against the C.E.G.B. alone there would be lower prices charged to the other purchasers of C category goods than would be charged to the C.E.G.B., and it would have been unsafe for the court to assume that it would be so when the matter had not been canvassed in evidence.

In the result, the association fail in their attempt to establish a prima facie case under any of the three paragraphs. It is, consequently, not necessary to discuss the question of detriments under the balancing provisions of section 21 (1) of the Act of 1956. The restrictions, other than the price restrictions, admittedly cannot stand without them, and, accordingly, we declare that all the restrictions under the agreement are contrary to the public interest by force of the Act of 1956.

Declaration accordingly.

R. P. Ct. (E. & W.)

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ASSOCIATED TRANSFORMER MANUFACTURERS' AGREEMENT, *In re.*

Solicitors: *Bristows, Cooke & Carpmael; Treasury Solicitor.*

N. P.

[QUEEN'S BENCH DIVISION.]

* HALSEY *v.* ESSO PETROLEUM CO. LTD.

[1960 H. No. 693.]

1961 *Feb.* 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 23.

Veale J.

Nuisance — Public — Atmospheric pollution — Noxious acid smuts — Damage to motor-car standing in public highway—Exceptional noise of vehicles at night.

Nuisance—Highway—Vehicular traffic—Noise at night—Emanating partly from private premises and partly from highway—Concentration of exceptionally heavy vehicles—Whether interference with enjoyment of house—Whether reasonable user of highway—Whether private nuisance—Whether public nuisance.

Nuisance—Noise—Interference with sleep—Noise from plant—Plant in premises adjoining residential area—Whether interference with ordinary physical comfort—Whether actionable nuisance.

Nuisance—Smell—No injury to health—Pungent oily smell of nauseating character—Whether actionable.

Rylands v. *Fletcher—Smuts—Emission of noxious acid smuts from boiler house chimneys—Damage to paintwork of motor-car standing in public highway—Liability.*

The plaintiff was the owner and occupier of a small terrace house in Fulham in a street in a residential area. The defendants owned and occupied an oil storage and issuing depôt which adjoined the street, on the river bank; there was there a strip of industrial development, and the defendants' were not the only premises where oil was dealt with. In the depôt, opposite the plaintiff's house, was a boiler house containing two steam boilers with metal chimney stacks from which, from time to time, noxious acid smuts were emitted which damaged the plaintiff's washing hung out to dry, and

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also damaged the paintwork of his car standing in the street outside his house. An occasional smell of oil had been present for many years, but during recent years, and growing in intensity and frequency, there was also emitted from the defendants' depôt a particularly pungent oily smell of a nauseating character. No injury to health was caused by the smell.

In 1956 the defendants introduced a night shift from 10 p.m. to 6 a.m. at the depôt, and since then the noise from the boilers went on throughout the night despite efforts made by the defendants to minimise it. This noise, which varied in intensity, at its peak reached 63 decibels, causing the plaintiff's windows and doors to vibrate, and he could not sleep through it. The entrance to the depôt was opposite the plaintiff's house and the exit gate near by, and since November, 1956, at intervals throughout the night, oil tankers, exceptionally heavy vehicles, sometimes in convoy, and at times of high demand as many as fifteen, came and went every night. Over and above the noise from the engines, the tankers rattled as they went, and the noise outside the plaintiff's house when some of them passed was 83 decibels. The noise from these vehicles was partly in the depôt and partly in the highway. It was possible for the defendants to conduct their operations without any, or any appreciable smell, and there was no nuisance by noise by day.

In an action by the plaintiff alleging nuisance, inter alia, by pollution of the atmosphere by the smuts and the smell, and noise, from, inter alia, the boilers and the vehicles, and claiming damages and injunctions:—

Held, (1) that the defendants were liable in nuisance for damage done to the plaintiff's washing by acid smuts emitted from their chimneys; they were also liable wherever the smuts alighted, whether on the plaintiff's washing or on his motor-car standing in the street, on the principles in *Rylands* v. *Fletcher* (1868) L.R. 3 H.L. 330; and they were also liable for the damage to his motor-car as for a public nuisance in respect of which the plaintiff had suffered special damage (post, p. 692).

Charing Cross Electricity Supply Co. v. *Hydraulic Power Co.* [1914] 3 K.B. 772; 30 T.L.R. 441, C.A.; *Miles* v. *Forest Rock Granite Co. (Leicestershire) Ltd.* (1918) 34 T.L.R. 500, C.A. and *Holling* v. *Yorkshire Traction Co. Ltd.* [1948] 2 All E.R. 662 applied.

(2) That injury to health was not a necessary ingredient in the cause of action for nuisance by smell, and, since the particularly pungent smell from time to time emitted from the depôt went far beyond a triviality and was more than would affect a sensitive person, it was, in view of its frequency, an actionable nuisance (post, p. 696).

Crump v. *Lambert* (1867) 3 Eq. 409 applied.

(3) That the noise from the boilers at night was a nuisance for which the defendants were liable, since night was the time when the ordinary man took his rest and the noise was an inconvenience materially interfering with the ordinary comfort physically of human existence according to the plain and simple standards of ordinary and reasonable persons living in Fulham (post, p. 698).

Dictum of Knight Bruce V.-C. in *Walter* v. *Selfe* (1851) 4 De G. & S. 315, 321 applied.

St. Helen's Smelting Co. v. *Tipping* (1865) 11 H.L.C. 642 and *Polsue and Alfieri Ltd.* v. *Rushmer* [1907] A.C. 121 considered.

(4) That the noise from the vehicles at night was an interference with the enjoyment by the plaintiff of his house, which was attributable to the defendants' mode of operation of their depôt, and the principles to be applied were the same as those in respect

of nuisance from the plant itself and that, applying those principles, the noise was a private nuisance (post, p. 700).

Bartlett v. *Marshall* (1896) 44 W.R. 251, and *Vanderpant* v. *Mayfair Hotel Co.* [1930] 1 Ch. 138 applied.

Southport Corporation v. *Esso Petroleum Co. Ltd.* [1956] A.C. 218, 224; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864, H.L.; [1954] 2 Q.B. 182; [1954] 3 W.L.R. 200; [1954] 2 All E.R. 561, C.A. considered.

(5) That the defendants were also liable for the vehicular noise at night as for a public nuisance in respect of which the plaintiff had suffered special damage, for the concentration of particularly noisy vehicles outside the plaintiff's house was an unreasonable user of the highway for which, in the circumstances, and particularly in view of the circumstance that a man was entitled to sleep during the night in his own house, the defendants were also liable (post, p. 701). The plaintiff, accordingly, was entitled to damages and injunctions.

Attorney-General v. *W. H. Smith & Son* (1910) 26 T.L.R. 482 and *Attorney-General* v. *Sheffield Gas Consumers Co.* (1853) 3 De G.M. & G. 304 applied.

ACTION.

