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Noise Nuisances: Commercial Enterprises v. Owners of Residential Property

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NOISE NUISANCES: COMMERCIAL ENTERPRISES v. OWNERS OF RESIDENTIAL PROPERTY

The problems of the reciprocal use and enjoyment of property by adjacent landowners have become increasingly pronounced in our time of intense urbanization. Salient has been the problem of noise nuisances which frequently result when adjacent property is devoted to the inconsistent uses of industry and residence ownership. This conflict is often a serious one. The enjoyment by the residence owner of his property may be considerably impaired; the abatement of the noise may be at the price of loss of productivity, considerable expense or of not conducting the business at all.[1] The resulting situation is one which requires a most careful balancing of equities.

There are certain basic legal distinctions or classifications in the law of nuisance which afford the courts some aid in dealing with the problem of noise nuisances. Nuisances are characterized as public or private;[2] they may or may not be nuisances *per se*[3] or they may be defined by statute.[4] By focusing attention upon the particular activity complained of the court may discern such further distinctions as that the invasion of the plaintiff's interest is negligent, or intentional, or that the defendant is engaged in ultra-hazardous activity.[5] Further, the courts may grant damages if injunctive relief would work hardship. The judicial resolution of the conflicting interests in nuisances cases has been little aided, however, by such legal analyses; the courts are required to reach an equitable result in differing fact

1. Professor Lloyd in his article *Noise as a Nuisance*, 82 U. OF PA. L. REV. 567 (1934), observes that few noise nuisance suits involve nationally important industries. Such suits can, however, involve quite serious injury to both parties. *E.g.*, Gault v. Transcontinental Gas Pipe Line Corp., 102 F. Supp. 187 (D. Md.), *aff'd*, 198 F.2d 196 (4th Cir. 1952) (gas pipe line compressor station, built at considerable cost, created noise and vibration which greatly disturbed nearby owners of costly suburban homes); Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932) ($400,000 tile factory near residential property required to limit its operations because of the noise created by it).

2. "A public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all." PROSSER, TORTS § 72 (1941). "Private nuisance is an unreasonable interference with the interest in the use and enjoyment of land." PROSSER, TORTS § 73 (1941); WOOD, NUISANCES §§ 14-16 (2d ed. 1883); 39 AM. JUR., *Nuisances* §§ 7-9 (1942).

3. See 39 AM. JUR., *Nuisances* § 11 (1942), discussing the distinction between nuisances *per se* and *per accidens*. PROSSER, TORTS 563-65 (1941) uses the term "absolute" nuisances.

4. 39 AM. JUR., *Nuisances* §§ 9, 12-15, 204, 205 (1942); 66 C.J.S., *Nuisances* § 7 (1950).

5. PROSSER, TORTS § 71 (1941); 39 AM. JUR., *Nuisance* §§ 4, 24 (1942). For an excellent discussion of these distinctions see Prosser, *Nuisance without Fault*, 20 TEXAS L. REV. 399, 410-20 (1942), wherein the author shows that in the case of ultrahazardous activity the courts have unconsciously made use of the doctrine of *Rylands v. Fletcher*.

situations of varying and interdependent elements.[6]

The purpose of this note is to present the various elements given consideration in noise nuisance cases. It is emphasized that an atomized approach belies somewhat the true import of the various elements. They are necessarily related and given a *gestalt* effect in a particular case. The authority employed will, so far as possible, be limited to cases where the noise of a commercial enterprise was the sole or principal interference involved.[7]

CHARACTER OF THE AREA

The golden rule of property ownership with regard to creating nuisances is that one must not use his property so as to injure that of another.[8] Necessarily, however, those who reside in urban areas must submit to some discomfort or injury because of the inherent presence of noise in such localities and the significant value to society of manufacturing enterprises.[9] The courts have compromised this conflict of interests by enforcing only that degree of quiet which is reasonable in the light of the locality and other elements.[10] Thus,

6. "For time out of mind the term 'nuisance' has been regarded as incapable of definition so as to fit all cases, because the controlling facts are seldom alike, and each case stands on its own footing. We are not aided by the classification into public or private nuisances, because the difference between them does not depend on the nature of the thing done, but on the fact that one affects the public at large, and the other a limited number only. . . . The injury may be to person or property, to health, comfort, safety, or morality. It may be a crime." Melker v. City of New York, 190 N.Y. 481, 488, 83 N.E. 565, 567 (1908).

