

## JUNCTION CITY LUMBER COMPANY v. SHARP.

Opinion delivered November 29, 1909.

1. NUISANCE—INJURY TO RESIDENCE.—Anything that materially and substantially lessens or destroys the use and enjoyment of one's homestead constitutes a nuisance. (Page 541.)
2. SAME—RIGHT TO USE ONE'S PROPERTY.—While every one has the right to the reasonable enjoyment of his own property, this right must be so exercised as not to violate the rights of others. (Page 542.)
3. SAME—CINDER PIT.—Where a lumber company constructed its sawdust or shaving pits and burnt its shavings and sawdust in a place where the smoke, cinders, soot and ashes were blown into a dwelling house, so as to cause a necessary and material annoyance to the owner, it will be liable as for a nuisance. (Page 543.)
4. SAME—MEASURE OF DAMAGES.—Where an injury to real estate by the maintenance of a nuisance is of a permanent nature, the measure of damages is the depreciation in the market value of the land; but if

the injury is not of a permanent nature, the depreciation in its rental value is the measure of damages. (Page 545.)

Appeal from Nevada Circuit Court; *Jacob M. Carter*, Judge; reversed.

*McRae & Tompkins* and *D. L. McRae*, for appellant.

He who uses his legal right harms no one. 59 Miss. 116; 9 N. Y. 444. One living in a city must necessarily submit to the inconveniences of city life. 78 Ky. 400; 188 Mass. 6; 118 N. W. 768; 23 Mich. 448. The measure of damages, unless the injury is permanent, is the depreciation in rental value during the continuance of the nuisance. 118 S. W. 786. The damages should at most be only nominal. 58 L. R. A. 390; 14 *Id.* 229; 74 Ia. 169; 86 Ala. 515.

*J. O. A. Bush*, for appellee.

Appellee's right to recover did not depend upon who owned the land where the nuisance was operated, nor the negligence of appellant in operating its plant. 85 Ark. 553; 27 L. Ed. 739. The right to enjoy property is as much a matter of legal concern as the property itself. 73 Ind. 293; 108 U. S. 328. The measure of damages is compensation for the physical discomfort sustained by appellee. 67 Ill. App. 443; *Id.* 351.

FRAUENTHAL, J. The plaintiff below, H. G. Sharp, is the owner of a lot in Prescott, Arkansas, which is occupied by him as a residence.

The defendant, the Junction City Lumber Company, owns a block in the same city near the plaintiff's dwelling house, upon which it has erected and operates a planing mill. The plaintiff alleged that the defendant in the operation of its plant created and maintains a nuisance, which disturbs, annoys, and injures him in the use and enjoyment of his property; and he instituted this suit for the recovery of the damages which he claims he has sustained thereby. The plaintiff is a carpenter, and at the time he bought his lot and built his dwelling thereon the land now occupied by the defendant was then occupied by a furniture factory. This furniture factory was destroyed by fire, and the defendant thereafter purchased the property; and after the erection and occupancy by plaintiff of his dwelling the defendant built its planing mill on the land acquired by it. This was three

or four years prior to the institution of this suit. At the same time the defendant built on this property a shaving pit, which is situated 375 feet from the plaintiff's house. The plant of the defendant employs about fifty men, and has a capacity of about 30,000 feet of lumber per day. The defendant delivers into the shaving pit by means of a blow pipe large quantities of shavings and sawdust, which are there burned; and these burning shavings and sawdust emit smoke, ashes and cinders, which envelope the plaintiff's residence, causing discomfort and annoyance in its use and enjoyment. The evidence on the part of the plaintiff tended to prove that the fires have been kept burning for the greater part of each year continuously during the past three years; that his house was situated in a north-eastwardly direction from the pit, and that the winds in that locality blow from the southwest and blow the smoke and ashes towards and upon his property; that the ashes and cinders soil the clothes of his family, and the smoke injures the use and enjoyment of his residence by reason of its discomfort and annoyance. At the request of the plaintiff, the court gave the following instruction: "If you find from the evidence that the defendant built or constructed its sawdust or shaving pits and burns its shavings or sawdust in a place where the smoke, cinders, soot or ashes are blown in on plaintiff's house in such a manner as to reasonably annoy him and his family and disturb them in the peaceable use and comfortable enjoyment of the same, you will find for the plaintiff."

