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holding do not aid the defendant's. They did not release or transfer their debts, nor acquire them from third persons. The recovery of judgment thereon did not prejudice them, and did not give them the status of bona fide purchasers or encumbrancers within the meaning of this law.

Appellants claim that the evidence does not support the finding that the land was not conveyed to the wife as a gift. The husband and wife each testified that there was no intention or purpose to make a gift to her, or to make the property her separate estate. The wife testified that she did not understand that the property was to be hers. There is no evidence to the contrary. Without such intention to make a gift, the mere conveyance to her would not invest it with that character. *Fanning v. Green* (Cal.) 104 Pac. 308. There are some rulings which are assigned as error upon the admission of this testimony and other testimony of like character. We think that the testimony of the plaintiffs as to their intention with respect to the conveyance to the wife was competent testimony. We find no error in the record.

The judgment and order are affirmed.

We concur: Angellotti, J.; Sloss, J.

#### CALIFORNIA SUPREME COURT.

WILLIAM L. JUDSON, Respt.,

v.

LOS ANGELES SUBURBAN GAS COMPANY et al., Impleaded, etc., Appts.

(— Cal. —, 106 Pac. 581.)

#### Nuisance — contributing cause — defense.

1. One operating his manufacturing plant in such a way as to constitute a nuisance to neighboring property owners cannot escape liability therefor because railroads and wooden bridges in the neighborhood may also be source of possible discomfort to him.

#### Same — gas plant — operation.

2. The operation of a gas manufacturing plant in such manner that the smoke, odor, and noise produced by it, interfere with the comfortable enjoyment of the neighboring property, the smoke being such as to obscure the landscape for considerable periods of time, and the noise being like the rumbling of a train with explosions like gun shots, constitutes a nuisance, although there is nothing to show that the value of the property is depreciated, the rental value impaired, or the health of the occupants in-

jured, and although the discomfort caused is not constant.

#### Damages — nuisance — proof.

3. An award of damages for conducting a manufacturing plant so as to be a nuisance to neighboring property, in causing discomfort or annoyance in its use, is not prevented by the fact that plaintiff does not show injury to his dwelling, house or herbage, nor to the vendible or rental value of the property.

#### Nuisance — gas factory.

4. A gas factory does not constitute a nuisance *per se*.

#### Same — manufacturing plant — ordinary use.

5. One conducting a lawful business under municipal permission, and under public obligation to furnish a commodity, is not relieved from the obligation to use his property so as not to injure his neighbor, and this obligation is not necessarily met by the adoption of the most approved appliances and methods of production.

#### Injunction — decree — excessive relief.

6. An injunction restraining the owner of a gas plant from conducting and operating it in such manner as to cause or permit smoke, gas, or offensive smells or fumes, to be emitted therefrom, or be precipitated therefrom upon the property of the complaining party, is not too broad, where its owner concedes that it cannot be operated without producing conditions constituting a nuisance.

(January 4, 1910.)

**A**PPEAL by defendants Los Angeles Suburban Gas Company et al, from a judgment of the Superior Court for Los Angeles County in plaintiff's favor and from an order denying a new trial in an action for damages and an injunction against the use of a gas manufacturing plant as a nuisance to neighborhood property. Affirmed.

The facts are stated in the opinion.

Messrs. Porter, Sutton, & Cruickshank, for appellant:

The gas works are suitably located.

Re Smith, 143 Cal. 368, 77 Pac. 180.

In ascertaining whether the property of one complaining is in fact injured, or his comfort and convenience materially interfered with, by an alleged nuisance, the character of the neighborhood and the pre-existing circumstances are entitled to consideration.

16 Am. & Eng. Enc. Law. p. 934.

The damage in question resulted from a cause entirely beyond defendants' control, and without any carelessness or negligence on their part whatever, and under the more recent and better line of authorities, they are not responsible.

Kleebauer v. Western Fuse & Explosives

Note. — As to gas plant as a nuisance, see case note to *McGill v. Pintsch Compressing Co.* 20 L.R.A. (N.S.) 466. 26 L.R.A. (N.S.)

Co. 138 Cal. 502, 60 L.R.A. 377, 94 Am. St. Rep. 62, 71 Pac. 617.