7. For collections of cases dealing with particular businesses, devices, or animals as noise nuisances see Notes, 23 A.L.R.2d 1289 (1952) (loud speakers used for business purposes), 86 A.L.R. 998 (1933) (bakery); 81 A.L.R. 1207 (1932) (poultry plants), 79 A.L.R. 1060, (1932) (dogs), 41 A.L.R. 626 (1926), (ice plant), 38 A.L.R. 1506 (1925), 31 A.L.R. 187 (1924) (creamery and milk plants), 37 A.L.R. 800 (1925) (water or electric light plant), 37 A.L.R. 689 (1925) (saw mill), 33 A.L.R. 727 (1924) (amusement park), 23 A.L.R. 1412 (1924) (gasworks), 22 A.L.R. 1200 (1923) (mechanical music devices), 4 A.L.R. 1343 (1919) (steam whistles).

As to industrial noises generally see Notes, 90 A.L.R. 1207 (1934), 23 A.L.R. 1407 (1923). See also: Lloyd, *Noise as a Nuisance*, 82 U. OF PA. L. REV. 567 (1934); Notes, 14 NOTRE DAME LAW. 131 (1938) (automobile patrons), 4 OKLA. L. REV. 501 (1951) (noise of queue), 25 VA. L. REV. 465 (1939); 3 MD. L. REV. 240 (1939) (on nebulous decrees against noise nuisances); 29 MINN L. REV. 38 (1944) (airports); 9 OHIO ST. L.J. 537 (1948) (airports); 15 ORE. L. REV. 268 (recreational activities).

8. The common-law maxim *sic utere tuo ut alienum non laedas* is ever present in nuisance cases.

9. "People who live in great cities that are sustained by manufacturing enterprises must necessarily be subject to many annoyances and positive discomforts . . . produced by and resulting from the business that supports the city." Commonwealth v. Miller, 139 Pa. St. 77, 21 Atl. 138, 139 (1891); "'extreme rights' cannot be enforced." Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371, 373 (1914).

10. Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914); Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N.W. 214 (1923); Gilbert v. Showerman, 23 Mich. 448 (1871); Kestner v. Homeopathic Medical & Surgery Hospital of Reading, 245 Pa. 326, 91 Atl. 659 (1914).

when a commercial enterprise intrudes into a purely residential area, the noise emanating from its operations has been judicially abated during normal hours of repose when it interfered with the sleep of nearby residents,[11] and has been enjoined altogether when it seriously impaired the normal enjoyment of residential property.[12] Similarly, the pastoral quietude of rural areas is preserved in favor of homeowners.[13]

The problem of noise and the relational use of property becomes more difficult when the particular area is not clearly devoted to a single use. If the use made of such property is mixed industrial and residential, the degree of protection afforded homeowners is diminished; the standard of reasonableness, however, although more flexible, is still imposed.[14] The industrial nature of a locality has in some instances virtually precluded any right to relief,[15] but such homeowners are clearly not deprived of some reasonable use of their land for residential purposes.[16] The situation most difficult of com-

11. Peacock v. Spitzelberger, 16 Ky. L. Rep. 803, 29 S.W. 877 (1895); Shea v. National Ice Cream Co., 280 Mass. 206, 182 N.E. 303 (1932); Kobielski v. Belle Isle East Side Creamery Co., 222 Mich. 656, 193 N.W. 214 (1923); Roukovina v. Island Farm Creamery Co., 160 Minn. 335, 200 N.W. 350 (1924); Friedman v. Keil, 113 N.J. Eq. 37, 166 Atl. 194 (Ct. Err. & App. 1933); Kroecker v. Camden Coke Co., 82 N.J. Eq. 373, 88 Atl. 955 (1913) (area termed as "densely populated section of a city").

12. Bickley v. Morgan Utilities Co., 173 Ark. 1038, 294 S.W. 38 (1927); Muskegon Trust Co. v. Bousma, 247 Mich. 98, 225 N.W. 611 (1929); Krocker v. Westmoreland Planing Mill Co., 274 Pa. 143, 117 Atl. 669 (1922); Appeal of Ladies' Decorative Art Club of Philadelphia, 22 W.N. Cas. 75, 13 Atl. 537 (Pa. 1888); Blomen v. N. Barstow Co., 35 R.I. 198, 85 Atl. 924 (1913); Citizen's Planing Mill Co. v. Tunstall, 160 S.W. 424 (Tex. Civ. App. 1913); Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 12 S.E. 1085 (1891).

