The driver makes a note of, and reports any defective equipment to the mechanic. If the stalls in the garage are not filled with other equipment, the truck is then driven therein headed east. It has never been the custom to park trucks in the stalls with the headlights facing westerly toward plaintiffs' house, (T. 106). Once inside the garage the mechanic checks for broken springs and the amount of grease in the

transmission, (T. 100). Finally the truck is parked out in the yard (the leased premises from Phillips to the east of the garage) where it awaits the next trip.

Before a truck can be driven out on the road its motor must be run for about 20 minutes to build up air pressure for the air brakes. But it is not idled nor raced in the yard to warm up the motor, for the only way that a diesel motor can be warmed up is to take it out on the road and drive it at least four miles, (T. 102, 105).

Prior to 1952 it was sometimes very difficult to start the diesel engines in the wintertime because of cold temperatures. This difficulty at times necessitated one truck pushing or pulling another, (T. 123) and caused some noise. Since the winter of '52-53 an electrical device has been employed which is a hot water heater, plugged into an outdoor wall outlet and placed inside the radiator. It keeps the radiator water warm and makes the engines easy to start, (T. 101-102). It makes no noise whatsoever, contrary to plaintiffs' apparent misinformation, (T. 28, 122).

With regard to floodlights, Mr. Hughes testified that the company has no yard floodlights and that all night work was done inside the garage "because men doing mechanical work cannot work with a light in one hand and a wrench in the other." (T. 106). He also stated that there has never been any steam cleaning of trucks after dark at night, (T. 107).

Plaintiffs' counsel, on cross examination of Mr. Hughes, elicited the fact that the grease gun is an air-power driven machine that makes a chugging noise.

“Just a quick air release is all it is. Just a chug. One flip from one valve to another back and forth.” (T. 114)

Minor spot welding on tanks is performed at the garage, but all dents that have to be pounded out of the tanks are sent to Fruehauf Co., W. S. Hatch Co. does not have facilities for straightening dents, (T. 122).

Specific Noises Complained of and Their Remedy

With reference to plaintiffs' specific complaints we have:

(1) A claim of pounding a wheel wedge with a sledge hammer in order to get the huge truck tires off the wheel. This difficult task of removing a tire from its wheel used to be performed manually with a sledge hammer, but to lessen noise and reduce the labor involved, defendant company purchased a pneumatic tire changer which pushes the tire off the wheel noiselessly, (T. 110).

(2) Noise from a pneumatic grease gun. This is the ordinary service station grease gun which emits a chugging noise as the operator releases the air pressure. Mr. W. S. Hatch sleeps in his residence immediately west of the garage and he stated that at times he could hear some pounding, but was never able to hear the grease gun, (T. 188).

(3) A hissing sound when trucks are steam cleaned. Trucks are steam cleaned only in the daytime, (T. 106).

(4) The sound of truck motors which are idled or raced. It is undisputed that a diesel motor cannot be warmed up by racing it. The idling of a diesel motor to build up air pressure certainly cannot be considered legally objectionable in view of the noise of the 42 trains and the great many more truck engines which accelerate in low gear while passing 72 feet from plaintiffs' house on Onion Street.

(5) General noises from within the shop. Both Willard S. Hatch and the mechanic, Frank C. Hughes, testified that all employees are given strict orders to keep the garage doors down, especially at night, in order to minimize any possible sounds, (T. 107, 184). Plaintiffs contended that the doors were indiscriminately left open, but the truth of this matter is revealed by Mr. Hughes' testimony on cross examination:

“Q. I think you said that you have had instructions to keep the doors down. Then how do you comply with this so-called safety requirement of opening them up, and how often are they opened and closed?

A. Well, I don't know anything about a safety requirement for opening and closing doors. I just know when it gets too smoky in there for a man to stay in there.

Q. Because you're running motors?

A. Can be welding. Cutting metal that has oil on it.

Q. I presume it's cooler with the doors open in the summertime, isn't it?

A. We never got to experience that much this summer on the night shift, because those doors was closed just about all summer." (T. 115)

(6) Old tires, lumber and junk piled up along plaintiffs' boundary line. These items were all cleaned up prior to trial, (T. 183). In an area where all sorts of trucks, trailers and various other equipment are stored (See Ex. No. 3) the presence of such objects do not constitute an actionable nuisance. This complaint is an indication of the aesthetical demands which plaintiffs have made upon defendants in an area dominated by the railroad and the refinery, et al. Plaintiffs even go so far as to request this court to insure the permanence of such neatness by issuing a (mandatory) injunction (page 23 of Appellants' Brief). It has always been defendants' chagrin that their efforts to comply with plaintiffs' requests and demands be interpreted not as an indication of willingness to cooperate but merely as an item of some guilt on their part and triumph by plaintiffs. Of course, no authority has been cited by plaintiffs to the effect that an injunction will issue to insure a condition that has already been voluntarily complied with.