The plaintiff, Thomas Henry Halsey, at all material times the occupier of No. 28, Rainville Road, Fulham, brought this action against the defendants, the Esso Petroleum Company Ltd., the owners and occupiers of an oil storage and issuing depôt, the Hammersmith Depôt, adjoining Rainville Road, claiming an injunction to restrain the defendants, their servants or agents from carrying on or permitting to be carried on their business at their depôt in such a manner as (a) to cause or permit excessive and prolonged vibration from boilers and pumps installed in the depôt through the 24 hours of the day and night; (b) to cause or permit such excessive and prolonged noise from the boilers and pumps; (c) to cause or permit the discharge from the smoke stacks of the boilers of a harmful substance, which, inter alia, discoloured and rotted clothes and damaged motor-car cellulose and paintwork; (d) to cause or permit excessive noise by oil tankers arriving at and leaving the depôt at all hours of the day or night; and (e) to cause or permit obnoxious vapours or fumes to be emitted from the depôt, or otherwise to conduct the depôt so as to cause a nuisance to the plaintiff's property in Rainville Road and to him or members of his family in the occupation of his property. The plaintiff also claimed damages, including special damage of £5 for damaged clothing and £100 by reason of damage to the paintwork of his car.

The defendants denied nuisance. They contended, inter alia, that no substance had been emitted from their chimney stacks which had had the harmful effects alleged, alternatively no substance had been emitted other than such as was emitted from all chimneys in the area including domestic chimneys and that such harm or injury as the plaintiff might prove to have resulted from any substance in the atmosphere had been caused

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by his being in an urban area and not by emission from their chimneys. They alleged that such vibrations, noise, emissions and vapours as they might be proved to have caused or made were reasonable in the circumstances and did not visibly or sensibly diminish the value of the plaintiff's property or the comfort and enjoyment thereof. They also raised a plea of prescription.

The following is a summary of the facts found by Veale J. No. 28 Rainville Road was a small terrace house in a residential area zoned for residential purposes. There was a strip of industrial development on the river bank zoned for industrial purposes where all kinds of industrial activities were carried on, and the defendants' premises were not the only place where oil was dealt with. In the depôt, opposite the plaintiff's house, there was a boiler house containing two steam boilers fired by oil one of which had a metal chimney stack of 30ft, the top being 40ft above ground level, and the other, installed in 1949, a metal stack of 52ft. There were a number of pumps, originally steam, which were being and had mostly been, changed over to electricity. The Hammersmith Depôt had been occupied by the defendants since at least 1896; up to 1939 it had stocked and distributed all kinds of oils, petrol and kerosene, and there was a garage and a fleet of 30 vehicles, not all tankers; there was also an oil bottling plant. In 1936 a night shift was introduced, but only six tankers were in use at night. During the war the depôt dealt with fuel oil, gas oil, which included oil for diesel engines, and motor or lubricating oil only. Since the war, there had been great changes at the depôt. In 1955 a loading stand was brought into use. During the war there had been no night shift, but in 1956 a night shift, on a much greater scale than in the years 1936 to 1938, from 10 p.m. to 6 a.m. was introduced. In 1953 the throughput was 30,414,000 gallons and in 1957 it had risen to 56,607,000 gallons. In 1960 it was probably 70,000,000 gallons.

In 1957 and 1958 the Government was encouraging the use of fuel oil, the black and tarry residue from refineries, used in furnaces and boilerhouses. Fuel oil was in three grades, light, medium and heavy, and it was necessary to heat the medium grade to 120°F. and the heavy grade to 140°F., for the purpose of pumping it: those two grades were sometimes kept rather above those temperatures throughout the whole period of their transportation, including the time that the oil was at the depôt. After 1957 the defendants, who since 1948 had dealt with nothing but fuel oil and gas oil at the depôt, dealt solely with the three grades of fuel oil and the throughput continually increased. At about that time further alterations were made to the depôt. Adjustments were made to the feed of the boilers so that they were able, if required, to burn heavy oil, although it seemed that in fact they continued to burn light grade fuel oil as in the past. A ring main and thermostat control attached to it was installed which improved the

combustion of the boilers, which provided steam for heating the medium and heavy grades of oil.

It was about that time that local residents began to complain of smuts emitted from the defendants' chimneys, and there was a long history of such complaints. Noxious acid smuts were emitted from the defendants' chimneys and fell on laundry hung out to dry in the immediate vicinity of the chimneys and on the plaintiff's motor-car standing in the street. After the laundry had been washed, a brown stain appeared which on further washing was replaced by a hole, and the smuts also damaged the paintwork of the plaintiff's car standing outside his house in the street. In March, 1960, after a suggestion by the Medical Officer of Health, the defendants lagged the chimneys, but that did not stop the emission of acid smuts, although it might have made it less frequent. There was also, from time to time, a pungent oily smell of a nauseating character emitted from the depôt. Various efforts, only partially successful, had been made by the defendants to minimise the noise from the pumps, but so far as the plaintiff was concerned, the noise from the pumps was largely drowned by the noise from the boilerhouse opposite his house. That noise went on throughout the night, varying in intensity, at its peak rising to about 68 decibels, and causing his windows and door to vibrate. The entrance to the depôt was opposite, and the exit gate close to, the plaintiff's house. Since November, 1956, at intervals throughout every night, heavy oil tankers came and left the depôt. The tankers were very large vehicles, some weighing as much as 24 tons laden, and apart from the noise of the engines, rattled as they went. Sometimes three or four came and went at the same time and in times of high demand as many as fifteen came and went every night. When some of the tankers passed the noise outside the plaintiff's house reached 83 decibels.

Further facts appear from the judgment.

Leonard Caplan Q.C. and *N. C. Lloyd-Davies* for the plaintiff.
Gerald Gardiner Q.C. and *Michael Corley* for the defendants.

The following cases in addition to the cases referred to in the judgment were cited in argument: *West* v. *Bristol Tramways Co.*[1]; *Southwark and Vauxhall Water Co.* v. *Wandsworth Board of Works*[2]; *Salvin* v. *North Brancepeth Coal Co.*[3]; *Harper* v. *G. N. Haden & Sons*[4]; *Tinkler* v. *Aylesbury Dairy Co. Ltd.*[5]; *Chase* v. *London County Council and Leslie & Co. Ltd.*[6]; *Fabbri* v. *Norris*[7]; *Dwyer* v. *Mansfield*[8]; *Ex parte Lewis*[9]; *Cooke* v.

[1] [1908] 2 K.B. 14; 24 T.L.R. 478, C.A.
[2] [1898] 2 Ch. 603; 14 T.L.R. 576, C.A.
[3] (1874) 9 Ch.App. 705.
[4] [1933] Ch. 298, C.A.
[5] (1888) 5 T.L.R. 52.
[6] (1898) 14 T.L.R. 177.
[7] [1947] 1 All E.R. 315; 63 T.L.R. 34, D.C.
[8] [1946] K.B. 437; 62 T.L.R. 401; [1946] 2 All E.R. 247.
[9] (1888) 21 Q.B.D. 191; 4 T.L.R. 649, D.C.