"2. If you find for the plaintiff, you will assess his damages at such a sum as will in your judgment be a fair compensation for such annoyance, inconvenience and discomfort as the proof may show he and his family have suffered, if any; and in arriving at the amount you are told that the law lays down no rigid rules, but you are to be governed by your good judgment and reason and sound discretion based on the evidence in the case."

At the request of the defendant the court gave the following instructions:

"5. You are further told that one who chooses to reside in a city or town near manufacturing establishments cannot be heard to complain of the noise, smoke and confusion incident

thereto in the prosecution of a lawful business in a reasonably careful way. For these annoyances they are compensated by the attendant advantages. So in this case, if you believe from the evidence that the defendant is lawfully making a reasonable use of its property, so as to occasion no unnecessary damage to plaintiff, your verdict should be for the defendant.

"6. You are further told that, in passing upon the question as to whether the defendant is liable for damages, if the alleged annoyance is only occasional and not such as to annoy a reasonable person, the defendant would not be liable, although it might in fact annoy the plaintiff."

The court refused to give the following instructions asked for by the defendant:

"3. You are told that the defendant has the right to run a saw mill or planing mill and to use steam as a motive power, and to burn the shavings; and if in constructing and in using the property it has been guilty of no negligence, your verdict should be for the defendant."

"4. You are further told that if you find from the evidence that at the time plaintiff bought the property and built his residence thereon he knew that the lots and block upon which defendant's mill is built were appropriated and used for manufacturing purposes and establishments, he cannot be now heard to complain of the annoyance which arises necessarily from the lawful use of said property for such purposes."

The jury returned a verdict in favor of the plaintiff for \$250; and from the judgment entered thereon the defendant presents this appeal.

1. This action is based upon the right of the plaintiff to recover damages to his property caused by an alleged nuisance maintained by the defendant upon its property. The plaintiff is the owner of a lot upon which is located his residence, and the value of his ownership depends upon the use and enjoyment of it as a residence. Anything that materially and substantially lessens or destroys that use and enjoyment impairs the value of the property and thus damages the plaintiff. Such acts create a nuisance, and the party who so maintains them to the injury of another is responsible in damages.

In the case of *Baltimore & Potomac Rd. Co. v. Fifth Baptist Church*, 108 U. S. 317, Mr. Justice Field says: "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." Any injury to lands or houses which renders them less useful or comfortable is a nuisance. Joyce on Nuisance, § 2; Hilliard on Torts (4th Ed.), 584.

All acts done by one which render the dwelling house of another less fit for habitation, or which materially and substantially prevents its enjoyment in as full and ample a manner as before, will constitute a nuisance. Joyce on Nuisances, § 22; 2 Greenleaf, Ev. p. 427.

The use and enjoyment of property is the essential and valuable element of the right of ownership; and, wherever the property may be located, its owner has a right to be protected in that use and enjoyment, and to receive damages for an injury thereto. The locality may be considered in determining the extent of that injury, but anything which palpably and substantially annoys and disturbs one in the possession of his property works an injury for which he is entitled to redress, wherever it may be located. Every owner has a right to this protection. It is true, as is claimed by the defendant, that it has also the right to the use and employment of its property. And to obtain that use and employment it has the right to build and maintain on its property any business it may desire, which is lawful; but that right must be so exercised and the business prosecuted that it does not destroy the right of the neighboring owner to the enjoyment of his property. As is said in the case of *Bohan v. Port Jarvis Gas Light Co.*, 9 L. R. A. 711: "Every one has a right to the reasonable enjoyment of his own property; and so long as the use to which he devotes it violates no rights of others, there is no legal cause of action against him. The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business; and, so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. \* \* \* \* But where the damage is the necessary consequence of just what the defendant is doing,