(7) Lights shining upon plaintiffs' residence. The garage building itself deflects all ceiling lights onto the ground before they reach plaintiffs' residence. Frank Hughes testified that lights inside of the shop can only

be seen if a person is standing in line with the door, (T. 116). The annoyance of the one or two wall lights which shine upon plaintiffs' house could be eliminated by dark green shades or venetian blinds. Plaintiffs' contention, at page 22 of their brief, that a total wattage of 2850 to 3800 watts shines upon their home all night is absurd. The witness, E. B. Rawlins, who lives in the next house south of plaintiffs', stated that waste gas burning atop the Phillips Refinery waste gas stack didn't bother him in his house because he kept his shades drawn, but at times he had been in his front yard at night when you could almost read a newspaper by this burning of waste gases at the refinery, (T. 162). The trial court stated "that there was no evidence establishing that the defendants had operated large floodlights on the west of their (garage) building in the nighttime," (memorandum decision paragraph 4, R. 10) and found in its findings of fact No. 5 "that the truck headlights and fixed lights of the defendants are not so maintained or used as to unreasonably interfere with the use by plaintiffs of their residence," (R. 14-15).

(8) Smells. Defendants submit that the record is so barren of any complaint about odors that the voluminous citation of authorities in appellants' brief concerning this subject is completely lacking in factual basis. The exhaust from Onion Street traffic and the burning of waste gas at the Phillips refinery must be the source of this fancied annoyance.

ARGUMENT AND AUTHORITIES

POINT I.

THE TRIAL COURT CORRECTLY DECIDED AS A MATTER OF FACT THAT NO ACTIONABLE NUISANCE EXISTS.

Plaintiffs have devoted the latter half of their brief to a citation of authorities which hold *that where a nuisance in fact is found to exist*, it is no defense:

- (a) That the business is conducted in a lawful, modern and efficient manner.
 - (b) That the noises are necessarily incident to the business.
 - (c) That the parties are situated in an industrial area.
 - (d) That the plaintiffs moved to the nuisance.
- (Appellants' Brief, pages 41, 42)

Defendants have never claimed that, as a matter of law, they were justified in continuing to maintain and create an actionable nuisance because of the legal application of any of the above factors. No argument of this kind was ever made to the trial court and such is not the contention of respondents on appeal. These matters are pleaded in defendants' Answer for the reason that their presence or absence does have a decided influence in determining whether or not a nuisance in fact may be found to exist.

The fundamental issue in this case, as stated by the trial court, is whether or not the operation of defendants' business constitutes a nuisance. In reply to this question defendants submitted the following authorities to the Trial Judge and repeat them for the benefit of this court. They announce the universally accepted rule of law that the creation of a reasonable amount of noise does not constitute an actionable nuisance.

“There can be no fixed standard as to what noise constitutes a nuisance, and the circumstances of the case must necessarily *influence* the decision. *To amount to a nuisance, the noise must be unreasonable in degree, and reasonableness in this respect is a question of fact. 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 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.” (emphasis added) Vol. 39 American Jurisprudence, Nuisances, Section 47, page 331.

“Generally, noise is not *ex necessitate* a nuisance even when disagreeable. It has been stated that no one is entitled to absolute quiet in the enjoyment of his property, but is limited to a degree of quietness consistent with the standard

of comfort prevailing in the locality in which he dwells. Thus it has been held that as many useful acts are necessarily attended with more or less noise, reasonable noises in an appropriate locality are not necessarily nuisances even though they are disagreeable and annoying." 66 C.J.S., Nuisances, Sec. 22, Noise P. 772.

The Supreme Court of Utah in applying the above stated rule of law reversed a judgment for damages allegedly caused by the bad smell, gas and smoke emitted from defendants' refining operation in *Dahl v. Utah Oil Refining Co.*, 71 Utah 1, 262 Pac. 269. The Court declared the law in Utah to be, that:

"The right to recover damages for injuries occasioned by fumes, gases, dust, smoke, foul air, etc., being cast upon one's property by another, in proper cases, is well established. But the rule of liability is not absolute and the law does not afford redress for every such discomfort or annoyance. Extreme rights in this regard cannot be enforced. *Of necessity some degree of inconvenience and annoyance must be endured or community and social life would be impossible.* It thus follows that what constitutes in law an actionable nuisance is always a question of degree . . ." (emphasis added.)

"While a nuisance, in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive—in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his property. Every person has the right to the reasonable enjoyment of his property. As to what

is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another. I Wood on Nuisances (3d Ed.) Sec. 1, 2."

This Court is aware that the volume and type of noises that may be considered unreasonable has undergone a steady change which evolution has coincided with the increased development of industry throughout the country. Thus in *Hannum v. Gruber*, 346 Pa. 417, 31 Atl. 2d 99, it was said:

"No word is used more frequently in discussing these cases than the word "reasonable" and no word is less susceptible of exact definition . . . Noises which in the preindustrial era would have been considered intolerably unreasonable are now tolerated as reasonable. The noise and smoke of railroad trains frequently passing human habitations is not now considered unreasonable although an equal amount of noise and smoke would doubtless at an earlier time have been considered unreasonable. That a certain amount of smoke fumes, gases and noises will necessarily be produced and emitted by manufacturing plants is inevitable, but that persons who dwell near manufacturing plants like persons who dwell near railroads or on busy city streets must put up with a certain amount of resulting annoyance and discomfort is self-evident. The prosperity of an industrial community depends on its industrial activities, and it would be inconsistent with sound public policy to prohibit these activities at the be-

hest of a comparatively few who are annoyed thereby . . . A certain amount of noise also is inseparable from industrial activity. The burdens of prosperity must be taken with its benefits.”