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Forbes [10]; *Holland* v. *Worley* [11]; *Rapier* v. *London Tramways Co.*[12]; *West* v. *White* [13]; *Shotts Iron Co.* v. *Inglis* [14]; *Thompson* v. *Hill* [15]; *Emblen* v. *Myers* [16]; *Kelsen* v. *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.*[17]; and *Bainbridge* v. *Chertsey Urban Council.*[18]

Cur. adv. vult.

February 23. VEALE J. read the following judgment: The plaintiff in this action lives at 28, Rainville Road, a small terrace house in Fulham. The defendants are a very large and well-known company with many activities relating to oil. They operate an oil distributing depôt at Fulham. The plaintiff alleges that the defendants are guilty of nuisance in law in relation to their operations at that depôt.

Eleven days were occupied in hearing the evidence in the case and the argument of counsel. I have heard the evidence of 41 witnesses, 24 of whom were local residents; but in this action I am concerned with Thomas Henry Halsey who is the only plaintiff. This is a case, if ever there was one, of the little man asking for the protection of the law against the activities of a large and powerful neighbour. I hasten to say that there is not, and never has been, and could not be, any suggestion of deliberate annoyance. Indeed, the defendants have gone to great lengths in some directions to do what they can to minimise causes of annoyance. On the other hand, the plaintiff alleges that the conduct of the defendants in other directions entitles him to exemplary damages.

The claim is broadly put on two bases: pollution of the atmosphere and noise; but that is perhaps an over-simplification. The alleged pollution takes the form of smells (which do not cause any real injury to health unless one is allergic to such smells) and also of deposits consisting of acid smuts and oily drops which fall on washing put out to dry, on fabrics inside the house such as curtains, and on paintwork, including the paintwork of a motor-car. The alleged noise comprises noise from boilers, pumps and vehicles, the latter category embracing not only the noise of the vehicle itself in motion, but noises caused by the driver and workmen such as shouting, slamming doors and banging pipes.

It is important that the nature of the district should be borne in mind. I have seen a map of the district and also certain photographs. These are helpful, but not as helpful as an actual view. There is an undoubted strip on the river bank of industrial development. This strip is zoned for industrial purposes. There are various kinds of industrial activity carried on, and the defendants' premises are not the only place where oil is dealt with.

[10] (1867) L.R. 5 Eq. 166.
[11] (1884) 26 Ch.D. 578.
[12] [1893] 2 Ch. 588; 9 T.L.R. 468, C.A.
[13] (1877) 4 Ch.D. 631.
[14] (1882) 7 App.Cas. 518, H.L.
[15] (1870) L.R. 5 C.P. 564.
[16] (1860) 6 H. & N. 54.
[17] [1957] 2 Q.B. 334; [1957] 2 W.L.R. 1007; [1957] 2 All E.R. 343.
[18] (1914) 84 L.J.Ch. 626.

On the other hand, the houses in Rainville Road and in the streets adjacent to Rainville Road are in a residential area. They are not affected by traffic in Fulham Palace Road. They are what might be described as nice small terrace houses. This area is zoned for residential purposes.

In assessing the character of the neighbourhood, I have been assisted by what I have seen myself. On February 22, at 10 o'clock in the morning, I attended a formal view when I went inside the depôt as well as walking along certain of the neighbouring roads. I was accompanied by counsel representing both parties. In addition, on two occasions, entirely unaccompanied, I have walked along Wingrave Road and part of Rainville Road, namely, at approximately ten minutes to nine on Thursday, February 9, and at approximately half past eleven at night on Friday, February 10. This enabled me the better to see the character of the neighbourhood by day and by night. It also enabled me to understand the nature of the alleged smell and of the alleged noise, both of which are matters which are extremely difficult to put into words. The parties were made aware of these visits as soon as possible and of the times at which they were made. This is a course which has been taken in other cases, for instance by Lord Goddard C.J. in *Hare* v. *The British Transport Commission*,[1] and is in my view within the exception mentioned by Denning L.J. in *Goold* v. *Evans & Co.*[2] Nevertheless, I do not think it would be right to regard anything I saw, heard or smelt on those occasions as of itself evidence, and I decide this case on the evidence I have heard in the witness box and on the view in the presence of representatives of both parties, and disregard for this purpose the two unaccompanied visits, except in so far as those visits assisted me in coming to a conclusion as to the character of the neighbourhood and as to the nature of the alleged smell and noise. In no circumstances, of course, do such visits assist me as to the frequency or duration of an alleged nuisance. The official view on February 22, besides being helpful in other respects, confirmed the provisional conclusion to which I had come on two matters, namely, first, that it is quite possible for the defendants to conduct their operations without any or any appreciable smell at all, and secondly, that no nuisance by noise exists by day.

I have been referred to a very large number of authorities, but it seems to me that, save on one point to which I will refer later, there can be little dispute as to the law which has to be applied to the facts. As long ago as 1865, in *St. Helens Smelting Co.* v. *Tipping*,[3] Lord Westbury L.C. said[4]: "in matters of this "description it appears to me that it is a very desirable thing to "mark the difference between an action brought for a nuisance

[1] [1956] 1 W.L.R. 250; [1956] 1 All E.R. 578.
[2] [1951] 2 T.L.R. 1189, 1191, C.A.
[3] (1865) 11 H.L.C. 642.
[4] 11 H.L.C. 642, 650.

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"upon the ground that the alleged nuisance produces material "injury to the property, and an action brought for a nuisance on "the ground that the thing alleged to be a nuisance is productive "of sensible personal discomfort. With regard to the latter, "namely, the personal inconvenience and interference with one's "enjoyment, one's quiet, one's personal freedom, anything that "discomposes or injuriously affects the senses or the nerves, "whether that may or may not be denominated a nuisance, must "undoubtedly depend greatly on the circumstances of the place "where the thing complained of actually occurs. If a man lives "in a town, it is necessary that he should subject himself to the "consequences of those operations of trade which may be carried "on in his immediate locality, which are actually necessary for "trade and commerce, and also for the enjoyment of property, "and for the benefit of the inhabitants of the town and of the "public at large. If a man lives in a street where there are "numerous shops, and a shop is opened next door to him, which "is carried on in a fair and reasonable way, he has no ground for "complaint, because to himself individually there may arise "much discomfort from the trade carried on in that shop. But "when an occupation is carried on by one person in the neigh-"bourhood of another, and the result of that trade, or occupation, "or business, is a material injury to property, then there unques-"tionably arises a very different consideration. I think, my "Lords, that in a case of that description, the submission which "is required from persons living in society to that amount of "discomfort which may be necessary for the legitimate and free "exercise of the trade of their neighbours, would not apply to "circumstances the immediate result of which is sensible injury "to the value of the property."