13. Gault v. Transcontinental Gas Pipe Line Corp., 102 F. Supp. 187 (D. Md.), *aff'd*, 198 F.2d 196 (4th Cir. 1952); Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (1934) (small unincorporated community); Frank v. Cossitt Cement Products, Inc., 197 Misc. 670, 97 N.Y.S.2d 337 (Sup. Ct. 1950).

14. In such situations the character of the area seemingly loses the aspect of control, and the right to relief is more dependent upon other elements. East Arkansas Const. Co. v. James, 211 Ark. 154, 199 S.W.2d 589 (1947) (lawful business enjoined from disturbing sleep); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903) (a case of extreme noise nuisance); Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914) (court carefully balanced decree so as to preserve industrial operations and at the same time eliminate offensive noise); Eastcott v. Metal Craft Co., 254 Mich. 513, 236 N.W. 847 (1931) (required only partial abatement).

15. Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 196 N.E. 149 (1935) (complainant failed to show requisite amount of disturbance); Hauser v. Kraeuter & Co. 97 N.J. 413, 129 Atl. 437 (1925) (defendant's enterprise caused considerable noise which was the most salient among the disturbances in the area, but plaintiff was refused relief); Haber v. Paramount Ice Corp., 239 App. Div. 324, 267 N.Y. Supp. 349 (2d Dep't 1933) (character of area seemingly prevented injunctive relief, new trial on question of damages); Fiscaletti v. Long Island Quilting Co., 81 N.Y.S.2d 605 (Sup. Ct. 1948) (court gave consideration to the facts that there were other noises in the area, that defendant conducted his operations without negligence, and with proper appliances; the focus of the court's attention on the industrial character of the area caused it to deny an injunction).

16. Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932); Wheat Culvert Co., Inc. v. Jenkins, 246 Ky. 319, 55 S.W.2d 4 (1932); Malm v. Dubrey,

promise is that where the locality under consideration embraces the marginal line between commercial user and residential areas, and the lands of the commercial user and residence owner are adjacent and devoted to respectively consistent uses. The commercial user is not permitted to maintain a sound nuisance so as to deprive the residence owner of reasonable enjoyment of his property, but the element of the character of the area is seemingly without influence;[17] there being no inconsistent use of such.

A corollary problem is the question of the use as sanctioned by zoning ordinances. A showing that a particular enterprise is located in accordance with zoning requirements is not a license to create a nuisance,[18] but such ordinances have been influential in the denial of relief to residence owners whose homes are located in areas zoned for enterprises which they should clearly have known would emit considerable noise.[19] Non-conforming use statutes have protected commercial enterprises which were properly located before the area changed in character or was re-zoned,[20] but not if the noise has increased[21] or the business has changed character.[22]

Commercial enterprises often seek to defend suits to abate noise nuisances by showing that there are similar disturbances in the area. This attempted justification has been found to be without merit as a defense by some courts.[23] Such a showing is an element for consider-

325 Mass. 63, 88 N.E.2d 900 (1949); Waier v. Peerless Oil Co., 265 Mich. 398, 251 N.W. 552 (1933); Wallace & Tiernan Co., v. United States Cutlery Co., 97 N.J. Eq. 408, 128 Atl. 872 (Ch. 1925) (both parties manufacturers); Quinn v. American Spiral Spring & Mfg. Co., 293 Pa. 152, 141 Atl. 855 (1928).

17. Beauvais v. D. C. Hall Transport, Inc., 49 So.2d 44 (La. App. 1950); Garber v. Rubel Corporation, 160 Misc. 716, 290 N.Y. Supp. 633 (Sup. Ct. 1936).

18. Gault v. Transcontinental Gas Pipe Line Corp., 102 F. Supp. 187 (D. Md.), *aff'd*, 198 F.2d 196 (4th Cir. 1952); Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932); Williams v. Blue Bird Laundry, 85 Cal. App. 388, 259 Pac. 484 (1927); Malm v. Dubrey, 325 Mass. 63, 88 N.E.2d 900 (1949); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Marshall v. Holbrook, 276 Mass. 341, 177 N.E. 504 (1931); Masso v. Hanscom Realty Corp. 162 Misc. 864, 295 N.Y. Supp. 922 (Sup. Ct. 1937).

19. Leblanc v. Orleans Ice Mfg. Co., 121 La. 249, 46 So. 226 (1908); Hauser v. Kraeuter & Co., 97 N.J. 413, 129 Atl. 473 (1925); Wojnar v. Yale & Towne Mfg. Co., 348 Pa. 595, 36 A.2d 321 (1944).

