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Recovery of Damages for Private Nuisance

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These few cases represent substantially all of the law on future advances on mortgages in Washington. True, there are not many cases, but the few that are on the record display a consistent handling of the problem in line with what seems to be the majority holding on all phases of the problem. The only question which is as yet unsettled in this jurisdiction is the one the court refused to answer in the *Elmendorf* case. The question is, "What effect will the recording of a junior encumbrance have upon the rights of the mortgagee who advances funds at his option subsequent to the recording of the junior encumbrance, but without actual knowledge of the subsequent encumbrance?" This question was passed over in the *Elmendorf* case because, knowledge being admitted, the court did not have to answer it. But when the occasion does arise, it is the writer's guess that the Washington court will follow the majority, as it has in all the other phases of the problem of future advances, and declare that unless the mortgagee making the voluntary advances has actual notice of the subsequent lien, he will be protected as to those voluntary advances.

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RECOVERY OF DAMAGES FOR PRIVATE NUISANCE

With a reversal of position amounting almost to defiance of precedent, the majority opinion in *Powell v. Superior Portland Cement, Inc.*[1] denies damages for injury caused to respondent's premises by dust from appellant's plant at Concrete, Washington. The plant, in operation since 1908, is the main industry of the town, at least half of its residents being economically dependent upon the plant. Respondent, who had resided in Concrete since 1907, in 1934 purchased a home within three blocks of the cement plant, and lived therein until August 1938, when he left Concrete. The home, partially furnished, has been rented since 1938.

The respondent brought suit in which he asked for an injunction against the plant and damages for injury to the property and for personal discomfort caused by the dust blown from the appellant's kilns. Injunctive relief was properly[2] denied by trial court, which, however, awarded five hundred dollars for damages sustained. On appeal, the Supreme Court unanimously upheld that part of the decision denying the injunction, but it denied[3] recovery for damages, as indicated above, and reversed the trial court's decision to that extent.

Essentially, the problem, as viewed by the majority, is whether or not an individual buying property in an industrial community can col-

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[1] 115 Wash. Dec. 12, 129 P. (2d) 536 (1942).

[2] Bartel v. Ridgefield Lumber Co., 131 Wash. 183, 229 Pac. 306, 37 A. L. R. 683 (1924); Mattson v. Defiance Lumber Co., 154 Wash. 503, 282 Pac. 848 (1929); see note, 5 WASH. L. REV. 76.

[3] There is one dissenting opinion and three judges concurred in two concurring opinions.

lect damages for interference with the *ordinary* and *reasonable enjoyment* of his home caused by dust which is unavoidably created in the manufacturing process. The majority takes the position that the dust did not cause material damage to the property but considered it to be merely annoying and unpleasant. As a matter of fact, there was some dispute as to the extent and character of the injury sustained, the trial court finding that the air-borne substance "decreased the life of the paint. It damages the roof and shortens the life of the roof." This item would clearly seem to warrant a finding of material injury to the property, but the language of the majority indicates that they did not find such injury resulting from the dust deposited on the respondent's property. It may be that the emphasis on the evidence introduced to show that the dust discolored the shrubbery, interferred with the washing and drying of clothes and generally increased the burden of housekeeping led the court to consider that type of injury rather than material injury. No showing of negligence was made; in fact it was shown that the cement company had installed the best equipment and had eliminated the nuisance as much as possible. This being so, it is to be concluded that the dust is an inescapable burden giving rise to the problem as to whether the nuisance-creating industry or the private home owner must bear the cost.

Though the cases awarding damages for actual destruction are not definitive under the facts of the main case, they represent the only type of factual situation which reached the Supreme Court for many years, and, hence, are worthy of mention here. One of the earliest cases on the question of recovery against an industry for a nuisance was *Sterrett v. Northport Mining and Smelting Company*,[4] in which damages were awarded for destruction of plaintiff's property by sulphur fumes created in the smelting process. The policy formulated in that case and which has been invoked in most of the subsequent cases was stated as follows:

> ". . . The smelter is not operated in any manner different from that in which smelters are usually operated. The business carried on in a lawful business. The fumes are poisonous and destructive. No way to overcome the difficulties has ever been found.
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> ". . . It is lawful to operate a smelter. *No one has a right, however, to pursue a lawful business if thereby he injures his neighbor, without compensating such for the damages actually sustained.*" (Italics added.)