In this case smell and noise come into one category, actual deposits in the way of harmful smuts and oily drops come into the other. I bear in mind the observations of Lord Loreburn L.C. in *Polsue and Alfieri Ltd.* v. *Rushmer*.[5] Lord Loreburn said[6]: "The law of nuisance undoubtedly is elastic, as was stated "by Lord Halsbury in the case of *Colls* v. *Home and Colonial* "*Stores*.[7] He said[8]: 'What may be called the uncertainty of "'the test may also be described as its elasticity. A dweller in "'towns cannot expect to have as pure air, as free from smoke, "'smell, and noise as if he lived in the country, and distant from "'other dwellings, and yet an excess of smoke, smell, and noise "'may give a cause of action, but in each of such cases it "'becomes a question of degree, and the question is in each "'case whether it amounts to a nuisance which will give a right "'of action.' This is a question of fact."

Later in his speech, Lord Loreburn said: "I agree with

[5] [1907] A.C. 121; 23 T.L.R. 362, H.L.

[6] [1907] A.C. 121, 123.

[7] [1904] A.C. 179; 20 T.L.R. 479, H.L.

[8] Ibid. 185.

" Cozens-Hardy L.J. when he says [9]: ' It does not follow that " ' because I live, say, in the manufacturing part of Sheffield I " ' cannot complain if a steam-hammer is introduced next door, " ' and so worked as to render sleep at night almost impossible, " ' although previously to its introduction my house was a reason- " ' ably comfortable abode, having regard to the local standard; " ' and it would be no answer to say that the steam-hammer " ' is of the most modern approved pattern and is reasonably " ' worked.' "

One useful approach to the considerations to be taken into account in a case of alleged nuisance by noise is to be found in the judgment of Luxmoore J. in *Vanderpant* v. *Mayfair Hotel Co.*[10] Luxmoore J. said [11]: " Apart from any right which may have " been acquired against him by contract, grant or prescription, " every person is entitled as against his neighbour to the comfort- " able and healthful enjoyment of the premises occupied by him, " and in deciding whether, in any particular case, his right has " been interfered with and a nuisance thereby caused, it is " necessary to determine whether the act complained of is an " inconvenience materially interfering with the ordinary physical " comfort of human existence, not merely according to elegant or " dainty modes and habits of living, but according to plain and " sober and simple notions obtaining among English people: see " *Walter* v. *Selfe* [12] and the remarks of Knight Bruce V.-C. It " is also necessary to take into account the circumstances and " character of the locality in which the complainant is living. " The making or causing of such a noise as materially interferes " with the comfort of a neighbour when judged by the standard " to which I have just referred, constitutes an actionable nuisance, " and it is no answer to say that the best known means have " been taken to reduce or prevent the noise complained of, or " that the cause of the nuisance is the exercise of a business or " trade in a reasonable and proper manner. Again, the question " of the existence of a nuisance is one of degree and depends on " the circumstances of the case."

So far as the present case is concerned, liability for nuisance by harmful deposits could be established by proving damage by the deposits to the property in question, provided of course that the injury was not merely trivial. Negligence is not an ingredient of the cause of action, and the character of the neighbourhood is not a matter to be taken into consideration. On the other hand, nuisance by smell or noise is something to which no absolute standard can be applied. It is always a question of degree whether the interference with comfort or convenience is sufficiently serious to constitute a nuisance. The character of the neighbourhood is very relevant and all the relevant circumstances have to be taken into account. What might be a nuisance in one

[9] [1906] 1 Ch. 234, 250, C.A.
[10] [1930] 1 Ch. 138.
[11] Ibid. 138, 165, 166.
[12] (1851) 4 De G. & S. 315, 322.

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area is by no means necessarily so in another. In an urban area, everyone must put up with a certain amount of discomfort and annoyance from the activities of neighbours, and the law must strike a fair and reasonable balance between the right of the plaintiff on the one hand to the undisturbed enjoyment of his property, and the right of the defendant on the other hand to use his property for his own lawful enjoyment. That is how I approach this case.

It may be possible in some cases to prove that noise or smell have in fact diminished the value of the plaintiff's property in the market. That consideration does not arise in this case, and no evidence has been called in regard to it. The standard in respect of discomfort and inconvenience from noise and smell which I have to apply is that of the ordinary reasonable and responsible person who lives in this particular area of Fulham. This is not necessarily the same as the standard which the plaintiff chooses to set up for himself. It is the standard of the ordinary man, and the ordinary man, who may well like peace and quiet, will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry, if he chooses to live alongside a factory.

Nuisance is commonly regarded as a tort in respect of land. In *Read* v. *J. Lyons & Co. Ltd.*,[13] Lord Simonds said[14]: "he "alone has a lawful claim who has suffered an invasion of some "proprietary or other interest in land." In this connection the allegation of damage to the plaintiff's motor-car calls for special consideration, since the allegation is that when the offending smuts from the defendants' chimney alighted upon it, the motor-car was not actually upon land in the plaintiff's occupation, but was on the public highway outside his door. Whether or not a claim in respect of private nuisance lies for damage to the motor-car in these circumstances, in my judgment such damage is covered by the doctrine in *Rylands* v. *Fletcher*.[15] If it be the fact that harmful sulphuric acid or harmful sulphate escaped from the defendants' premises and damaged the motor-car in the public highway, I am bound by the decision of the Court of Appeal in *Charing Cross Electricity Supply Co.* v. *Hydraulics Power Co.*[16] and *Miles* v. *Forest Rock Granite Co.* (*Leicestershire*) *Ltd.*,[17] in neither of which cases was the plaintiff in occupation of land. This doctrine of *Rylands* v. *Fletcher*,[18] whether or not it is strictly based on nuisance, applies to the sulphuric acid or sulphate in smuts or oily drops wherever they alight: on washing hung out to dry, as well as on to a motor-car in the street. In my judgment the plaintiff is also right in saying that if the motor-car was damaged in this way while on the public highway, it is a

[13] [1947] A.C. 156; 62 T.L.R. 646; [1946] 2 All E.R. 471, H.L.
[14] [1947] A.C. 156, 183.
[15] (1868) L.R. 3 H.L. 330.
[16] [1914] 3 K.B. 772; 30 T.L.R. 441, C.A.
[17] (1918) 34 T.L.R. 500, C.A.
[18] L.R. 3 H.L. 330.

public nuisance in respect of which he has suffered special damage. This view accords with the judgment of Oliver J. on very different facts in *Holling* v. *Yorkshire Traction Co. Ltd.*[19] I have no evidence as to the period during which the plaintiff's motor-car was outside his door; but even if the plaintiff was using the road as a place to garage his motor-car, and he was not entitled to do so, I do not regard those facts as disentitling him to claim damages in respect of injury to the motor-car.

[His Lordship considered the evidence, found the facts summarised above and continued:] I have no doubt at all that the defendants have been the cause of the emission into the atmosphere of noxious smuts which have caused damage to the plaintiff's washing and to his motor-car. The smuts are noxious acid smuts, and it does not matter whether they contain sulphate or sulphuric acid. For this damage the defendants in my judgment are liable, both as for a nuisance and under *Rylands* v. *Fletcher*.[20] It is not necessary for the plaintiff to prove or for me to decide precisely why this has happened. It is necessary for the plaintiff to prove the fact of it happening, and this I am satisfied he has done.