20. Kubby v. Hammond, 68 Ariz. 17, 198 P.2d 134 (1948); City of Chicago v. Reuter Bros. Iron Works, Inc., 398 Ill. 202, 75 N.E.2d 355 (1947); Firth v. Scherzberg, 366 Pa. 443, 77 A.2d 443 (1951). In the case of Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86 (1928), a commercial enterprise was protected by a nonconforming use statute when prior to operation a new zoning ordinance prohibiting the intended use was passed.

21. Benjamin v. Lietz, 116 Utah 476, 211 P.2d 449 (1949).

22. Morris v. Borough of Haledon, 20 N.J. Super. 433, 90 A.2d 113 (1952). Zoning ordinances frequently include by-laws which provide that although a particular use is permissible, no use which constitutes a common law nuisance is protected by the statute. Malm v. Dubrey, 325 Mass. 63, 88 N.E.2d 900 (1949).

23. Vowinckel v. N. Clark & Sons, 216 Cal. 156, 13 P.2d 733 (1932); Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 Pac. 581 (1910); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903); Fox v. Ewers, 195 Md. 650, 75 A.2d 357 (1950); Simon v. Detroit Motor Valve Co., 233 Mich. 17,

ation,[24] however, perhaps as being indicative of the character of the area.[25]

It is clear that the doctrine of "coming to the nuisance" has been exploded by the American courts.[26] This would seem to be especially true if the noise complained of has been increased.[27] The priority of a commercial enterprise in the particular area is of influence, however, in determining a residence owner's right to injunctive relief.[28] Similarly, the fact that the complainant had established his residence before the defendant business began operations is given consideration.[29]

The Time and Type of Noise

The noise emanating from a particular enterprise can well be a nuisance at some times and not at others.[30] It is generally conceded that mankind has sanctioned night as a time of repose;[31] consequently injunctions issue against commercial property owners whose operations interfere with the sleep of adjacent residents,[32] but not in

206 N.W. 336 (1925); Roessler & Hasslacher Chemical Co. v. Doyle, 73 N.J.L. 521, 64 Atl. 156 (Sup. Ct. 1906).

24. Beauvais v. D. C. Hall Transport, Inc., 49 So.2d 44 (La. App. 1950); Fiscaletti v. Long Island Quilting Co., 81 N.Y.S.2d 605 (Sup. Ct. 1948); Goodall v. Crofton, 33 Ohio St. Rep. 271 (1877); Kennedy v. Frechette, 45 R.I. 399, 123 Atl. 146 (1924).

25. Irby v. Panama Ice Co., Inc., 184 La. 1082, 168 So. 307 (1936); Olsen v. Tung, 179 La. 760, 155 So. 16 (1934); Crutcher v. Taystee Bread Co., 174 S.W.2d 801 (Mo. 1943).

26. Fendley v. City of Anaheim, 110 Cal. App. 731, 294 Pac. 769 (1930); Williams v. Blue Bird Laundry, 85 Cal. App. 385, 259 Pac. 484 (1927); 39 Am. Jur., *Nuisance* § 197 (1942).

27. Friedman v. Keil, 113 N.J. Eq. 37, 166 Atl. 194 (Ct. Err. & App. 1933).

28. McClung v. Louisville & N.R.R., 255 Ala. 302, 51 So.2d 371 (1951); Mackenzie v. Frank M. Pauli Co., 207 Mich. 456, 174 N.W. 161 (1919); Morris v. Borough of Haledon, 20 N.J. Super. 433, 90 A.2d 113 (Ch. 1952); Benton v. Kernan, 130 N.J. Eq. 193, 21 A.2d 755 (Ct. Err. & App. 1941); De File v. Hudson Republican Corp., 151 Misc. 256, 272 N.Y. Supp. 448 (Sup. Ct. 1934).

29. Walsworth v. Farmers' Gin Co., 161 La. 246, 110 So. 338 (1926); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903); Leeds v. Bohemian Art Glass Works, 63 N.J. Eq. 619, 52 Atl. 375 (Ch. 1902); Hamilton v. Bates, 284 Pa. 513, 131 Atl. 369 (1925).

30. 39 Am. Jur., *Nuisance* § 51 (1942).

31. "Mankind needs sleep for a succession of several hours once in every 24 hours, and nature was provided a time for that purpose, to wit, the nighttime . . . and noises which would not be adjudged nuisances, under the circumstances, if made in the daytime, will be declared to be nuisances if made at night. . . ." Gilbough v. West Side Amusement Co., 64 N.J. Eq. 27, 53 Atl. 289 (Ch. 1902).