The annoyances suffered by plaintiff have been so trifling in character and so rare in occurrence that they do not entitle him to an injunction or to any damages.

Price v. Grantz, 118 Pa. 402, 4 Am. St. Rep. 604, 11 Atl. 794; Euler v. Sullivan, 75 Md. 616, 32 Am. St. Rep. 422, 23 Atl. 845; Robb v. Carnegie Bros. 145 Pa. 324, 14 L.R.A. 329, 27 Am. St. Rep. 696, 22 Atl. 649; 16 Am. & Eng. Enc. Law, p. 929; Louisville & N. Terminal Co. v. Lellyett, 114 Tenn. 368, 1 L.R.A. (N.S.) 90, 85 S. W. 881; Atchison, T. & S. F. R. Co. v. Armstrong, 71 Kan. 366, 1 L.R.A. (N.S.) 129, 114 Am. St. Rep. 474, 80 Pac. 978.

The measure of damages is the difference in the rental value of the property free from and subject to the nuisance.

21 Am. & Eng. Enc. Law, 2d ed. p. 727; Shively v. Cedar Rapids, I. F. & N. W. R. Co. 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133; Jackson v. Kiel, 13 Colo. 378, 6 L.R.A. 254, 16 Am. St. Rep. 207, 22 Pac. 504; Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Francis v. Schoellkopf, 53 N. Y. 152; Chipman v. Palmer, 9 Hun, 517; Eufaula v. Simmons, 86 Ala. 515, 6 So. 47; Farley v. Gate City Gaslight Co. 105 Ga. 323, 31 S. E. 193; O'Connor v. St. Louis K. C. & N. R. Co. 56 Iowa, 735, 10 N. W. 263; Pinney v. Berry, 61 Mo. 359; Wiel v. Stewart, 19 Hun, 272; Beir v. Cooke, 37 Hun, 38; Michel v. Monroe County, 39 Hun, 47; Robinson v. Smith, 25 N. Y. S. R. 647, 7 N. Y. Supp. 38; Gomme v. Stevenson, 76 Tex. 642, 13 S. W. 556.

The injunction is too broad.

McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795.

Messrs. Eminent H. Wilson and B. H. Donnell, for respondent:

No place is suitable for the maintenance of a gas works if it is a nuisance to those who reside near thereto.

Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; Euler v. Sullivan, 75 Md. 616, 32 Am. St. Rep. 422, 23 Atl. 845; Robinson v. Baugh, 31 Mich. 290; Seacord v. People, 121 Ill. 635, 13 N. E. 194; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 25 Eng. Rul. Cas. 144.

The existence of other nuisances in the neighborhood will not bar a recovery.

Euler v. Sullivan, supra; Seacord v. People, 121 Ill. 634, 13 N. E. 194; Ducktown Sulphur, Copper & I. Co. v. Barnes (Tenn.) 60 S. W. 593; Robinson v. Baugh, supra; Woodyear v. Schaefer, 57 Md. 9, 40 Am. Rep. 419; R. v. Neil, 2 Car. & P. 483; Dennis v. State, 91 Ind. 293; Burlington v. Stockwell, 5 Kan. App. 576, 47 Pac. 988; 26 L.R.A. (N.S.)

Hurlbut v. McKone, 55 Conn. 43, 3 Am. St. Rep. 17, 10 Atl. 164; Meigs v. Lister, 23 N. J. Eq. 205; Douglass v. State, 4 Wis. 390.

A use of property which materially interferes with the physical comfort of those who live in the neighborhood, or which seriously impairs the comfortable enjoyment of their homes, is a nuisance, even though it does not injure their health.

State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076; State v. Wetherall, 5 Harr. (Del.) 487; Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347; Haag v. Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654; Lippman v. South Bend, 84 Ind. 276; Ashbrook v. Com. 1 Bush, 139, 89 Am. Dec. 616; Barnes v. Hathorn, 54 Me. 124; Eames v. New England Worsted Co. 11 Met. 570; Red Wing v. Gup-til, 72 Minn. 259, 41 L.R.A. 321, 71 Am. St. Rep. 485, 75 N. W. 234; Davidson v. Isham, 9 N. J. Eq. 186; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 201; Meigs v. Lister, 23 N. J. Eq. 199; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246; State v. Wood-bury, 67 Vt. 602, 32 Atl. 495; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336; Hayden v. Tucker, 37 Mo. 214; Ducktown Sulphur, Copper & I. Co. v. Barnes, and R. v. Neil, supra; R. v. White, 1 Burr. 337; Bamford v. Turnley, 3 Best & S. 81; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719.