The rule allowing recovery against an industry was extended somewhat in *Park v. Northport Smelting and Refining Company*.[5] There was no dispute that plaintiff's trees had been destroyed by fumes from the defendant's plant, but conflicting testimony was introduced in regard to the amount of damage sustained. The court ruled that the difficulty of proving damages was no defense to such an action and inferred that if substantial damages could not be proved, nominal damages, at least, were recoverable. The plaintiff again recovered in *Johnson v. Northport Smelting and Refining Company*[6] which action was for damages alleged to have been caused to timber on the plaintiff's property by gases discharged from the smelter.

[4] 30 Wash. 164, 70 Pac. 266 (1902).
[5] 47 Wash. 497, 92 Pac. 442 (1907).
[6] 50 Wash. 567, 97 Pac. 746 (1908).

In *Hardin v. Olympic Portland Cement Company*,[7] which belongs to the group of cases in which relief is granted for material damage, the cement company was held liable on the authority of the *Sterrett* rule. The majority opinion in the *Powell* case refers to the *Hardin* decision acknowledging the theory of the earlier case to be "that no one has a right to pursue a lawful business, if thereby he injures his neighbor, without compensating that neighbor for the damages actually sustained." Then, instead of attempting to differentiate the cases on the question of material and substantial damage sustained, which could easily have been done,[8] the *Hardin* holding is effectively excluded from further consideration by the statement that "the presence or absence of precedent should not determine the question in the case at bar."

In 1924, the court decided *Bartel v. Ridgefield Lumber Company*,[9] and in that case there is language to bridge the gap between the clear-cut cases of material damage and the case in which only discomfort and annoyance are alleged, to which type the *Powell* case belongs. As in the main case, the property damage in *Bartel v. Ridgefield Lumber Company* was purchased after the industrial plant had been in operation for many years and the purchaser was thereby charged with knowledge of the soot, cinders and other substances which would be deposited on his property. The opinion in that case reviewed all of the Washington decisions in point and then expressed the rule which has been in effect in this state until the *Powell* decision.

> "The rule governing in the foregoing and many other cases is not that one may use his own property as he sees fit, so long as he uses it in the usual manner and without negligence, but that one may put his own property to any use he sees fit, so long as he does not thereby materially damage someone else or his property and that negligence is not the sole test of responsibility. *Where a trade or business is carried on in such manner as to materially interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done for which an action for damages will lie, without regard to the locality where such business is carried on,* and notwithstanding the business be entirely lawful, and notwithstanding the best and most approved appliances and methods may be used in the construction and management of the business." (Italics added.)

There was an attempt on the part of the appellant to impeach this rule by showing that the point of "comfortable enjoyment" was not an issue in the *Bartel* case. Since actual damages had been sustained, the appellant argued, the facts do not support the rule. However, Judge Bridges, in stating the rule, merely purported to summarize and restate the rule governing cases previously decided[10] not only in this

[7] 89 Wash. 320, 154 Pac. 450 (1913).

[8] In the process of manufacturing the cement, gas fumes and particles of cement were thrown over upon Judge Hardin's premises, destroying vegetation and greatly depreciating the property. No such material damage is present in the *Powell* case.

[9] *Supra* note 2 .

[10] The cases cited by Judge Bridges and referred to in the above quoted part of the opinion include cases from the United States Supreme Court,

jurisdiction but in many others. It was based upon a careful analysis of leading cases and was employed as a rule for deciding the *Bartel* case, but it was not meant to be the law of that case. Moreover, appellant's argument, however valid it might be with respect to the *Bartel* holding, is negatived by *Mattson v. Defiance Lumber Company*[11] in which the court, confronted squarely with the problem of interference with *reasonable enjoyment*, applies the rule from the *Bartel* case in granting relief.