32. East Arkansas Const. Co. v. James, 211 Ark. 154, 199 S.W.2d 589 (1947); Hill v. McBurney Oil & Fertilizer Co., 112 Ga. 788, 38 S.E. 42 (1901); Wheat Culvert Co., Inc. v. Jenkins, 246 Ky. 319, 55 S.W.2d 4 (1932); Malm v. Dubrey, 325 Mass. 63, 88 N.E.2d 900 (1949); Davis v. Sawyer, 133 Mass. 289 (1882); O'Connor v. Jersey Creamery Co. of Detroit, 265 Mich. 219, 251 N.W. 333 (1933); Abend v. Royal Laundry Service, Inc., 122 N.J. Eq. 77, 192 Atl. 239 (Ch. 1937); Frank v. Cossitt Cement Products, 197 Misc. 670, 97 N.Y.S.2d 337 (Sup. Ct. 1950); Masso v. Hanscom Realty Corp., 162 Misc. 864, 295 N.Y. Supp. 922 (Sup. Ct. 1937); Firth v. Scherzberg, 366 Pa. 443, 77 A.2d 443 (1951); City of Bethlehem v. Druckenmiller, 344 Pa. 170, 25 A.2d 190 (1942).

favor of a complainant who sleeps during the day.[33] Similarly the seasonal effect of noise can be of influence.[34] An asphalt plant which was operated only sixty days a year has been held a public nuisance.[35] In accordance with what is reasonable in a given situation the courts have limited operations to the usual daylight hours,[36] certain periods of the day,[37] to the normal work week,[38] or have totally enjoined that noise which constituted a clear nuisance.[39]

Can the nature of the noise influence the court's decision? The answer is clearly that it can, but it would seem to be the *effect* of the noise in a given situation[40] which is important, and not the proximity of the parties[41] or the volume or intensity of the din.[42]

The attempt by the courts to classify various types of sounds and determine whether such are actionable as nuisances is obviously futile when done in abstraction without giving consideration to the *effect* of such sounds. Thus the monotonous sound of an air conditioner did not constitute a nuisance,[43] but the monotonous sound of an electric substation was as actionable as harsh and intermittent sounds.[44] Similarly, noise of clanging tank-car tops and loud talking so interfered with the enjoyment of adjacent property as to justify preventive relief,[45] but the slamming of car doors and boisterous conduct of fishermen in early morning hours was thought not to be actionable.[46] Music may be a nuisance,[47] but the question of what is music is not abundantly clear.[48]

33. Darnell v. Columbus Show Case Co., 129 Ga. 62, 58 S.E. 631 (1907).
34. Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 196 N.E. 149 (1935).
35. Eaton v. Klimm, 217 Cal. 362, 18 P.2d 678 (1933).
36. See note 32 *supra*.
37. Jones v. Kelley Trust Co., 179 Ark. 857, 18 S.W.2d 356 (1929).
38. McMillan v. Kuehnle, 76 N.J. Eq. 256, 73 Atl. 1054 (Ch. 1909).
39. City of Bethlehem v. Druckenmiller, 344 Pa. 170, 25 A.2d 190 (1942); Krocker v. Westmoreland Planing Mill Co., 274 Pa. 143, 117 Atl. 669 (1922); Appeal of Ladies' Decorative Art Club of Philadelphia, 22 W.N. Cas. 75, 13 Atl. 557 (Pa. 1888); Citizens' Planing Mill v. Tunstall, 160 S.W. 424 (Tex. Civ. App. 1913); Benjamin v. Lietz, 116 Utah 476, 211 P.2d 449 (1949).
40. "The real test . . . is, whether it is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities. . . ." WOOD, NUISANCES § 617 (3d ed. 1893). For cases discussing this rule of *effect* see note 74 *infra*.
41. McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908).
42. Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941).
43. People on Complaint of Gershberg v. Arkow, 204 Misc. 635, 124 N.Y.S.2d 704 (N.Y. City Ct. 1953).
44. Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941).
45. Waier v. Peerless Oil Co., 265 Mich. 398, 251 N.W. 552 (1933).
46. In Hobson v. Walker, 41 So.2d 789 (La. App. 1949), in a seemingly absurd view as to the noise concerned, the court felt that fishermen, by the nature of the sport they were about to undertake, would naturally be quiet at a minnow shop some distance from the fishing grounds because when they began to pursue the "denizens of the deep" silence would be required.
47. Stodder v. Rosen Talking Mach. Co., 241 Mass. 245, 135 N.E. 251 (1922); Peters v. Moses, 171 Misc. 441, 12 N.Y.S.2d 735 (Sup. Ct. 1939).
48. See Lloyd, *Noise as a Nuisance*, 82 U. OF PA. L. REV. 567, 578 (1934).