Throughout the presentation of this case defendants have contended that what they are doing is REASONABLE under the above authorities; that the operation is made more reasonable by reason of the fact that it is lawful in the first place (not an outlawed business under the zoning ordinances); that it is conducted in a modern and efficient manner and hence unreasonable noises have been eliminated. The location in the industrial area does affect the amount of noise that can reasonably be expected to exist. Plaintiffs’ expensive remodeling was pleaded because it indicates the fastidiousness of their demands. They themselves are obliged to be reasonable under all the circumstances.

In the Restatement of the Law on Torts, Sections 826 to 828 inclusive, the authors of the treatise on nuisances have stated that a determination of whether or not an actionable nuisance exists, that is whether the acts complained of are reasonable or unreasonable, depends upon an evaluation of many factors. The authors conclude that the reasonableness or unreasonableness of a claimed nuisance depends upon weighing “the gravity of the harm” to the plaintiff against “the utility of the actor’s (defendants’) conduct.” In comment “b” and “c” to Section 826, it is stated:

“b. *The point of view.* The unreasonableness of an intentional invasion is determined from an objective point of view. The question is not whether a reasonable person in the plaintiff’s or defendant’s position would regard the invasion as unreasonable, but whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable. Regard must be had not only for the interests of the person harmed but also for the interests of the actor and for the interests of the community as a whole. Determining unreasonableness is essentially a weighing process, involving a comparative evaluation of conflicting interests in various situations according to objective legal standards.

“c. *‘Gravity’ of harm and ‘utility’ of conduct.* The terms ‘gravity’ and ‘utility’ are used in the Restatement of this Subject to express the legal evaluation of harm and conduct. The gravity of harm is its seriousness from the objective, legal standpoint, while the utility of conduct is its meritoriousness from the same standpoint. The gravity or seriousness of harm from a legal standpoint is not necessarily the same as its seriousness from the standpoint of the person harmed. A person might, for example, regard personal discomfort or annoyance as a more serious harm to himself than the destruction of some tangible object on his land, whereas the *legal seriousness or gravity of harm through destruction of physical things is generally greater than the gravity of harm through mere annoyance or discomfort.*” (emphasis added.)

The Restatement then sets forth the following factors which are to be considered in weighing the “gravity of the harm” against “the utility of conduct.”

“Sec. 827. GRAVITY OF HARM — FACTORS INVOLVED.

In determining the gravity of the harm from an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are to be considered:

- (a) the extent of the harm involved;
- (b) the character of the harm involved;
- (c) the social value which the law attaches to the type of use or enjoyment invaded;
- (d) the suitability of the particular use or enjoyment invaded to the character of the locality;
- (e) the burden on the person harmed of avoiding the harm.”

“Sec. 828. UTILITY OF CONDUCT — FACTORS INVOLVED.

In determining the utility of conduct which causes an intentional invasion of another’s interest in the use and enjoyment of land, the following factors are important:

- (a) social value which the law attaches to the primary purpose of the conduct;
- (b) suitability of the conduct to the character of the locality;
- (c) impracticability of preventing or avoiding the invasion.”

Gravity of Harm to Plaintiff

The Restatement rule as set forth above is appropriate and applicable to the instant case. It would be proper for this Court, in order to arrive at an equitable decision, to weigh these factors as the trial court did, giving due consideration to the fact that the Trial Judge observed the witnesses' demeanor, viewed the premises and witnessed the demonstration of the defendants' equipment at their garage. The Restatement formula allows the court to weigh the gravity of the harm or the seriousness of the noises and lights of which the plaintiffs complain against the utility of defendants' trucking business being conducted in the manner, place and for the purposes enumerated.

It should be noted that plaintiff has not cited any Utah cases nor any authority from other jurisdictions which hold that noise and lights amount to an actionable nuisance in an industrial area such as the neighborhood involved herein. The Utah case of *Thompson v. Anderson*, 107 Utah 331, 153 P. 2d 665, occurred near South Temple at No. 28 South, 4th East Street, Salt Lake City, Utah, and involved the defendants' use of a sound truck with loud speakers, which noise in plaintiff's opinion was nine times louder than a radio. This use of the sound truck and hammering and slamming noises incident to the furniture repair business and use of a large vacuum cleaner which gave off a shrill, long, dreary whistle was enjoined by the Trial Court during the nighttime.

The important features of that case are that it was not shown that it was necessary for the noises to occur during the nighttime and the case involved a residential section of Salt Lake City, which was very quiet except for the noise created by defendants. Also in *Benjamin v. Lietz*, 116 Utah 476, 211 P. 2d 449, the Supreme Court correctly affirmed an injunctive order which prohibited the defendant from operating a planing mill situated at 2032 South 10th East Street, Salt Lake City, after the hour of 6:00 p.m. on week days and all day on Sundays. The residential area involved, the absence of other sources of noise and the non-necessity of operating during the nighttime make it clearly apparent why these cases cannot be considered as a binding precedent in the instant dispute. Each case must be determined upon its own facts.