A careful reading of the *Mattson* case, which is perhaps the best known Washington case in point, serves to indicate that it is indistinguishable on its facts from the *Powell* case. Dr. Mattson bought property on a bluff overlooking a sawmill and built a beautiful home thereon. After establishing his residence there, he complained of "the smoke nuisance" resulting from operation of the sawmill, and he alleged that the cinders, ashes and other matter deposited upon his property substantially damaged it, and rendered the home of the plaintiffs *less inviting* and *less comfortable* and destroyed the *enjoyment* thereof. After hearing the evidence the jury found that the Mattson property had not been substantially damaged, but it did find that the plaintiff had been "deprived of the comfortable use and enjoyment of their premises." Relief was granted for this invasion of the plaintiff's property rights. On appeal, the question of material damage and depreciation was introduced, but the court did not base its award of damages to the Mattsons on the finding of physical destruction. Apparently the court held it was not necessary to resolve the conflicting testimony; instead it asserted that the law of the case was stated in *Bartel v. Ridgefield Lumber Company* and quoted long portions of that opinion including the paragraph set out above. This indicates fairly conclusively that the *Mattson* opinion granted damages solely on the basis of *discomfort* resulting from the nuisance. The exclusion, in the holding, of consideration of substantial damage brings the *Mattson* case squarely in line, factually, with the *Powell* situation as delineated by the majority. Thus, the only two cases in Washington in which recovery is not predicated in whole or in part upon the finding of substantial destruction of property are diametrically opposed to each other in their holdings.

Mention must be made of the statutory policy before the Washington treatment of this problem has been brought up to date. The statutes, under the chapter dealing with those who may sue for damages because of a nuisance, declares "such action may be brought by any person whose property is injuriously affected or whose *personal enjoyment* is lessened by the nuisance."[12] (Italics added.) This section has never been applied to a set of facts quite analogous to those under examination. Wherever it has been relied upon, however, the alternative aspects have been given equal emphasis.[13] Unless a strained con-

Minnesota, California, Massachusetts, as well as the Washington decisions in point decided before 1924.

[11] *Supra* note 2.

[12] REM. REV. STAT. § 944.

[13] Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298 (1921); Hall v. Galloway, 76 Wash. 42, 35 Pac. 478 (1913); Ingalls v. Eastman, 61 Wash. 289, 112 Pac. 372 (1910). This list is not exhaustive of the cases citing the statute but these cases are the ones most pertinent to the present inquiry.

struction is given the statute, the conclusion cannot be escaped that lessening of enjoyment caused by reason of the nuisance is a ground for awarding damages. The opinion does not mention the statute. Perhaps this is due to the fact that the appellant's use of this section was only in connection with a point not discussed by the majority, while the respondent did not expound its applicability to the case at hand but was content merely to make reference to the section.

The present examination of Washington authority reveals that there has been in the past no deviation[14] from the policy of recognizing the right of each individual to freedom from personal discomfort and annoyance in maintaining his home. Furthermore, there is much support[15] for this proposition to be found in other jurisdictions.

The decision of the United States Supreme Court in *Baltimore and Potomac Railway Company v. Fifth Baptist Church*[16] presents a discussion of the principle allowing recovery for discomfort and interference with enjoyment of property unaccompanied by depreciation in the market value or the rental value of the premises. Soot, smoke, etc., from the railroad engines caused great discomfort to the congregation. In approving an instruction given by the trial court to be considered in making the award, the Supreme Court stated:

> "The plaintiff was entitled to recover because of the *inconvenience* and *discomfort* caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purpose for which it was erected and dedicated. *The property might not be depreciated in its salable or market value* . . . But, as the court below very properly said to the jury, the congregation had the same right to the comfortable use of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and *it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages.* As with a blow on the face, there may be no arithmetical rule for the estimate of damage. There is, however, an injury, the extent of which the jury may measure." (Italics added.)