Owing to what was said to be a misunderstanding, the plaintiff's experts were refused access to the depôt. The reason given for this refusal was that only tests outside the depôt were relevant. In these circumstances I regard it as remarkable that a table of tests in the depôt was put in by the defendants. Further, the refusal was dated November 23, 1960, a few days after tests were in fact carried out in the depôt. Mr. Gardiner for the defendants agreed that this refusal was unfortunate. The defendants were, of course, under no obligation to allow any tests or inspection by the plaintiff; but I regard the reason given for the refusal as another unsatisfactory feature of this case. Be that as it may, the changes made at the defendants' depôt and the increasing throughput may be or may not be merely a coincidence. This nuisance to the plaintiff may, partly at all events, be due to the shortcomings of one of the chimney stacks. I do not know and I do not have to decide. The fact is that noxious smuts have come from the defendants' depôt and have done damage.

I am not impressed by any argument based on the fact that noxious smuts are to be found elsewhere and on many urban buildings. In the vast majority of such places, although they may be unsightly, they do no damage or no appreciable damage, and their origin cannot be traced. In the present case, acid smuts have done damage and their origin has been traced. There is not and cannot be any doubt that the emission of acid smuts is a well-known problem. As is stated in the 31st Report of the Department of Scientific and Industrial Research on the Investigation of Atmospheric Pollution (1958), p. 23, this is— and I quote— "a form of pollution which is particularly troublesome in its "effect." One witness regarded it as being a particularly well

[19] [1948] 2 All E.R. 662. [20] L.R. 3 H.L. 330.

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known trouble in the case of metal chimneys. Wherever fuel, whether coal or oil, is burnt, sulphur dioxide is discharged into the air. This does not depend on the efficiency of the combustion. The amount of sulphur dioxide so discharged depends on the amount of sulphur in the fuel. Although fuel oil frequently contains between 3 per cent. and 4 per cent. of sulphur, I was told that 90 per cent. of the oil burnt by the defendants comes from Thames Haven as opposed to 10 per cent. from Purfleet. The sulphur content of Thames Haven oil is 2·2 per cent. on the average, which is low. But this case is not a complaint of damage by sulphur dioxide; it is a complaint of damage by sulphate or H_2SO_4. What may happen is that the sulphur dioxide discharged up the chimney may combine with water vapour, as may very small quantities of sulphur trioxide, and it is then that sulphate or SO_4 is formed. This condenses and when in contact with particles of carbon, acid smuts may also be formed, and it is for this reason that lagging of the chimney may be important, since thereby this process is stayed and the chimney temperature is higher and above what has been called the acid dew-point.

The defendants' chimneys were lagged approximately two months after the complaint in December, 1959, by the Medical Officer of Health; that is, in approximately March, 1960. I have no details of what was done. It has certainly not stopped the emission of acid smuts, though it may have made them less frequent. [His Lordship referred to the evidence and continued:] I find as a fact that lagging has not cured the emission of acid smuts, though they may now be less frequent. There is no defence to this action so far as noxious smuts are concerned.

I find the question of oily droplets more difficult to decide. Not unnaturally, because they are not visible to the naked eye, the plaintiff cannot say he has seen them fall. No claim for damage to his curtains is included in the statement of claim. On balance, after some considerable hesitation, I do not think that I can say that the plaintiff's laundry is in real and constant danger from oily droplets as opposed to acid smuts emitted from the defendants' depôt. I have no doubt that there are occasions when these oily droplets do not disperse into the atmosphere as completely as the defendants' expert witness says they do, and I am not prepared to dismiss, as I am asked to do, the tests of the plaintiff's expert witnesses as being worthless. Nevertheless, I find myself in doubt on this one point as to the frequency and extent of oily droplets as opposed to acid smuts, and I limit my finding that the defendants are guilty of nuisance causing damage to the plaintiff to the emission of acid smuts.

I turn now to the question of smell. At the time of my official view of the locality yesterday, on February 22, there was no appreciable smell at all, either inside or outside the defendants' depôt. But a large body of witnesses have given evidence of smell, and I have no doubt but that smells escape from the defendants' depôt. That is not surprising of itself, because the depôt

is, after all, an oil depôt. The defendants contend first that there is no smell escaping; alternatively, that if any smell escapes, it does not amount to a nuisance; alternatively, that if there is any smell, there is a prescriptive right to cause it.

Over a period of much more than 20 years, the defendants have dealt with different kinds of oil at the depôt. I think from time to time, over the years, smells of oil have escaped. No doubt the frequency and intensity of these smells has varied, but more than one witness has told me that there has always been some sort of smell. What I might call the general background of occasional oily smells is something in respect of which, in my judgment, the plaintiff is not entitled to complain. It is not, however, of this type of smell that the plaintiff does complain in this action. On occasions, he says, the smell is much worse. "You have to be there to realise it," he said, "it really makes "you feel sick." The further and better particulars to the statement of claim refer to the smell which arises from heating oil and also use the words, "a pungent rather nauseating smell of an oily "character." It is of this that the plaintiff complains in this action.

It is often very difficult to put into words the nature of a smell. I have had various descriptions given to me. The plaintiff ascribed it to hot oil. His wife said it was an awful smell of burning oil, a sickly smell which made her feel sick in the stomach. "Absolutely horrible," "absolutely shocking," "nauseating," "definitely vile," are only some of the epithets which have been used by the witnesses. "Nauseating" was a word used by others.

I have carefully considered the evidence of the different witnesses on this point. I find as a fact that over and above the occasional smell of oil which has been present from time to time for many years, during recent years and growing over the years in frequency and intensity there has been emitted from the defendants' depôt a particularly pungent smell, which goes far beyond any triviality, far beyond any background smell of oil, and it is a serious nuisance to local residents, including the plaintiff. I have no doubt whatever but that this smell comes from the defendants' depôt. This smell is not only strictly local to the defendants' depôt, but I accept the evidence of the witnesses who have tracked it down to the depôt. It is not necessary for the plaintiff to prove or for me to decide how and why it is caused; but it is significant that the defendants have in recent years turned over their total through-put to fuel oil. Fuel oil in its medium and heavy grades is heated, and the more you heat such oil the more it smells. I bear in mind that those working in the depôt itself say they are not conscious of any smell except when, for instance, a cover on a tank is lifted. Mr. Roast, one of the defendants' witnesses, said that if an extremely sensitive person stood at the side of an oil tanker, he might smell something. It may be that those

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who work at the depôt or for the defendants' company are used to oily smells and do not notice anything. The plaintiff does not work in the depôt, and I am quite satisfied that there is on occasion a smell escaping from the depôt, which is far more than what would affect a sensitive person. There is something which is a nauseating smell, and this is so frequent as to be an actionable nuisance.