The extent of the harm involved in this case is limited to a distance of less than 300 feet. The only persons complaining in this generally noisy neighborhood bordering the railroad tracks are the brother and sister-in-law of the defendant, Willard S. Hatch. Mr. Rawlings, who lives in the first house south of the plaintiffs, says that the biggest noise disturbance comes from trains and trucks that pass along Onion Street in front of his house, (T. 164); that the burning waste gas as the Phillips Refinery is so bright at times that he can read a newspaper in his front yard at night, (T. 162). The trial court, at the time of its visit to the premises, heard the noises made by the pounding of a hammer on a truck and by a diesel tractor being driven about the yard. It concluded

that the noises created by defendants' operations were insignificant in comparison with the noises caused by the heavy truck travel along Onion Street, which is four times as close to plaintiffs' house, and especially the 42 trains which pass daily within 195 feet from plaintiffs' house.

The harm caused to plaintiffs can only be considered grave if the elimination of the noise would leave plaintiffs with a measurable amount of relief. The Trial Court concluded that:

“... even if this was done (enjoin the defendants' business activities) it would not diminish to any appreciable degree the noises, confusion and smells which emanate and exist in this immediate vicinity.” (R. 10)

As for the old tires, batteries, lumber and concrete blocks which were piled along the east boundary line of plaintiffs' property (290 feet from plaintiffs' house—cleaned up in the summer of 1953) and which were alleged to constitute an eyesore and a nuisance, the rule is that:

“The fact that a thing is unsightly, or that it offends the aesthetic sense, is not in itself sufficient to make it a nuisance. It has been held, however, that while unsightly things are not to be banned solely on that account, they should be properly placed and not so located as to be unduly offensive to the neighbors or the public, and that the fact that a thing is unsightly and offensive to the view of average persons may alone make

it a nuisance warranting equitable interference, where it is located in a *residential* district.” (emphasis added) Vol. 39, Am. Jur., Nuisances, Sec. 29, Unsightliness.

Instead of adjusting to the industrial progress of the Woods Cross community, the plaintiffs in effect seek to have the court turn the community back to a rural state. Plaintiff Glen A. Hatch testified that in 1951 he remodelled his house, and that the cost of this improvement was \$22,000.00 or \$23,000.00, (T. 4). The extensive remodeling of plaintiffs’ house in the face of the development of the area is a most unusual and difficult thing to understand. Particularly is this true when at the same time plaintiffs seek to impose their claimed financial loss upon the defendants. Of course plaintiffs had the right to remodel their home. No one denies that fact. In doing so they were fully aware of the industrial character of Woods Cross, that the area would become further industrialized. Notwithstanding this knowledge they elected to reconstruct their home at large expense. They must have concluded that continuing to live at their location on Onion Street overshadowed in value to them the disadvantages from living in the industrial area. Plaintiffs cannot build a beautiful home in an industrial area and then say that they are not to be disturbed. Plaintiffs have the duty of making reasonable efforts to adjust to the conditions under which they live:

“The harm involved in an intentional invasion of another’s interest in the use and enjoyment of land can sometimes be partially or wholly avoided

by the other. In most cases, however, the avoidance of one harm involves another in the form of experience and inconvenience, for the burden involved in avoiding is often as great as that sought to be avoided. Nevertheless, there are some situations in which one can avoid most of the harm from an interference with his use or enjoyment of land with very little trouble or expense. For example, one may be able *by closing the windows in his building to shut out much of the noise or smoke from his neighbor's activities*. In such cases the gravity of the harm is less than it would be if the harm were unavoidable or could only be avoided with difficulty. . . This factor of the burden to the person harmed of avoiding the harm is not often decisive as to gravity. It merely embodies the common sense idea that persons living in society must make a reasonable effort to adjust their uses of land to those of their fellowmen before complaining that they are being unreasonably interfered with in what they are doing." Comment on Clause (e) of Restatement Rule 827. (emphasis added)

Utility of Defendants' Conduct

As for the utility of defendants' conduct, the suitability of the road oil transportation business to the locality here involved is obvious. There is no place in Davis County better suited to the location of the W. S. Hatch Company's place of business. The social value which the law attaches to the purpose of defendants' business is important. In our present era of building new roads, the transportation of road oil from the refinery to the construction site is a necessary and valuable

social contribution. Factor “c” of the Restatement rule 828 takes into consideration the impracticability of preventing or avoiding the noises and lights of which plaintiffs complain. It is undisputed: that it is impossible to limit the operation of defendants’ business to the daytime only; that the necessity of delivering hot road oil at a construction site many miles distant from Salt Lake City requires the operation of defendants’ garage throughout the nighttime. The changing of tires, greasing of trucks and making minor repairs during the graveyard shift are so necessary to the business that to enjoin the noises incident to these operations would in effect enjoin the operation itself.