A court may justify relief given by determining that the noise complained of in a given situation is "unbearable"[49] or has a "proclivity" to wake people from their sleep,[50] but such characterizations are in light of the *effect* of the sound disturbance.

The Relative Value of the Property, Feasibility of Abatement, and Public Interest

In almost every case of noise nuisance the value of the commercial enterprise sought to be enjoined is considerably in excess of that of the complaining residence owner. The inclusion of this element patently converts the courts' consideration of balance of equities to one of balancing interests.[51] Such is not to be confused with a consideration of the economic effect on the community, but rather, is an appraisal by the court of what each party stands to lose. Some courts, however, feel that it is an element deserving of judicial recognition,[52] but it cannot be said to have the aspect of control.[53]

The most desirable solution to the problem of noise nuisances is the mechanical abatement of the noise so as to render the divergent uses of adjacent property compatible. The expense involved, however, may well be prohibitive. This consideration has been held to be the test of whether or not noise was reasonable.[54] A mandatory injunction has required preventive measures when the cost of such was reasonable and has been refused[55] when at too great an expense.[56] One court, however, in a case of extreme interference with complainant's enjoyment of his property, required cessation of the defendant's operations or, in the alternative, abatement, the cost of which equalled the value of complainant's property.[57]

What can be said in favor of the defense of the owner of a commercial enterprise that he has done all he can to minimize the disturbance? This is in essence defending on the basis of freedom from negligence.[58] Such is not *per se* a good defense,[59] but has been

49. Blomen v. N. Barstow Co., 35 R.I. 198, 85 Atl. 924 (1913).
50. Waier v. Peerless Oil Co., 265 Mich. 398, 251 N.W. 552 (1933).
51. As to balancing equities in nuisance cases see WALSH, EQUITY § 56 (1930); Note, 61 A.L.R. 924 (1929).
52. Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 196 N.E. 149 (1935); Roy v. Chevrolet Motor Car Co., 262 Mich. 663, 247 N.W. 774 (1933).
53. See cases cited note 1 *supra;* 39 AM. JUR., *Nuisance* § 159 (1942).
54. Ebur v. Alloy Metal Wire Co., 304 Pa. 177, 155 Atl. 280 (1931); Collins v. Wayne Iron Works, 227 Pa. 326, 76 Atl. 24 (1910).
55. Eastcott v. Metal Craft Co., 254 Mich. 513, 236 N.W. 847 (1931).
56. Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 196 N.E. 149 (1935); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933).
57. Quinn v. American Spiral Spring & Mfg. Co., 293 Pa. 152, 141 Atl. 855 (1928).
58. See PROSSER, TORTS § 71 (1941).
59. Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 Pac. 581 (1910); Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821 (1903); Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270 (1898); Wallace & Tiernan Co. v. United States Cutlery Co., 97 N.J. Eq. 408, 128 Atl. 872 (Ch. 1925); Fiscaletti v. Long Island Quilting Co., 81 N.Y.S.2d 605 (Sup. Ct. 1948);

employed by the courts in behalf of a defendant to bolster his case when other elements are in his favor.[60]

It is generally conceded that public convenience or that a certain business is useful and necessary is not a defense to a suit to enjoin a nuisance.[61] Such considerations are, however, of influence in determining the propriety of equitable relief.[62] The problem is that of minimizing the detrimental effects arising from inconsistent use of adjacent property; to protect residential property from disturbing noise and at the same time allow businesses which are beneficial to the public to operate.[63]

This attitude is doubtless manifested by the court's willingness to enjoin only that noise which unreasonably interferes with complainant's enjoyment of his property,[64] and in their reluctance to grant relief other than damages when the defendant is a quasi-public corporation.[65] Complete enjoining of operations has been found to be error.[66] It has been held that the element of public convenience is of influence only if the public interest is direct, and relates to the activity which is sought to be enjoined.[67]

Masso v. Hanscom Realty Corp., 162 Misc. 864, 295 N.Y. Supp. 922 (Sup. Ct. 1937); Garber v. Rubel Corp., 160 Misc. 716, 290 N.Y. Supp. 633 (1936); Blomen v. N. Barstow Co., 35 R.I. 198, 85 Atl. 924 (913).