It is true that neither the plaintiff nor his wife before the action made a specific complaint of smell; but they had in my judgment many matters of which they were entitled to complain. It is sufficient for me to say that I accept their evidence. The plaintiff did in fact sign the petition which complained of contaminated atmosphere. Whether or not this smell amounts to a nuisance depends of course upon the whole of the circumstances, including the character of the neighbourhood and the nature, intensity and frequency of the smell. I hold that this smell, of which the witnesses have given evidence, and which may or may not be due to heated oil, does amount to a nuisance, and further that any defence of prescription in respect of it fails because the frequency and intensity of it which constitute the nuisance have not continued for anything approaching 20 years.

I approach this question with caution, as Mr. Gardiner asked me to do, since there has been no injury to health, but injury to health is not a necessary ingredient in the cause of action for nuisance by smell, and authority for that proposition is to be found in the judgment of Lord Romilly M.R. in *Crump* v. *Lambert*.[21] I reject the contention that the evidence for the plaintiff has been exaggerated by people who feel strongly against the defendants on other grounds. I accept the evidence for the plaintiff, and it is right to add that the description by the witnesses of the nature of the smell was confirmed by my own experience on the night of February 10. On that night, at half past eleven, there was in Rainville Road and Wingrave Road, clearly emanating from the defendants' depôt, a nasty smell, which could properly be described, as the plaintiff has described it in his further and better particulars, namely, "a pungent, "rather nauseating smell of an oily character." The defendants in my judgment are liable for nuisance by smell.

I turn now to the question of nuisance by noise. This question relates to two distinct matters: the noise of the plant and the noise of the vehicles, the latter complaint including the noise of the vehicles themselves and the attendant noises made by drivers shouting and slamming doors and banging pipes. It is in connection with noise that, in my judgment, the operations of the defendants at night are particularly important. After all, one of the main objects of living in a house or flat is to have a room with a bed in it where one can sleep at night. Night is the time when the ordinary man takes his rest. No real complaint is made by

[21] (1867) 3 Eq. 409, 412.

the plaintiff so far as the daytime is concerned; but he complains bitterly of the noise at night.

In dealing with the question of noise, I disregard entirely complaints of noise on new installations, such as pile driving. Although no doubt they are annoying to local residents, such noise is of a temporary character.

So far as the plant is concerned, there are really two distinct noises: that from the boilerhouse and that from the pumps. The latter are being changed from steam to electricity, and I think it is the fact that there are two noises, which has made the descriptions given by the witnesses vary. It is the noise from the boilerhouse which is of main importance to the plaintiff, because he lives opposite to it. The plaintiff says it goes on through the night, at some times being heavier than others, but when it comes to its peak his windows and doors " vibrate terrifically." He cannot sleep through it. Mrs. Edy, of 29, Rainville Road, puts a mattress against her door to stop the vibration. The defendants have very recently done something to make things better by soundproofing the walls of the boilerhouse; but it nevertheless remains. Mrs. Carter at 19 Rainville Road says she gets accustomed to it when it is quiet, but when it is noisy it wakes her up.

I accept the evidence of the plaintiff as to noise and I hold it is a serious nuisance, going far beyond a triviality, and one in respect of which the plaintiff is entitled to complain. Because of the noise made by the boilers, I think that the plaintiff is not so much, certainly since the throbbing of the steam pumps ceased, troubled by the noise of the electric pumps. But that is because the noise of the pumps is largely drowned by the noise of the boilers, and even if the noise of the boilers stopped, it might be that the plaintiff could justifiably complain of the noise of the pumps.

I have been assisted on this aspect of the case by the scientific evidence. Scientific evidence is helpful in that it may tend to confirm or disprove the evidence of other witnesses. The scale of decibels from nought to 120 can be divided into colloquial descriptions of noise by the use of words: faint, moderate, loud, and so on. Between 40 and 60 decibels the noise is moderate, and between 60 and 80 it is loud. Between 80 and 100 it is very loud, and from 100 to 120 it is deafening. On November 29, 1960, readings were taken on a Dawmeter outside the plaintiff's house. Six tests between 9 and 11 o'clock in the evening showed readings of 64 to 68 decibels, all rising to about 68 as a peak. There was, therefore, a constant " loud " noise outside the plaintiff's house. When a tanker passed the reading was 83 decibels, though at the moment I am concerned with the plant and in particular the boilers.

On January 25, 1961, between 6 and 8 o'clock in the evening inside the house, with the window open three inches, further tests showed that the noise inside the house was substantially

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above the maximum permissible intrusive noise, which is the level at which a noise would interfere with ordinary conversation. The noise outside the house was again found to be 68 decibels. This is something which happens, no doubt with variations in intensity, not just now and again, but every night and all night, and I have no doubt at all but that it is an actionable nuisance. I think it would disturb an ordinary man. [His Lordship considered the evidence, found that the noise of the boilers was not the same at all times, accepted the peak figure of 68 decibels, and continued:] I bear in mind the observations of Lord Selborne L.C. in *Gaunt* v. *Fynney*[22] where he deals with the difficulty of proof of nuisance by noise. But bearing in mind, I hope, all the relevant considerations, in my judgment the defendants are liable in nuisance for the noise of their plant, though only at night. Applying and adapting the well-known words of Knight-Bruce V.-C. in *Walter* v. *Selfe*,[23] this inconvenience is, as I find to be the fact, more than fanciful, more than one of mere delicacy or fastidiousness. It is an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes of living, but according to plain and sober and simple notions among ordinary people living in this part of Fulham.

But the question of noise does not stop there. At intervals through the night tankers leave and come to the defendants' depôt. It has been urged upon me that the public highway is for the use of all, and that is true. But it must be borne in mind that these tankers are not ordinary motor-cars; they are not ordinary lorries which make more noise than a motor-car; they are enormous vehicles, some when laden weighing 24 tons, which, apart from the loud noise of the engine, may rattle as they go, particularly when empty and especially if they hit something in the road like a grating. They all enter the depôt almost opposite the plaintiff's house, which involves a sharp turn in order to do so, often changing down into low gear at the same time. They leave by the exit gate which is also close to the plaintiff's house. The noise of a tanker was 83 decibels—in the "very loud" category.

The plaintiff complains of this noise, especially when three or four vehicles arrive or leave at a time. This again is not something which happens at odd times. It now happens every night, though not always in convoy, and has happened since the night shift was introduced in November, 1956. Previous night shift work before the war was, in my view, small. In 1957 the through-put was 56,607,000 gallons. In 1960 the through-put was probably 70 million gallons. There has been a corresponding increase in night tanker traffic, the deliveries having been approximately 25 per cent. of the total on night shifts in 1959 and 1960.

[22] (1872) 8 Ch.App.Cas. 8, 11, 12. [23] 4 De G. & S. 315, 322.

The defendants operate 27 tankers of their own, and in winter hire as many as 33, making a total of 60. Twenty-five per cent. of 60 is 15. I appreciate that tankers do not all have the same capacity; but this means that almost every night very roughly 15 vehicles will both leave and return. In summer it is less; but in times of high winter demand the plaintiff's house is very much within range of some 15 vehicles both arriving and leaving at different times during the night, and, as the defendants' district manager truly stated in the correspondence, "Any noise "always sounds at its greatest at night."

