SOUTHERN ICE & UTILITIES COMPANY *v.* BRYAN.

4-2963

Opinion delivered April 10, 1933.

1. EVIDENCE—OPINION OF NON-EXPERT.—A nonexpert witness may testify that her children, after being exposed to ammonia fumes from an ice plant operated near her home, were pale and sick.
2. TRIAL—INSTRUCTION ASSUMING DISPUTED FACTS.—Instructions which assume that plaintiff's home was in a residential district were not erroneous where the undisputed evidence was that plaintiff's home was occupied as such long before defendant established its ice plant on adjoining property.

3. NUISANCE—ICE PLANT.—The operation of an ice plant in a residential district, no matter how well constructed and conducted, is a nuisance, where it destroys the comfort of persons occupying adjoining premises.
4. NUISANCE—DAMAGES.—The measure of damages to a home by erection of an ice plant on an adjoining lot is the difference between the fair market value immediately prior to erection of the plant and its fair market value after the erection and operation of the plant.

Appeal from Hot Spring Circuit Court; *Thomas E. Toler*, Judge; affirmed.

STATEMENT BY THE COURT.

Appellee, Chas. A. Bryan, owned lot 4 in block 106 of Lund & Hill's survey of Malvern, Hot Spring County, Arkansas, which he occupied as a homestead with his family. This lot had been occupied as a homestead by appellee and his predecessors in title for more than fifty years. In 1930 appellant, Southern Ice & Utilities Company, constructed an electric ice plant on lots adjoining the home of the appellee, and thereafter operated the same in course of business. On January 16, 1932, appellee filed this suit, seeking to recover damages in the sum of $3,000 for alleged depreciation in the value of his property, by reason of the construction and operation of the ice plant. There was a trial before a jury, which resulted in a judgment in favor of appellee for $1,000, and this suit is prosecuted to reverse said judgment.

The jury was warranted in finding the following facts:

That appellee and his predecessors in title had resided upon and occupied lot 4 in block 106 for more than 50 years; that the dwelling house occupied by appellee and his family was in a residential section of the city of Malvern; that, over the expressed protest of appellee, the appellant in 1930 erected an ice manufacturing plant on lot 5, block 106, adjoining appellee's property; that the wall of the appellant's ice plant was within 15 or 16 feet of appellee's bedroom; that the ice plant has been continuously operated since its erection in 1930; that motors were run day and night by the ice plant during the summer seasons; that the noises arising from the operation of said motors was unbearable; that appellant permitted

fumes from ammonia to escape from its plant, which passed into and upon the premises of appellee; that at times it was necessary for appellee to remove his grandchildren from certain portions of his home to other places to escape such fumes; that appellant, in the construction of said plant, erected a tower 45 or 46 feet high which conveyed water over a fall for the purpose of breaking it up, and that the noises from this fall was a constant menace to appellee's nervous system; that these noises and disturbances were continuous. That gasoline motor trucks were loaded on the southeast side of the ice plant and opposite the residence of appellee; that the starting and stopping of said trucks created loud and disturbing noises which materially disturbed appellee and his family in the occupancy of their home; that appellee's property was worth $5,000 prior to the erection of the ice plant, and that it is not now worth more than $2,500.

The trial court submitted appellee's case to the jury upon the following instructions, which are complained about on this appeal:

"This suit was instituted by Chas. A. Bryan, plaintiff, versus defendant, Southern Ice & Utility Company, for the sum of $3,000 it is alleged to be due him because of certain noises and odors causing discomfort, etc., as alleged, emanating from the ice plant in its operation. Defendant, on the other hand, denies that it is to pay the plaintiff any damages as no such conditions prevail, therefore plaintiff should not recover as against them. On the other hand, if they should prevail in the case, as stated, you have the evidence before you, the complaint read to you, and the issues are clearly drawn and presented to you, and now I shall read to you the written instructions.

" 'Plaintiff's instruction No. 1: You are instructed that a nuisance, in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive; but, in legal phraseology, it is applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, real or personal, working an obstruction of, or injury to, a right of another

or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage.

" 'Plaintiff's instruction No. 2: You are instructed that, if you find from a preponderance of the evidence in this case that the plaintiff is the owner of lot 4, block 106, of the city of Malvern, Arkansas, and uses and occupies same as his homestead, as alleged in his complaint, and the defendant, Southern Ice & Utilities Company, is the owner of lot 5 adjoining plaintiff's property above described in said block 106 of Malvern, and that said property is situated in a residential section of the city of Malvern, and if you further find from a preponderance of the evidence that said defendant has constructed, maintains and operates an ice manufacturing plant on its property in such close proximity to plaintiff's property and home that, in the carrying on of its ice manufacturing business in the ordinary and customary manner and as said plant was constructed to be operated, it causes and permits continuous and successive noises to emanate therefrom, to such an extent as to interfere with and disturb the plaintiff and his family in the use, occupancy and enjoyment of his property as a dwelling house and home, and to such an extent as would so disturb and interfere with any ordinary persons or family occupying said property as a dwelling and so as to cause a nuisance to plaintiff and his family in the enjoyment of his home, and that said nuisance is permanent to said property; and if you further find from a preponderance of the evidence in this case that the market value of plaintiff's property was diminished and damaged by reason of the nuisance, if any, created and maintained by the defendant in the construction and operation of said ice manufacturing plant, then your verdict should be for the plaintiff in this action.