The occasional times at which lights shine on plaintiffs’ house cannot be considered more objectionable than the lights which shine on plaintiffs’ house coming from trucks driving up and down Onion Street. The traffic survey shows the many trucks which drive past plaintiffs’ house during the nighttime. Frank Hughes testified that on a normal night 5 or 6 trucks go through the shop. In contrast, in a continuous 24 hour period, 124 double gear shift trucks, 904 automobiles and 42 trains passed within 72 feet to 195 feet of plaintiffs’ house, (T. 134, and Defs’. Exhibit 7).

It is the general rule that a service station or a public garage located in a residential area is not considered a nuisance unless operated in an arbitrary and unreasonable manner. 35 ALR 95; 50 ALR 107. Certain-

ly the noise from the pneumatic grease gun and pneumatic tire remover at the W. S. Hatch Co.'s garage cannot be considered unreasonable when compared with the noise of trains and trucks passing plaintiffs' house. Considered from the objective point of view the utility of the activity which produce these noises is far more important and far overshadows plaintiffs' complaints and their desire to be free from such noise.

In Volume 39 American Jurisprudence, Section 47 on Nuisances, it is stated that:

“NO ONE IS ENTITLED TO ABSOLUTE QUIET.”

Reasonableness of the noise caused by the defendant company's operations must be measured by the amount of noise otherwise present to disturb plaintiffs.

“We have no doubt the appellants have been and are annoyed by the noise and vibration of defendants' machinery. But the business of the latter is a lawful one, and the noises referred to appear to be an inseparable and necessary incident thereof. It is not alleged that they are either negligent or malicious in their manner of conducting their business. It is an important feature in the case that their works are located in a neighborhood exclusively devoted to manufacturing purposes. In such a location there must necessarily be much noise and jarring caused by the operation of the machinery, with perhaps smoke and unsavory smells, the result of the various industries. Admittedly the business of the appellant has not suffered by reason of the acts

complained of, and so far as the annoyances are concerned, they are to be expected in such a neighborhood and must be endured with the best grace possible unless valuable industries are to be sacrificed for the sake of quiet." *Straus v. Barnett*, 140 Pa. 111, 21 Atl. 253

Plaintiffs have quoted from a number of cases without stating the facts of the case upon which basis the court's language was meant to apply. They attempt to reverse the trial court's determination that no nuisance exists, upon the authority of such Utah cases as *Brough v. Ute Stampede Ass'n.* 105 Utah 446, 142 P2d 670; *Ludlow v. Colorado Animal By-Products Co.*, 104 Utah 221, 137 P2d 347, and the two Salt Lake City noise cases above referred to (*Benjamin v. Lietz*, planing mill; *Thompson v. Anderson*, radio equipment and loudspeaker).

The noises created by W. S. Hatch Co.'s business cannot be compared to the widespread fetid stench of the animal carcass rendering plant owned by Colorado Animal By-Products Co. Nor is there any similarity in the decision enjoining the Ute Stampede Ass'n. from using the street in front of plaintiffs' premises for its carnival and thereby creating a situation where noisy crowds of people blocked plaintiff's driveway, used vulgar language and entered the premises for private purposes, leaving empty liquor bottles and contraceptives thereon. Each case must be determined upon the basis of WHAT IS REASONABLE considering all the circumstances involved in each particular situation.

Plaintiffs cite and rely extensively on the case of *Quinn v. American Spiral Spring & Mfg. Co.* 293 Pa 152, 141 Atl. 855, 61 ALR 918, primarily for the proposition that defendants “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.” (page 14 of appellants’ brief). They state at page 23 of their brief that an order should be issued requiring defendants to move or change the location of their garage, referring again to the Quinn case.

The Quinn case is markedly distinguishable as a *matter of law!* There the trial court did find as a matter of fact that an actionable nuisance existed but dismissed plaintiff’s bill for an injunction and limited him to a recovery at law for whatever damages he had suffered:

“(2) because more harm would be done by granting than by refusing an injunction;”

The evidence in the Quinn case showed that plaintiff was totally blind and lived alone in his residence; that defendant’s president told him they were going to build a plant next door which would make a noise and cause some annoyance to him; that defendant offered to buy his property but would not allow anything for the building on it and consequently plaintiff refused to sell; that defendants built their plant and located the largest and heaviest pieces of machinery *unnecessarily* close to plaintiff’s dwelling; that the vibration imparted to plaintiff’s house by the operation of the heavy machi-

nery “was so great that pictures and other articles were shaken from tables, walls and mantelpieces, plaster fell from the walls and ceilings, and on one occasion a brick fell from the chimney.” The trial court found that “the vibrations and noises are unpleasant and at times cause a nervous shock to those living within the house and they seriously interfere with the comfort and enjoyment of plaintiff’s residence as a dwelling house.” But the trial court denied plaintiff equitable relief for the reason that it would be more expensive (\$12,000) for defendant to relocate the machinery than to purchase plaintiff’s property and house. This, said the appellate court, is an insufficient reason, for where a nuisance in fact is found to exist it cannot “make the slightest difference that the plaintiff’s property is of insignificant value to him as compared with the advantages that would accrue to the defendants from its occupation.” Defendants have no quarrel with the principle announced in this case, but the facts are totally different. There a nuisance was found to exist by the lower court.