The mere fact that the nuisance is not continuous, but the injury is occasional only, is no defense.

Meigs v. Lister and Ross v. Butler, supra; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Mulligan v. Elias, 12 Abb. Pr. N. S. 269; Evans v. Reading Chemical Fertilizing Co. 160 Pa. 209, 23 Atl. 702; Clowes v. Staffordshire Potteries Waterworks Co. L. R. 8 Ch. 125.

It is not necessary to prove damages in a specific sum.

Tuebner v. California Street R. Co. 66 Cal. 175, 4 Pac. 1162; Swift v. Broyles, 115 Ga. 885, 58 L.R.A. 390, 42 S. E. 277; Gempp v. Bassham, 60 Ill. App. 84; Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443; Van-Fossen v. Clark, 113 Iowa, 86, 52 L.R.A. 279, 84 N. W. 989; Louisville & N. R. Co. v. Simpson, 17 Ky. L. Rep. 989, 33 S. W. 395; Berlin v. Thompson, 21 Mo. App. 234; Whitmore v. Bischoff, 5 Hun, 176; Harsh v. Butler, Wright (Ohio) 99; Gavigan v. Atlantic Ref. Co. 186 Pa. 604, 40 Atl. 834; Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094; Cleveland, C. C. & St. L. R. Co. v. Pattison, 67 Ill. App. 353; Illinois C. R. Co. v. Grabill, 50 Ill. 246; Baltimore & P. R. Co. v. Fifth Baptist

Church, *supra*; Davis v. East Tennessee, V. & G. R. Co. 87 Ga. 612, 13 S. E. 567; Randolph v. Bloomfield, 77 Iowa, 52, 14 Am. St. Rep. 268, 41 N. W. 562.

Plaintiff may recover for any annoyance or discomfort occasioned by the air in and about his dwelling house being permeated with noisome gases and offensive odors discharged from defendants' plant.

Baltimore & P. R. Co. v. Fifth Baptist Church, *supra*; Illinois C. R. Co. v. Grabill, 50 Ill. 241; Wesson v. Washburn Iron Co. 13 Allen, 95, 90 Am. Dec. 181; Emery v. Lowell, 109 Mass. 197; Pierce v. Wagner, 29 Minn. 355, 13 N. W. 170; N. K. Fairbank Co. v. Nicolai, 167 Ill. 242, 47 N. E. 360; Gempp v. Bassham, *supra*; Cleveland, C. C. & St. L. R. Co. v. Pattison, 67 Ill. App. 351; Chicago-Virden Coal Co. v. Wilson, *supra*; Adams Hotel Co. v. Cobb, 3 Ind. Terr. 50, 53 S. W. 478; Ferguson v. Firmenich Mfg. Co. 77 Iowa, 576, 14 Am. St. Rep. 319, 42 N. W. 448; Randolph v. Bloomfield, 77 Iowa, 50, 14 Am. St. Rep. 268, 41 N. W. 562; Churchill v. Burlington Water Co. 94 Iowa, 89, 62 N. W. 646; Berger v. Minneapolis Gaslight Co. *supra*; Jarvis v. St. Louis, I. M. & S. R. Co. 26 Mo. App. 253; Brown v. Chicago & A. R. Co. 80 Mo. 457; Loughran v. Des Moines, 72 Iowa, 385, 34 N. W. 172; Swift v. Broyles, 115 Ga. 887, 38 L.R.A. 390, 42 S. E. 277; Graessle v. Carpenter, 70 Iowa, 166, 30 N. W. 392.

It is no excuse to say that the business is lawful, and necessary to the public.