A discussion of the problem by Virginia's court is found in the case *Virginia Ry. Co. v. London*[17] which was an action for damages for noise issuing from a roundhouse adjacent to plaintiff's property and for the discomfort caused by smoke, soot and cinders spread on the complainant's property by the locomotives occupying the roundhouse. The opinion expresses approval of the *Baltimore and Potomac Railway Company* position and, in addition, contains the following rationale for granting recovery:

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[14] The group of cases predicated upon mental rather than physical discomfort reflects the same policy: Champa v. Washington Compressed Gas Co., 146 Wash. 190, 226 Pac. 228 (1927); Ferry v. Seattle, 116 Wash. 648, 200 Pac. 336, 203 Pac. 40 (1921); Goodrich v. Starett, 108 Wash. 437, 184 Pac. 220 (1919); but see, Rea v. Tacoma Mausoleum Assoc., 103 Wash. 429, 174 Pac. 961, 1 A. L. R. 541 (1918).

[15] The textbooks are in line with the cases cited: COOLEY, TORTS (4th ed. 1932) III, § 432; HARPER, TORTS (1933) § 186; PROSSER, TORTS (1941) § 74; WALSH, EQUITY (1930) § 56.

[16] 2 Sup. Ct. 719, 108 U. S. 317, 27 L. ED. 739 (1883).

[17] 114 Va. 334, 76 S. E. 306 (1912).

> "There can be no doubt, under the facts of this case, that the value of the house of the defendant in error was, for residential purposes, greatly impaired by the nuisance created by the plaintiff in error. That is a conceded wrong, and to deny her the right to recover damages on account of that wrong, because the market value of her property had been increased by the wrong, would be to say that she could be improved out of her home against her will by the wrongful act of the plaintiff in error, and the law would afford her no redress."

Awarding $750.00 for discomfort and annoyance from the gas works, the California court, in the case of *Judson v. Los Angeles Suburban Gas Company*[18] took a stand directly contrary to the *Powell* ruling. The opinion reads:

> ". . . In order that a judgment of this character may be upheld, it is not necessary that the health of plaintiff or of members of his household should have been impaired. It is sufficient if the odors, sounds, and smoke were offensive to the senses.
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> "The fact that respondent proved no damage to the dwelling house or herbage on his land nor to the rental, or vendible value of the property does not prevent the court from awarding damages. In the very nature of things the amount of detriment sustained is not susceptible of exact pecuniary computation. It is for the court to say what sum of money the plaintiff should receive in view of the *discomfort* or *annoyance* to which he has been subjected."

One reading the *Powell* opinion in light of the preceding discussion is not impressed with its soundness. If it is given full weight, the injured property owner has small hope of obtaining relief in this jurisdiction. Ostensibly, the conflict has been resolved in favor of the more recent decision as it contains language expressly overruling cases to the contrary. "Any opinion of this court which holds, or from which it may be inferred, that one who voluntarily purchases property in a manufacturing community may be compensated because of smoke, gases, dust, or noises, inseparable from industrial activity in that community and reasonably necessary or expectable in the conduct of lawful industrial operations therein, is hereby overruled." Taken at its face value, this language would apparently preclude recovery by anyone purchasing property in an industrial area unless there is negligence shown in operating the plant causing the nuisance. Or, realizing the rigor of the *Powell* decision but wishing to uphold it withal, the court could regard the language as exclusive and hence allow recovery to one who purchased property before the nuisance-creating industry entered the vicinity. Taking the statement literally, the unrestricted language of the court permits of no relief, even when substantial and material injury has been done.

To sustain its position in the face of the numerous decisions to the contrary, the court cites only one case, *Ebur v. Alloy Metal Wire*

[18] 157 Cal. 168, 106 Pac. 581 (1910).

Company.[19] The rule of the *Ebur* case, that one living in an industrial district must put up with the accompanying discomfort, is incorporated verbatim in Judge Millard's opinion. One thing, however, which the court did not consider in adopting the statement from the *Ebur* case was the fact that the language of the Pennsylvania court was directed toward modifying the *injunction* granted by the trial court and it was not an exposition of the rule to apply in awarding *damages*. No one takes issue with the fact that it is possible to deny an injunction and yet grant damages in the same instance.[20] Therefore, it does not necessarily follow that damages would have been denied in the *Ebur* case even though the injunction was. Thus, the only case cited by the majority is not directly in point.