60. Irby v. Panama Ice Co., 184 La. 1082, 168 So. 307 (1936); Le Blanc v. Orleans Ice Mfg. Co., 121 La. 249, 46 So. 226 (1908); Hannum v. Gruber, 346 Pa. 417, 31 A.2d (1943).

61. 39 AM. JUR., *Nuisance* §§ 45, 161 (1942).

62. *Ibid.*

63. "[I]t is the duty of the court to balance the public necessity against private injury, if any, and seek some other method of relief than by injunction." Miranda v. Buffalo General Electric Co., 139 Misc. 532, 248 N.Y. Supp. 758, 760 (injunction refused), 140 Misc. 267, 251 N.Y. Supp. 510 (Sup. Ct. 1931).

64. Mackenzie v. Frank M. Pauli Co., 207 Mich. 456, 174 N.W. 161 (1919); Blomen v. N. Barstow Co., 35 R.I. 198, 85 Atl. 924 (1913); Thompson v. Anderson, 107 Utah 331, 153 P.2d 665 (1944).

65. Gault v. Transcontinental Gas Pipe Line Corp., 102 F. Supp. 187 (D. Md.), *aff'd*, 198 F.2d 196 (4th Cir. 1952); Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (1934); Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941); King v. Vicksburg Ry. & Light Co., 88 Miss. 456, 42 So. 204 (1906); Morton v. Mayor of City of New York, 140 N.Y. 207, 35 N.E. 490 (1893); Miranda v. Buffalo General Electric Co., 139 Misc. 532, 248 N.Y. Supp. 758 (injunction refused), 140 Misc. 267, 251 N.Y. Supp. 510 (Sup. Ct. 1931); Gainesville H. & W. R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890).

66. McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795 (1890).

67. "[T]he public . . . interest in having the plant continued in operation, . . . is a matter of no moment, unless the interest is direct and appertains to that of which the plaintiff has a just cause to complain." Quinn v. American Spiral Spring & Mfg. Co., 293 Pa. 152, 141 Atl. 855, 857 (1928). What is meant by "direct" is not certain. It would seem to indicate a distinction between the usual commercial enterprise and a quasi-public corporation. See also 61 A.L.R. 924, 933 (1929). As to defense of necessary war production see Godard v. Babson-Dow Mfg. Co., 313 Mass. 280, 47 N.E.2d 303 (1943).

THE REQUISITE DEGREE OF INTERFERENCE

The determination of whether the noise produced by a particular defendant's business constitutes a nuisance necessarily involves proof of injury by the complaining residence owner. The question arises as to what type of injury will support preventive or compensatory relief in favor of such complainants. As in other nuisance suits the loss of comfortable enjoyment,[68] diminished property value,[69] lessened rental,[70] loss of reasonable utility of property,[71] or that the property is a less desirable place to live[72] has been held sufficient to justify compensatory relief.

In order to gain preventive relief from noise, however, the complainant is required to prove the detrimental *effect*[73] of such sound disturbance on the occupants of his property. The degree of noise required to support injunctive relief is that which produces actual physical discomfort and annoyance to persons of ordinary sensibilities.[74] Such noise may constitute a nuisance even though no physical injury to the health of the occupants is shown.[75] The fact that a

68. Nailor v. C. W. Blakeslee & Sons, Inc., 117 Conn. 241, 167 Atl. 548 (1933); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908); Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941); Di Carlo v. Laundry & Dry Cleaning Service, 178 La. 676, 152 So. 327 (1933); Beauvais v. D. C. Hall Transport, Inc., 49 So.2d 44 (La. App. 1950); Nugent v. Melville Shoe Corp., 280 Mass. 469, 182 N.E. 825 (1932); Citizens' Planing Mill Co. v. Tunstall, 160 S.W. 424 (Tex. Civ. App. 1913).

69. Alabama Power Co. v. Stringfellow, 228 Ala. 422, 153 So. 629 (1934); Garber v. Rubel Corp., 160 Misc. 716, 290 N.Y. Supp. 633 (Sup. Ct. 1936); Gainesville H. & W.R. v. Hall, 78 Tex. 169, 14 S.W. 259 (1890).

70. Harris v. Randolph Lumber Co., 175 Ala. 148, 57 So. 453 (1911); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908); Kasper v. H. P. Hood & Sons, Inc., 291 Mass. 24, 196 N.E. 149 (1935); Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933); Masso v. Hanscom Realty Corp., 162 Misc. 864, 295 N.Y. Supp. 922 (Sup. Ct. 1937).