It is said by the defendants that since the public highway is for the use of everyone, the plaintiff cannot complain if all the defendants do is to make use of their right to use the public highway. I agree, if that is all that the defendants have done. If a person makes an unreasonable use of the public highway, for instance, by parking stationary vehicles on it, a member of the public who suffers special damage has a cause of action against him for public nuisance. Similarly, in my view, if a person makes an unreasonable use of the public highway by concentrating in one small area of the highway vehicles in motion and a member of the public suffers special damage, he is equally entitled to complain, although in most cases concentration of moving as opposed to stationary vehicles will be more likely to be reasonable. This is a question of reasonable user, which was the test applied by Neville J. in *Attorney-General* v. *W. H. Smith & Son*,[24] and the same question of reasonableness was stressed by Lord Cranworth L.C. in *Attorney-General* v. *Sheffield Gas Consumers Company*.[25]

In the particular circumstances of this case I do not think it matters very much whether one regards the alleged nuisance by vehicular noise as a private or a public nuisance. The history of the cause of action for private nuisance is set out by Lord Wright in *Sedleigh-Denfield* v. *O'Callaghan*.[26] The ground of responsibility is the possession and control of the land from which the nuisance proceeds, though Lord Wright refers to[27] "possibly certain anomalous exceptions." Public nuisance on the other hand, as Denning L.J. said in the Court of Appeal in *Southport Corporation* v. *Esso Petroleum Co.*[28] can cover a multitude of sins, great and small. In this latter case Devlin J., whose judgment is reported as part of the report of the proceedings in the House of Lords, said[29]: "It is clear that to give a cause of action "for private nuisance the matter complained of must affect the "property of the plaintiffs. But I know of no principle that

[24] (1910) 26 T.L.R. 482.

[25] (1853) 3 De G.M. & G. 304, 339, 340.

[26] [1940] A.C. 880, 902, 905; 56 T.L.R. 887; [1940] 3 All E.R. 349, H.L.

[27] [1940] A.C. 880, 903.

[28] [1954] 2 Q.B. 182, 196; [1954] 3 W.L.R. 200; [1954] 2 All E.R. 561, C.A.

[29] [1956] A.C. 218, 221, 224; [1953] 3 W.L.R. 773; [1953] 2 All E.R. 1204.

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"it must emanate from land belonging to the defendant. Mr. "Nelson cited *Cunard* v. *Antifyre Ltd.*[30] and I think that the "statement of the principle is put there as clearly and concisely "as it can be. Talbot J. said[31]: 'Private nuisances, at least "'in the vast majority of cases, are interferences for a sub-"'stantial length of time by owners or occupiers of property "'with the use or enjoyment of neighbouring property; and it "'would manifestly be inconvenient and unreasonable if the "'right to complain of such interference extended beyond the "'occupier, or (in the case of injury to the reversion) the "'owner, of such neighbouring property.' It is clear from that "statement of principle that the nuisance must affect the "property of the plaintiff; and it is true that in the vast majority "of cases it is likely to emanate from the neighbouring property "of the defendant. But no statement of principle has been cited "to me to show that the latter is a prerequisite to a cause of "action; and I can see no reason why, if land or water belonging "to the public, or waste land, is misused by the defendant, or "if the defendant as a licensee or trespasser misuses someone "else's land, he should not be liable for the creation of a nuisance "in the same way as an adjoining occupier would be."

Denning L.J.,[32] on the facts of that particular case, thought that there was no private nuisance because the offending oil had come from a ship at sea, and with that Lord Radcliffe[33] agreed.

In the present case the offending noise is partly in the depôt before and as the vehicles emerge into the highway, and as they re-enter, and partly in the short stretch of highway immediately outside the entrance and exist to the depôt, which is also immediately outside the plaintiff's house. There is no element of obstruction of or danger on or to the highway as such. The noise is an interference with the enjoyment by the plaintiff of his house. It is not an interference with the rights of the plaintiff or his visitors as members of the public to use the highway. The fact is that the defendants concentrate at their premises a number of particularly heavy and noisy vehicles. They send them out at night, making a very loud noise as they go, and they direct them to return, and the vehicles make a further very loud noise as they come back.

The noise outside and inside the plaintiff's house is, in my judgment, attributable to the defendants' mode of operation at their depôt, and the principles of law to be applied seem to me to be the same as those in respect of alleged nuisance by noise of the plant itself. Applying those principles which involve consideration of the whole of the relevant circumstances, I hold that the defendants are also guilty of nuisance in this respect, but

[30] [1933] 1 K.B. 551; 49 T.L.R. 184, D.C.

[31] Ibid. 551, 557.

[32] [1954] 2 Q.B. 182, 196, C.A.

[33] [1956] A.C. 218, 242; [1956] 2 W.L.R. 81; [1955] 3 All E.R. 864, H.L. (sub nom. *Esso Petroleum Co. Ltd.* v. *Southport Corporation*).

only during the night shift. I do not think that any proper comparison can be made with noisy undertakings like railways, which are carried on under statutory authority, nor, in my judgment, can Rainville Road, Fulham, properly be compared with the Great North Road. It is said that a decision in the plaintiff's favour on this point involves making new law. I do not think so. I do not regard motor-vehicles, even the defendants' tankers, as dangerous within *Rylands* v. *Fletcher*[34]; but I do not really think that there is anything new in the circumstances of this case, if the defendants are held liable for nuisance in respect of this particular noise. Part of the offending noise, indeed, comes from inside the depôt itself, as the vehicles enter or leave. The rest of it is directly related to the operation of the depôt. In *Bartlett* v. *Marshall*[35] the nuisance of noise, as in the present case, was committed at all events largely on the public highway. In *Vanderpant* v. *Mayfair Hotel Co.*,[36] Luxmoore J. granted an injunction in respect of nuisance by noise committed by the staff of the defendants' hotel as they arrived at and left the hotel, and by the delivery of goods from the street to the hotel premises. There is a similar case in Canada, namely, *Anger* v. *Northern Construction Co.*[37]

If these cases are more properly to be regarded as instances of public nuisance, I do not think, as already indicated, that the result is any different. If I treat this part of the case as public nuisance, as Mr. Caplan argued in the alternative, I ask myself: Is it reasonable to concentrate outside the plaintiff's house during the night, not on odd occasions, but every night, and not once a night, but at irregular intervals during the night and early hours of the morning, particularly noisy vehicles, sometimes in convoy, the noise of one of which is approximately 83 decibels? I bear in mind the importance of the defendants' business. I also, I hope, bear in mind all the circumstances, including the circumstance that a man is entitled to sleep during the night in his own house. I have no hesitation in saying that the plaintiff has satisfied me that the defendants' user of their tankers in all the circumstances is unreasonable. On this view they are liable as for a public nuisance, since it is conceded that noise can be special damage if it affects the plaintiff more than the ordinary member of the public. On this alternative view also the defendants are liable, since I find that the plaintiff has indeed suffered a special damage which is substantial and not transient or fleeting.