Undeniably, one's sympathies are with the Portland Cement Company. Powell had lived in Concrete since 1907; he purchased the property in question in 1934; suit was not initiated until he had left the property himself and rented it, with no loss in rental value being shown. The cement company commenced its operations in Concrete in 1908; it was the only industry of the town and most of the residents were directly dependent upon it while all, including the respondent, benefited from it. However, with the weight of authority to the contrary, this would seem to be another example of "hard cases make bad law."[21]

The court attempts to justify the holding on the theory that a contrary result would encourage litigation which would "harass industry and likely bankrupt many industries of this state which it is the policy of the law to protect within reason." Consistently, the Washington court has attempted to secure the greatest good for the greatest number through the protection of industry and to that end adopted the balancing of equities rule, although only a minority[22] of the jurisdictions go even that far. In both the *Bartel* and the *Mattson* opinions the court expressly recognized that the public interest must be protected, and referring to the lumber industry of Washington, stated that "industries such as this must be permitted to exist." Yet, even while acknowledging that the leading industries of the state must be fostered because public welfare depends on them, the court ruled that those engaged in the lumber industry must pay for the damage that is unavoidably done to property in the proximity of sawmills. If the court granted damages under such circumstances, it is difficult to understand why the cause of industry is championed so strongly in a case involving a cement plant, cement obviously not being a leading Washing-

[19] 304 Pa. 177, 155 Atl. 280 (1931). Action to enjoin operation of defendant's plant, which manufactured metal products, because of smoke, odors, gases and noises.

[20] PROSSER, *supra* note 15, § 74.

[21] Cases in which the industry is on a much larger scale than was the defendant industry in the *Powell* case allow recovery even though the plaintiff's property is of little value: Bliss v. Anaconda Copper Min. Co., 167 Fed. 342 (1909) in which the court suggested that plaintiff was not precluded from action for damages; McCarthy v. Bunker Hill Mining Co., 164 Fed. 927 (1908); Madison v. Ducktown etc. Co., 113 Tenn. 331, 83 S. W. 658 (1904) granted damages although the property injured was less than $1,000 in value as compared with the industry valued at over $2,000,000 and supporting over 10,000 people.

[22] See note, 5 WASH. L. REV. 76.

ton industry. The court may have felt, and justifiably so, that there was an element of "hold up" in bringing suit under the conditions in the *Powell* case, but neither the briefs nor the opinions indicate that the "hold up" cases[23] were consciously applied. Instead, the court stresses the importance of protecting industry from *any* private encroachment. The *Powell* decision abrogates the balancing of equities doctrine by denying relief to the private person just as the granting of injunctions, the inequities of which gave rise to the balancing rule, denied all relief to the industry. No jurisdictions can be found which support a rule that goes as far toward giving industry unlimited rein as does the principal case, and with the preponderance of judicial holdings favoring recovery, it is to be expected that the *Powell* ruling will not long remain intact.

As for the dangers of undue harassment, there seems to be no real basis for anticipating trouble in that direction. Though damages were allowed in the *Hardin* case, the *Bartel* case and the *Mattson* case, there does not seem to have been sufficient litigation to cause an undue burden to the industries concerned. Inasmuch as most of the population of Concrete is dependent upon the cement plant, it is not likely that many suits would be brought even if recovery had been allowed in the instant case. It is true of any industrial community that those most dependent upon the industry, who are thus not likely to bring suit against it, are also the ones living nearest to the plant creating the nuisance. Thus, the chances are remote that industry will be throttled by litigation.

If the supreme court is to uphold its latest decision regarding damages for nuisance, it will be sanctioning a holding which does violence not only to the former case law of the state but also to the statutory provision in point. In view of the overwhelming authority to the contrary found in Washington cases and those from other jurisdictions it is likely that the *Powell* holding will be re-examined.

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[23] However, even where one does purchase property in the neighborhood of a nuisance, the court will grant damages. Hurlbut v. McKone, 55 Conn. 31, 44, 10 Atl. 164, 3 Am. St. Rep. 17 (1887); Susquehanna Fertilizer Co. of Baltimore v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737 (1890); COOLEY, *supra* note 15, § 446.