" 'Plaintiff's instruction No. 3: If you find from a preponderance of the evidence in this case that the plaintiff is entitled to recover in this action, and that the damage to plaintiff's property, if any, is permanent, then your verdict should be for an amount equal to the difference in the fair market value of plaintiff's property immediately before and after the damage, if any, caused

by the construction, maintaining and operating of said ice plant by the defendant, as shown by the evidence in this case.' ''

Other facts necessary to a determination of the issues presented on this appeal will be stated in the opinion.

H. B. Means and *James D. Head,* for appellant.

John L. McClellan, for appellee.

JOHNSON, C. J., (after stating the facts). Appellant first complains that the trial court erred in permitting a nonexpert witness to testify that her children, after being exposed to ammonia fumes, "were pale and sick." This question was decided adversely to appellant's contention in the case of *Kansas City Southern Ry. Co.* v. *Cobb,* 118 Ark. 569, 178 S. W. 383, where the court held: "Where one person is acquainted with another, and they come in contact with each other frequently, it is not a matter of expert knowledge for one to tell whether the other appears to be sick or well. These are matters of common experience and observation, and a nonexpert witness, after stating the facts upon which his opinion is based, may even give his opinion in such matters."

Appellant next complains that the trial court erred in giving certain instructions on behalf of appellee, in refusing to give certain instructions on behalf of appellant, and in modifying certain instructions. The instructions given on behalf of appellee are quoted at length in the statement of facts.

Appellee's first instruction is a quotation from Ex parte *Foote,* 70 Ark. 12, 65 S. W. 706. Appellant contends that, notwithstanding the instruction is a correct definition of a nuisance, the same is academic in so far as application to this case is concerned. This is not the fact. A nuisance was the thing complained about, and, of course, it was perfectly proper for the trial court to explain to the jury and give to them a definition of what a nuisance was in law.

Appellee's instruction No. 2 was likewise a correct declaration of law, and the trial court did not commit error in giving it to the jury.

It is earnestly insisted on behalf of appellant that the trial court assumed in appellee's instructions that

the Bryan property was chiefly valuable for residential property when that was a sharply contested issue. Appellant is mistaken when it says that this was a contested issue in the lawsuit. The uncontradicted testimony shows that appellee and his family were occupying this property and residing thereon long prior to the time that appellant undertook and did establish its ice plant adjacent to his property, and this, notwithstanding it was notified by appellee that he protested its manufacturing plant adjacent to his home.

This court held in *Bickley* v. *Morgan Utilities Company, Incorporated,* 173 Ark. 1038, 294 S. W. 38: "And it may be said here that it matters not how well constructed or conducted an ice plant may be, it is nevertheless a nuisance if built and operated in a residential district so that it destroys the comfort of persons owning and occupying adjoining premises, creating annoyances which render life uncomfortable. Certainly, it cannot be said that the erection and operation of an ice plant within six feet of a bedroom window would not very greatly annoy the persons occupying the room, in addition to the fact, as shown by the proof in this case, that the property itself would be greatly damaged, worth much less than if the ice plant was not operated there."

The effect of the holding of this court in *Bickley* v. *Morgan Utilities Co., Inc., supra,* was that, whosoever undertakes to, and does, establish in a residential section an ice manufacturing plant is responsible as a matter of law for all damages which flow directly from its operation. This was the theory on which the instant case was presented to the jury by the court's instructions, and we think the court committed no error in so doing.

It is contended by appellant that certain of the instructions are in conflict with each other. To this we cannot agree. We think that when the court's whole charge is read together it presents the issues of the case concisely, fairly and clearly.

Appellant next complains that the trial court erred in telling the jury that, if they found for the plaintiff, they should award him the difference between the fair market value of his property immediately prior to the

erection of the ice plant and its fair market value after the erection and operation of said plant, it being contended on behalf of appellant that the correct measure of damage in the case was the difference between the rental value of the property prior to the erection of the ice plant and its rental value after the ice plant was erected and in operation.

The case of *Junction City Lumber Company* v. *Sharp,* 92 Ark. 538, 123 S. W. 370, is relied upon by appellant as establishing its contention. This case is not authority for appellant's contention. This court, in the *Junction City Lumber Company* v. *Sharp* case, *supra,* said: "In the case at bar it is not claimed that any injury was caused to the health by the maintenance of a nuisance, etc."

In the case at bar the testimony shows that people who occupied appellee's home were made sick by the ammonia fumes which were permitted to escape from its ice plant. Again, in the Junction City Lumber Company case, *supra,* the nuisance there complained of was a sawmill in close proximity to Sharp's home. This court knows that country sawmills are usually temporary in duration. In the instant case, the ice plant is of a permanent character and will probably be maintained much longer than appellee's dwelling. No intimation appears in this record that appellant expects to occupy its property for only a temporary length of time. On the contrary, the record reflects that its ice plant is a well-built and regulated establishment, and is of a permanent character, and therefore its continued operation will effect a continued injury to appellee and his property. Therefore, we think that the court was correct in giving this instruction on the measure of appellee's damage to the jury.

Other contentions are made by the appellant for reversal of the case, but we do not deem them of sufficient importance to discuss in this opinion.

Let the judgment be affirmed.