The joint effect of the noise of the tankers and of the plant has been, in my judgment, to create a very serious interference with the enjoyment by the plaintiff of his occupation of 28, Rainville Road. Some noise has in the past been made by the activities of the drivers as distinct from the noise of the vehicles

[34] L.R. 3 H.L. 330.
[35] (1896) 44 W.R. 25.
[36] [1930] 1 Ch. 138.
[37] [1938] 4 D.L.R. 738.

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themselves. The defendants have been at great pains to keep this noise to the minimum, and in my judgment, it is the vehicles rather than the drivers which are the trouble. I think a noise made by drivers and workmen might easily of itself become a nuisance if they are not continually kept under strict control. I emphasise that the plaintiff lives almost opposite to the entrance to the depôt. By saying that, in my view, the degree of noise of the tankers constitutes in his case a nuisance, I do not want it to be thought that I should necessarily come to the same conclusion in so far as residents in other streets are concerned. But there is more than one household where the occupants have to sleep in a room at the back instead of at the front, and also have to keep their windows shut at night in order to escape so far as possible from the noise. I understand why Mrs. Carter at 19, Rainville Road, said that when she went away on holiday, she had to get used at night to the quiet.

In my judgment, therefore, the defendants are liable to the plaintiff in respect of pollution, that is both smuts as well as smell, and also in respect of noise, that is both from the plant and from the tankers. I do not think that the senior executives of the defendants can have realised how serious an interference since 1956 their activities have been to the plaintiff's enjoyment of his property. One of the depôt's supervisors would not live in the plaintiff's house if he were paid, though he may have been expressing that view solely because of the smuts.

It is pleaded in the defence that any nuisance has been legalised by prescription. There is no substance in that contention, except in so far as I have already dealt with it in relation to smell. The nuisances for which I hold the defendants liable have not continued for anything approaching 20 years, and there have been persistent complaints. No question of prescription can arise until a nuisance is first committed. The nuisances of which the defendants are guilty are all of recent origin.

The plaintiff is therefore entitled to damages. For his damaged linen he claims £5. This is a modest claim and he is entitled to it. He is also entitled, in my view, to damages in respect of his motor-car, but I do not think the alleged loss of value due to the damaged paintwork is proved. I think a new coat of paint would have maintained the value of the motor-car. I have evidence as to what amount this would have been at the time the damage was sustained, and it might amount to £50. On this head I award £30. I do not think the perfect result envisaged for that price would be necessary.

Since the end of 1956 the plaintiff has suffered very considerable discomfort. It is something which cannot easily be assessed in terms of money. I am asked by Mr. Caplan to award exemplary damages in view of the conduct of the defendants. I agree that there are matters in respect of which the defendants' conduct does not seem to have been satisfactory; but, in my

judgment, this is clearly not a case for exemplary damages. Although the plaintiff fainted twice in the witness box there is no evidence before me of any injury to his health. I must do the best I can to award to him a sum in respect of the nuisances by noise and smell which have been inflicted on him over the last few years. On this head, which is limited to noise and smell over the past few years, I award £200. The plaintiff is therefore entitled to £235 damages.

So far as the future is concerned, I have considered the authorities to which I have been referred by both parties. I will not burden this judgment by reciting them. An injunction is a discretionary remedy, but the discretion should be exercised in accordance with accepted principles. One, but only one, of those principles is that the court is not a tribunal for legalising wrongful acts by an award of damages. I am fully conscious of the importance of the defendants' business. The question of remedy by injunction must be considered separately in respect of noise, smell and smuts.

As to noise, I have no doubt what my decision should be. I bear in mind the effect on the defendants of closing the night shift. Indeed, there was evidence quantifying the possible and probable loss of profit. I am asked to bear in mind the effect on the customers of the defendants, but the figures of estimated loss of profit are on the basis of the defendants making alternative arrangements to keep their customers supplied. I bear in mind that the defendants have in some respects done what they can to minimise the noise. Nevertheless, the plaintiff is entitled, in my judgment, to an injunction, but I limit it to the hours of the present night shift, namely, 10 o'clock at night to 6 o'clock in the morning. There will be an injunction restraining the defendants, by themselves, their servants or agents from so operating their plant at the depôt, and from so driving their vehicles as, by reason of noise, to cause a nuisance to the plaintiff between the hours of 10 p.m. and 6 a.m. I am prepared to suspend the operation of this order for a reasonable time so that the defendants may make appropriate arrangements.

As to smell, again I think that the plaintiff is entitled to an injunction. I have felt some difficulty on this aspect of the case because I do not think that the occasional slight smell of oil per se is a matter which can be complained about as opposed to what is described as the pungent, rather nauseating smell. It is difficult to find precise words which will cover my findings on the facts, and I should welcome the assistance of counsel. Subject to what they may say, I propose to grant an injunction in general terms restraining the defendants by themselves, their servants or agents, from so conducting their operations at the depôt as, by reason of smell, to cause a nuisance to the plaintiff. In this case there is no limitation as to the time of day or night, but again,

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I am prepared to suspend the operation of my order for a reasonable time if the defendants desire to make alterations or adjustments.

As to smuts, despite the argument of Mr. Caplan, based on *Wood* v. *Conway Corporation*,[38] I do not propose either to grant an injunction or to award damages for the future. If future damage is caused by the defendants to the plaintiff, he will be able to bring a fresh action. I take this course primarily because the whole boiler house and the offending chimneys are to be pulled down. A new boiler house in a different position will be erected, and the chimney will be of brick and 65 feet high. It is to be hoped that the construction and operation of the new boiler house will be such that this particular nuisance will be remedied. If it is not, and this nuisance continues as it was, I have little doubt but that an injunction could be obtained to restrain it. But I do not propose to make such an order in this action. I regard this aspect of the case as being within the four conditions mentioned by A. L. Smith L.J. in *Shelfer* v. *City of London Electric Lighting Co.*[39] It would be possible to award damages for the future, but I decline to do so. In the short time this boiler house has to live, there may be no damage to the plaintiff, although there may be smuts elsewhere. I desire to make it clear that I only take this course because of the evidence given by the defendants that the new boiler house will be in operation by June, 1961. I require an undertaking from the defendants that that will be so by June 30 next. They will have liberty to apply to cover the case of unforeseen circumstances arising; but I do not think in this respect they have hitherto shown any real sense of urgency. Such sense of urgency they must now show. In the absence of a suitable undertaking I shall grant an injunction.[40] In the result there will be judgment for the plaintiff for £235 and injunctions as indicated.

Judgment for the plaintiff with costs.
Injunctions suspended for six weeks.

Solicitors: *Tatton, Gaskell & Tatton; Piesse & Sons.*

J. F. L.

[38] [1914] 2 Ch. 47, C.A.
[39] [1895] 1 Ch. 287, 322, 323; 11 T.L.R. 137, C.A.
[40] An undertaking was given.