71. Wallace & Tiernan Co. v. United States Cutlery Co., 97 N.J. Eq. 408, 128 Atl. 872 (Ch. 1925).

72. Sardo v. James Russell Boiler Works, 241 Mass. 215, 135 N.E. 127 (1922) (damages awarded because the property became a less desirable place to live due to defendant's activity even though the value of the property had increased).

73. See note 40 *supra*.

74. Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932); McGill v. Pintsch Compressing Co., 140 Iowa 429, 118 N.W. 786 (1908); Kentucky & W. Va. Power Co. v. Anderson, 288 Ky. 501, 156 S.W.2d 857 (1941); Meyer v. Kemper Ice Co., 180 La. 1037, 158 So. 378 (1934); Fox v. Ewers, 195 Md. 650, 75 A.2d 357 (1950); Dittman v. Repp, 50 Md. 516 (1879); Marshall v. Holbrook, 276 Mass. 341, 177 N.E. 504 (1931); Benton v. Kernan, 130 N.J. Eq. 193, 21 A.2d 755 (Ct. of Err. & App. 1941); Damadio v. Levinsohn, 111 N.J. Eq. 84, 161 Atl. 504 (1932); Fiscaletti v. Long Island Quilting Co., 81 N.Y.S.2d 605 (Sup. Ct. 1948); Masso v. Hanscom Realty Corp., 162 Misc. 864, 295 N.Y. Supp. 922 (Sup. Ct. 1937); Haber v. Paramount Ice Corp. 239 App. Div. 324, 267 N.Y. Supp. 349 (2d Dep't 1933); Dillon v. Cortland Baking Co., 244 App. Div. 303, 230 N.Y. Supp. 289 (3d Dep't 1928); Blomen v. N. Barstow Co., 35 R.I. 198, 85 Atl. 924 (1913); Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 12 S.E. 1085 (1891); WOOD, NUISANCES § 17 (3d ed. 1893).

75. Judson v. Los Angeles Suburban Gas Co., 157 Cal. 168, 106 Pac. 581 (1910); Higgins v. Decorah Produce Co., 214 Iowa 276, 242 N.W. 109 (1932); Ross v. Butler, 19 N.J. Eq. 294 (1868).

person of unusual sensitivity is disturbed does not mean that the noise concerned is a nuisance,[76] and conversely the lack of detrimental effect on particularly robust individuals does not mean that no nuisance exists.[77] The term "ordinary" employed in this test means individuals in the broadest sense, and not the usual type of person who would be expected to live in a particular area.[78] When a threatened or apprehended noise interference is sought to be enjoined the complainant is required to prove with great clarity that the impending operations will become a nuisance, unless such enterprise would constitute a nuisance *per se*.[79]

CONCLUSION

By a careful consideration of these elements the conflicting interests of adjacent property owners can be rationalized to a point of fairness between the parties, but the volumes of such decisions do not yield the certainty and consistency of property use which is most desirable. There is no perfect judicial remedy for noise nuisances. The courts by the nature of the problem are required to weigh and evaluate the facts of each case, and are therefore virtually precluded from being able to propound sufficiently precise rules which might solve the problem. Conceivably, a greater emphasis on the element of the character of the area as being controlling would by judicial coercion provide the desired result of large urban areas devoted solely to residential or commercial usage. Courts of equity strive to reach decisions of great fairness and justice, but the result is inevitably one of compromise which leaves the goal of perfect use of property unattained. If this end is sought for urban areas the rights of existing property owners must in some measure be limited. Legislative action in the form of stringent abatement laws and perhaps mandatory relocation of property owners whose uses are inconsistent with that of the general area are possible solutions. The latter could in fairness be required only after an extended period of notice and just compensation. City planning, well considered and extensive, coupled with sufficient legislative action would seem to be the best means of approaching the goal of the greatest use of property without nuisance.

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76. Tortorella v. H. Traiser & Co., 284 Mass. 497, 188 N.E. 254 (1933).
77. Stevens v. Rockport Granite Co., 216 Mass. 486, 104 N.E. 371 (1914).
78. Metropoulos v. MacPherson, 241 Mass. 491, 135 N.E. 693 (1922).
79. Buckner v. Tillman, 195 Ark. 149, 110 S.W.2d 1060 (1937); Wingate v. City of Doerun, 177 Ga. 373, 170 S.E. 226 (1933); 39 AM. JUR., *Nuisance* §§ 151, 152 (1942).