Gavigan v. Atlantic Ref. Co. 186 Pa. 612, 40 Atl. 834; Evans v. Reading Chemical Fertilizing Co. 160 Pa. 209, 28 Atl. 702; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Tuebner v. California Street R. Co. 66 Cal. 171, 4 Pac. 1162; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655; Whitney v. Bartholomew, 21 Conn. 213; Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197; Parker v. Union Woolen Co. 42 Conn. 399; Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78; Hill v. McBurney Oil & Fertilizer Co. 112 Ga. 788, 52 L.R.A. 398, 38 S. E. 42; Wahle v. Reinbach, 76 Ill. 322; Owen v. Phillips, 73 Ind. 284; Ashbrook v. Com. 1 Bush, 139, 89 Am. Dec. 616; Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588; Scott v. Bay, 3 Md. 431; Susquehanna Fertilizer Co. v. Malone, *supra*; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 63 Am. St. Rep. 533, 39 Atl. 270; Ross v. Butler and Cleveland v. Citizens' Gaslight Co. *supra*; Atty. Gen. v. Steward, 20 N. J. Eq. 415; Bohan v. Port Jervis Gaslight Co. *supra*; Fish v. Dodge, 4 Denio, 311, 47 Am. Dec. 254; Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704; Crawford v. Rambo, 44 Ohio St. 279, 7 N. E. 429; Dennis v. Eckhardt, 3 Grant, Cas. 390; Wier's Appeal, 74 Pa. 230; Ducktown Sul-

phur, Copper & I. Co. v. Barnes, *supra*; Curtis v. Winslow, 38 Vt. 690.

Neither is it excused by the fact that it is necessary to the operation of the business.

Chicago G. W. R. Co. v. First M. E. Church, 50 L.R.A. 488, 42 C. C. A. 178, 102 Fed. 85; Shively v. Cedar Rapids, I. F. & N. W. R. Co. 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133; Pennsylvania R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. 622; Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 41, 12 L.R.A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Ducktown Sulphur, Copper & I. Co. v. Barnes, *supra*.

A lawful business, and one useful and necessary to the public, may be so conducted as to produce harm or injury to the persons or property of others, and in such cases the proprietor of the business will be liable.

Parker v. Union Woolen Co. 42 Conn. 402; Owen v. Phillips, 73 Ind. 288; Wier's Appeal, 74 Pa. 241; Curtis v. Winslow, *supra*; Ashbrook v. Com. 1 Bush, 143, 89 Am. Dec. 616; Norcross v. Thoms, 51 Me. 504, 81 Am. Dec. 588.

Careful management of the business will not justify the creation of a nuisance.

Evans v. Reading Chemical Fertilizing Co. 160 Pa. 223, 28 Atl. 702; Susquehanna Fertilizer Co. v. Spangler, *supra*; Susquehanna Fertilizer Co. v. Malone, 73 Md. 276, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; Bohan v. Port Jervis Gaslight Co. 122 N. Y. 24, 9 L.R.A. 711, 25 N. E. 246; Berger v. Minneapolis Gaslight Co. 60 Minn. 300, 62 N. W. 336; Cahill v. Eastman, 18 Minn. 324, Gil. 292, 10 Am. Rep. 184; Scott v. Bay, 3 Md. 445; Baltimore & P. R. Co. v. Fifth Baptist Church, *supra*.

The injunction is not too broad.

Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 208; Evans v. Reading Chemical Fertilizing Co. 160 Pa. 209, 28 Atl. 702.

Melvin, J., delivered the opinion of the court:

This is an action for damages caused by an alleged nuisance, and for its abatement. The action was dismissed as to defendants T. S. C. Lowe and Thaddeus Lowe. The California Coke & Gas Company answered the complaint herein, denying substantially all of its allegations, and E. E. Crandall, as receiver of the Los Angeles Suburban Gas Company, intervened, and filed his answer. He does not appeal, however. Plaintiff recovered judgment for \$750 damages, and defendants were enjoined from maintaining the nuisance. This appeal is from the judgment and from the order denying a motion for a new trial.

The complaint alleged that the California Coke & Gas Company, as lessee of the other corporation, constantly managed, conducted,

and operated certain gas works in such a manner as to precipitate about and above the property of plaintiff dense smoke and noxious, offensive gases. It was also alleged that the manufactory was so operated as to produce loud and disturbing noises and roaring and rumbling sounds which reached and penetrated to plaintiff's house and studio, and, together with the smoke, gases, fumes, etc., disturbed plaintiff and his family, making the house and studio places "devoid of quiet, peace, and rest."