This court should adhere to the reasoning of its own decisions as enunciated in *Dahl v. Utah Oil Refining Co.* 71 Utah 1, 262 Pac 269, wherein it was stated:

“Of necessity some degree of inconvenience and annoyance must be endured or community and social life would be impossible. It thus follows that what constitutes in law an actionable nuisance is always a question of degree. . . .

“ . . . The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.”

Thus, in *Coon v. Utah Construction Co.* 228 P2d 997, the conclusion of the trial court was affirmed that no actionable nuisance existed although findings of fact were entered that the plaintiffs were annoyed by the operation of the defendant's Euclid trucks upon the highway adjacent to plaintiff's house.

Plaintiffs claim that their action is brought under the authority of 78-38-1 U.C.A. 1953, but as pointed out in the Siberian Elm case (*Cannon v. Neuberger* 268 P2d 425) this statute has never been interpreted by this court

“to mean ‘anything *at all* which (is) *any person considers to be offensive* to the senses,’ etc. Rather it has held that the term ‘nuisance’ is applied to ‘the *unreasonable, unwarrantable or unlawful use* by a person of his property . . .” (page 425)

Defendant Company demonstrated and the trial court heard the noises produced by the operation of the pneumatic grease gun and tire changer, the pounding on the trucks and a diesel tractor being driven about the yard. This first hand opportunity to judge the intensity and volume of the sounds produced convinced the trial court that such sounds were not unreasonable, nor ex-

cessively loud, nor unnecessarily created. As stated in *Kinsman et al v. Utah Gas & Coke Co.* 53 Utah 10, 177 Pac. 418:

“ . . . greater consideration should be given to the court's finding by reason of the court's opportunity in visiting the plant and vicinity and seeing from personal investigation and observation the conditions that exist there, and determining whether or not such offensive odors, fumes, etc., do emanate from and are allowed to escape from, defendants' plant, and whether the same permeate the air about and enter the homes of the plaintiffs to such an extent as to render said premises uncomfortable and unfit for residential purposes.”

The defendant company and its president, Willard S. Hatch, have made every reasonable effort to keep the sounds at a minimum that might disturb plaintiffs. All major repairs are made during the daytime. A single mechanic is employed on the graveyard shift, and his duties are limited to inspections and necessary tire changes. Pounding rarely occurs at night and then only when it is necessary to fix a broken spring or make some minor repair. Willard S. Hatch has directed the mechanics to keep the garage doors down, although at times fumes from welding become so severe it is necessary to open the doors for ventilation. The purchase of the electric hot starts which are placed in the truck radiators have lessened the noise in starting the diesel motors. The company employees have all been instructed to refrain from steam cleaning trucks or trailers after dark.

The purchase of the pneumatic tire changer has eliminated what was at that time the most objectionable source of noises from pounding the wheel wedge with a sledge hammer. Defendant cleaned up the tires piled next to plaintiffs' boundary line but in spite of all their efforts, plaintiffs continued to make more and greater demands. Frank Hughes testified that one night between midnight and 1:00 A.M. he was alone at the garage when Mr. Glen Hatch called him on the telephone.

“A. The telephone rang and I answered, and he asked me what was going on over there, and I said nothing. I was in the shop. Wasn't a soul moving nowhere. I hadn't heard any noise.

Q. What did he say?

A. He said we was making so much noise over there we was disturbing his sleep over there, and his wife was about ready to go mad.

Q. Was there any noise at all being made in the shop?

A. Not in the shop, because I was the only employee there.

Q. Or on the premises, to your knowledge?

A. To my knowledge there was no one else on the premises.

Q. Do you know whether any noise was coming from any other source that might have been irritating?

A. If they had I never noticed it.” (T. 109)

Plaintiffs are Hypersensitive to Defendants' Activities

It was obvious to the trial court that Edith E. Hatch was vindictive in the manner that she testified. She stated that the hum from the refinery did not bother her, (T. 81) and that she got used to the noise from the trains, (T. 84) and trucks. She attributed all her ills and nervousness to the activities of the defendants and upon cross-examination indicated her animosity toward Mr. W. S. Hatch.

“Q. Now when you’ve complained to Mr. W. S. Hatch about matters, he’s tried to alleviate the situation, hasn’t he?

A. He certainly has not. If he has he didn’t do much.

Q. He’s tried to be a good neighbor, has he not? You don’t think that he delights in keeping you awake at night, do you?

A. Why should I?” (T. 87)

Her stubborn attitude and demanding nature were evidenced by her testimony concerning the “weed patch” which plaintiffs own on the north side of defendants’ property. See Defendants’ Exhibit No. 3.

“Q. Have you seen the fire hazardous condition in your own property, there to the north?

A. Do you know why that’s there?

Q. Have you seen that?

A. You call that very fire hazardous?

THE COURT: Mrs. Hatch, answer his question.

Q. Have you seen that condition?

A. I've passed by it.

Q. Now I'd like to have you tell me why it's there, if you want to.

A. You better let somebody else tell you then maybe.

MR. MOYLE: You may answer.

A. Shall I tell him?

MR. MOYLE: Yes.