Plaintiff's property is located upon the bank of the Arroyo Seco, in the city of Los Angeles. Mr. Judson is an artist, and, at the time of the trial and for a long time prior thereto, he had been occupying his studio building as a home, letting his adjacent dwelling house to a tenant. The gas works are about 900 feet from plaintiff's property, across the Arroyo in a south-westerly direction from his residence and studio. There is no proof that plaintiff's land has depreciated; that its rental value has been impaired; nor that the health of Mr. Judson or that of any member of his family has been injuriously affected, by the operation of defendants' gas works. He did assert, however, that the smoke, odor, and noise produced by the manufacture of gas at defendants' works, interfered with his comfortable enjoyment of his property. The testimony adduced before the chancellor was of a conflicting character, and while, of course, we cannot, under our invariable rule, pass upon its weight, we must consider appellants' contention that the evidence is not sufficient to justify any judgment whatever in favor of respondent. Mr. Judson testified that the works were in the Arroyo 50 or 60 feet lower than his property; that nearly every day since the erection of the gas works, at night as well as during the hours of daylight, he had noticed offensive odors; and that the annoyance had gradually increased all the time. Speaking of the noises he testified: "The noises that I complain of consist of a continuous roaring sound and occasional explosions. The roaring is almost continuous, and the explosions are frequent. The roaring sounded like the rumbling of a train, and the explosions sometimes like a shot out of a pistol, sometimes like a shotgun, sometimes like an explosion of dynamite, and again as though it were a large mass of gas, that made a much heavier explosion, but not so sharp. I heard these explosions sometimes frequently, and sometimes there would be quite a period when it did not occur. These noises disturbed my sleep at night. The members of my family were also disturbed by these noises." He further said: "The smoke disturbed me whenever the wind carried it 26 L.R.A. (N.S.)

our way. The smoke was black and white and yellow. We noticed it very soon after the gas works were built, and, during the period of a year and a half prior to last January, it was occasionally so thick as to obscure the landscape. These periods when it obscured the landscape probably lasted for from twenty minutes to an hour." While unable to state any exact amount of pecuniary damages, Mr. Judson testified that the smoke, odors, and noise had disturbed him in his occupation as an artist. He was corroborated by a number of his neighbors, some residing nearer and some farther from the gas works than he did. Their testimony greatly resembled that of plaintiff, except for the immaterial variations which one expects in accounts given by different people of physical conditions and happenings. The smoke was described as being of a "very penetrating and unpleasant" odor, and as being at times so thick that "it is impossible to see across the road," or as sweeping over the Arroyo "in such quantities as to strongly suggest a London fog." The noise was described variously by the different witnesses, but all agreed that at times annoying explosions occurred, one lady likening the sounds to a Fourth of July celebration.

While it was shown on behalf of the defendants that the main line of the electric railroad between Los Angeles and Pasadena passed very near plaintiff's studio; that the tracks of two steam railroads were within a few hundred feet of his property; and that between the gas works and his home a wagon road crossed the Arroyo on a wooden bridge,—we cannot say that the sounds inevitably coming from such sources would be as annoying as those produced by the explosions, clanking of machinery, and hissing, produced, according to the testimony, by the operation of the gas works. The fact that other sources of possible discomfort to plaintiff existed in the neighborhood of his property is no defense to an action of this kind. *Robinson v. Baugh*, 31 Mich. 294. Nor can we say that the annoyance suffered by plaintiff was of a slight character, and not such as justified the injunctive relief granted nor the damages awarded. Considered as a whole, we think the evidence on behalf of the plaintiff amply sufficient to sustain the judgment. 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. *Meigs v. Lister*, 23 N. J. Eq. 201; *Coker v. Birge*, 9 Ga. 428, 54 Am. Dec. 347; *Cleveland v. Citizens' Gaslight Co.* 20 N. J. Eq. 206; *Bohan v. Port Jervis Gaslight Co.*

122 N. Y. 23, 9 L.R.A. 711, 25 N. E. 246; Hayden v. Tucker, 37 Mo. 221.

Admittedly the discomfort caused respondent by the operation of the gas factory was not constant. This makes no difference. It has been repeatedly, and we think most properly, held that, where a nuisance is intermittent, owing to periodical cessation of work, variation in the direction of the wind, and the like, nevertheless injunction will lie. The learned chancellor observed in Ross v. Butler, 19 N. J. Eq. 302, 97 Am. Dec. 654: "I am not aware of any authority or established principle holding that a clear, unmistakable nuisance, which it is intended to commit periodically, will be permitted because it does not exist the greater portion of the time, but only for a small portion of it. This court will not determine that a family shall have their dwelling house made uncomfortable to live in for twelve hours once in two weeks, or that they shall protect themselves by closing the house tightly, and remaining indoors for that time. It is surely no justification to a wrongdoer that he takes away only one twenty-eighth of his neighbor's property, comfort, or life."

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. Wood, Nuisances, §§ 563, 866; Tuebner v. California Street R. Co. 66 Cal. 175, 4 Pac. 1162; Gavigan v. Atlantic Ref. Co. 186 Pa. 604, 40 Atl. 834; Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336; Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

There is nothing in the habeas corpus proceedings in Re Smith, 143 Cal. 368, 77 Pac. 180, which conflicts with the conclusion reached by us in the case at bar. This court held in the Smith Case that an ordinance passed by the board of supervisors of the county of Los Angeles, prohibiting the erection of gas plants in that locality, was invalid as being unreasonable. A gas factory does not constitute a nuisance *per se*. The manufacture in or near a great city of gas for illuminating and heating is not only legitimate, but is very necessary to the comfort of the people. But in this, as in any other sort of lawful business, the person conducting it is subject to the rule *sic utere tuo ut alienum non laedas*, even when operating under municipal permission or under public obligation to furnish a commodity. 26 L.R.A. (N.S.)

Terre Haute Gas Co. v. Teel, 20 Ind. 131; Atty. Gen. v. Gaslight & Coke Co. L. R. 7 Ch. Div. 217; Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655. Nor will the adoption of the most approved appliances and methods of production justify the continuance of that which, in spite of them, remains a nuisance. Evans v. Reading Chemical Fertilizing Co. 160 Pa. 223, 28 Atl. 702; Susquehanna Fertilizer Co. v. Malone, 73 Md. 276, 9 L.R.A. 737, 25 Am. St. Rep. 595, 20 Atl. 900; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 502, 63 Am. St. Rep. 533, 39 Atl. 270.

The judgment in this case enjoins the appellant "from conducting and operating the gas works and manufactory . . . in such a manner as to cause or permit smoke, gases, or offensive smells or fumes, to be emitted therefrom, or to be precipitated therefrom upon the property of the plaintiff." Counsel for appellant place upon this language the construction that it absolutely enjoins the gas companies from causing or permitting any smoke or gases to be emitted from the works, regardless of its reaching respondent's property or not. We think this interpretation of the injunction is not justified. The appellants are enjoined from maintaining the same sort of nuisance that had caused the annoyance to plaintiff. The injunction would perhaps be clearer if read with the first "therefrom" omitted, but we think the meaning is obvious. While the language does not limit the production of gases, etc., to such as would be inoffensive to plaintiff, it is clear from the evidence of appellants' own witnesses that the plant is operated with the least possible amount of escaping smoke, fumes, and gases. When so operated, it has been a nuisance injuriously affecting respondent. Therefore any conduct of the processes of manufacture for which that plant is equipped would but repeat the injury and annoyance to him. Consequently the injunction is not too broad, as it might be if applied to some factory in which the injurious effects complained of might be prevented without abating the operation of the works entirely. In this essential particular, the case at bar differs from *McMenomy v. Baud*, 87 Cal. 134, 26 Pac. 795, and that case is therefore not authority for the proposition that the injunction is too broad. Here it is conceded by appellant that the works cannot be operated at all without producing the conditions which obtained when plaintiff commenced his action.

The judgment and order are affirmed.

We concur: **Lorigan, J.; Sloss, J.; Shaw, J.**

Petition for rehearing denied, February 3, 1910.