A. All right. We tried to get Phillips to clean up this corner here. It was dangerous. If it had caught on fire why it would have cleaned out the orchard, and we asked Phillips would they clean that. They didn't do anything about it. They came this year and asked and we said clean half, clean up that corner over there and we will clean up ours. This is the first summer that there has ever been left. Other summers it hasn't been there.

Q. In other words Phillips wanted to clean that fire hazard though, in the north, and you have placed a condition on it that something else be done before you permit that; is that right?

A. They didn't clean theirs. What was the difference in ours and theirs? As far as fire hazard?

Q. Did Phillips tell you that was hazardous?

A. They didn't say so, no.

Q. They wanted it cleaned up?

A. They didn't say it was hazardous.

MR. WILKINS: That's all.

MR. MOYLE: That's all." (T. 88, 89)

Plaintiffs in their brief (page 13) state that:

"If there is any animosity and hard feelings, 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).

What is construed by plaintiffs as an implied threat is the statement of W. S. Hatch:

"Q. Do you recall a telephone conversation that you had with your brother Glen last summer, when you stated in substance or effect that if Glen was not satisfied with the way you are running the business that you'd re-open the driveway between the homes and run your trucks through there again?

A. He said that I had never cooperated with him, never done anything to lessen the noise, and I says, "Well, what about leaving the driveway? Do you want us to go back up the driveway again?" (between the parties' houses). That was an answer to his stating we didn't cooperate. He don't give us any credit for moving out of that lane, and getting as far out as we can.

Q. It wasn't intended then as a threat to re-open it?

A. No." (T. 192)

Incidentally W. S. Hatch owns one-half of the driveway.

As this court well knows, it takes two people to make a scrap. Defendant W. S. Hatch does not deny that he is presently upset and peeved about being sued by his brother. After a history of repeated demands for greater quiet and futile attempts to satisfy plaintiffs' whims, it is apparent that plaintiffs hope to drive defendants' business completely out of the area; see particularly the Transcript of Testimony at pages 188, 189. The filing of the complaint by one brother against another seeking an injunction and \$20,000 damages is evidence of animosity, and when the trial court listened to the noises that were the subject of the suit, it concluded that the plaintiffs must be hypersensitive to single out for complaint such a minor contribution to the sum total. The trial court's finding that the plaintiffs are supersensitive to the defendants' activities and that this supersensitiveness is occasioned by the animosity between the plaintiffs and the defendant Willard S. Hatch is amply sustained by the record.

In *Tortorella v. H. Traiser & Co.*, 284 Mass. 497, 188 N. E. 254, 90 ALR 1203, the Supreme Court of Massachusetts affirmed a judgment dismissing a complaint to enjoin the operation of machinery alleged to constitute a nuisance.

“A noise may constitute an actionable nuisance (citing cases) but it must be a noise which affects injuriously the health or comfort of ordinary people in the vicinity to an unreasonable extent. Injury to a particular person in a peculiar

position or of specially sensitive characteristics will not render the noise an actionable nuisance.” (emphasis added)

This rule relating to the materiality in a nuisance case of special sensitive characteristics on the part of the plaintiffs is expressed in Section 31 of Volume 39, American Jurisprudence on Nuisances :

“Effect on Persons of Ordinary Habits and Sensibilities. —The criterion for determining whether a particular annoyance or inconvenience is sufficient to constitute a nuisance is its effect upon an ordinarily reasonable man, — that is, a normal person of ordinary habits and sensibilities, — and not its effect upon supersensitive persons, those of too fastidious tastes, those in ill health, afflicted with disease or abnormal physical conditions, or, on the other hand, those who are hardened or inured to annoyances or disturbances of the kind in question. . . .”

The manner in which plaintiffs belittled the obviously noisier truck traffic on Onion Street and the rumbling din of the passing trains supports the opinion of the trial court “that the plaintiffs are hypersensitive to defendants’ activities. . . .”

POINT II

NO PROPER FOUNDATION WAS LAID BEFORE THE WITNESS, GLEN A. HATCH, WAS ASKED TO STATE HIS CONCLUSION AS TO DEPRECIATION IN HIS RESIDENCE PROPERTY VALUE.

THE COURT PROPERLY STRUCK THE TESTIMONY OF CHARLES A. LARSON BECAUSE OF HIS TOTAL LACK OF KNOWLEDGE CONCERNING DEFENDANTS' OPERATIONS.

Plaintiffs cite in their brief the Utah case of *Ludlow vs. Colorado Animal By-Products Co.*, 104 Utah 221, 137 P2d 347, which expresses the correct rule of damages to be applied where there are multiple sources of smells or noise, etc.; to-wit, "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."

The question asked Glen A. Hatch and the objection made were as follows:

"Q. And what amount in your opinion would your residence property be depreciated in the event that this nuisance should continue unabated?

MR. WILKINS: Now I object to that question, no foundation having been laid for any answer from the witness.

THE COURT: I'll sustain the objection.

MR. MOYLE: I think Your Honor should take into consideration the fact that he is also an owner of the property.

THE COURT: Well, I think the objection is well taken to the question at this time. You may qualify if you can do so. You may qualify or do as you like, if you want to do so.

MR. MOYLE: I won't attempt to go further.

THE COURT: You can connect it up further on if you'd like.

MR. MOYLE: I may be able to do that."

The objection was made because plaintiff's counsel did not lay a proper foundation for the witness to answer the question. The witness was simply asked to state his conclusion as to how much the property would depreciate if the claimed nuisance should continue unabated. This is a far different question than one which would be based upon market value without the nuisance as compared with market value under the nuisance. The court attempted to guide counsel in reframing the question, stating that the witness would be allowed to answer with the proper basis shown, but the matter was dropped.

With reference to the witness, Charles A. Larson, there would have been two grave errors committed by the court had the court permitted the witness' testimony to stand. These errors are: (1) The witness was so confused about the operations and noises involved and the properties being referred to that there could have been no reliance upon any values or amount of damages that he might have fixed. For example; (a) He thought the Mitchell and Droubay Garages and parking lots belonged to defendants, (T. 52). (b) He was not familiar with the new Phillips loading rack located to the north of the defendants' property, (T. 52). (c) He assumed that oils are loaded upon the defendants' property, (T. 57) and based some of his determinations upon that assumption,

when as a matter of fact no oils are there loaded, (T. 59). (d) He was unable to give any breakdown as to the contributing factors in depreciating the property such as the railroad, the Phillips Refinery, and the other industries in the area. It was evident that this so called expert had made only a cursory examination of the area involved and was not sufficiently familiar with it to testify as to what activities defendant controlled and what its contribution to the sum total of noises amounted to.

(2) Aside from all this, however, the witness was not testifying as to market values but was testifying as to “replacement costs.”

“Q. Now when you fix the replacement value that value didn’t take into consideration the fact that on July 9, 1953, that W. S. Hatch was already operating there, did it?

A. No. That was replacement value.

Q. So you don’t mean to say that that was the value of the property as of that date?

A. I said that was a replacement value.

Q. That’s nothing but a contractor’s constructing figure, isn’t it?

A. That’s right.” (T. 65)

This witness was unable to give any figure that would make proper allowance for the variation in market values due to the numerous industrial influences in the

neighborhood. As a matter of fact defendants attempted to have this witness give a breakdown on the contributing factors influencing value and he finally confessed that he could not do so.

“Q. Well then, you can’t give me any overall breakdown. Is that what it comes down to?

A. Just an estimate. What I thought the house could sell for with all of those in there in a lump sum.

Q. Well, can you break them down or can’t you?

A. I cannot break them down right now.” (T. 69)

As a matter of fact this witness testified that land values would increase with industrialization.

“Q. Are you familiar with the new highway that is projected at the back that’s going across there?

A. I don’t know the location of it. Just general.

Q. Well, let’s assume that its about 1200 feet from the garage of W. S. Hatch up to the center line of the new highway. Would that have an influence if that freeway comes through, would that have an influence on values?

A. I think that’s going to help all that lower country become more industry.

Q. The future of this area is industry isn’t it, Mr. Larson?

A. I think so.

Q. It’s not residential?

A. I think not.

Q. It became that way not through W. S. Hatch's operation did it?

A. No. People moving into it all the time. One company doesn't make all of the industry." (T. 64-65).

Plaintiffs' cases relating to eminent domain proceedings are inapplicable in a nuisance case. For there the market value of the property at the time it is taken is the single matter in issue and in the instant case, it is necessary for a witness to have a basis for his testimony as to how much the claimed depreciation of property can be attributed to any of the many causes in the vicinity.

In any event these rulings on the evidence concerning damages are not prejudicial error, being made in a case tried without a jury wherein it was found that no actionable nuisance exists.

CONCLUSION

When the trial court visited the premises and heard the sounds produced by a mechanic pounding on a truck frame, the operation of the pneumatic grease gun and tire changer and the noise produced by a diesel tractor driving about the yard, the court must have been impressed with the fact that the noises were not loud, and in comparison with the sounds from Onion Street traffic and the railroad were not of such volume to constitute a nuisance.

The most that can be said for plaintiffs' position is that there is some conflict in the testimony as to the facts. While this is an equity case, nevertheless the trial court visited the premises in the presence of counsel, and observed the demeanor of the witnesses, and particularly those who showed animosity. An appellate court is at a disadvantage in all of these things because the written record may not truly reflect them. It is for this reason that appellate courts in nuisance cases are reluctant to overrule a trial judge's finding that no nuisance exists. It is for these reasons that the Supreme Court of Utah in no case has reversed the decision of a trial court finding the absence of a nuisance.

The record is replete with instances of defendants' good faith in minimizing objectionable noise. If an injunction *were* ever issued to restrain defendants in any of their alleged noise-making activities, plaintiffs would listen harder than ever in order to obtain an order of contempt and thereby embarrass defendants. This case of disturbance and annoyance has a more fundamental cause than the noises plaintiffs claim emanate from their brother's business. This is a case where no actionable nuisance has been found by the fact finder, and one which

does not deserve the enforcement arm of the law. It is submitted that upon the record and in accordance with the best interests of wisdom and justice, the decision should be affirmed.

Respectfully submitted,

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