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Home Owner's Rights versus Industrial Expediency

NUISANCE

HOME OWNERS RIGHTS VERSUS INDUSTRIAL EXPEDIENCY

Plaintiffs sought damages for odors which necessarily interfered with the use, occupation, and wholesome enjoyment of their homes. The odors were emitted by the defendant's tannery. Held, for defendant. Since the evidence showed that the defendant's tannery was located in an industrial area, that it was an essential industry, and that it operated in the most modern manner with the approval of the state board of health, the plaintiffs could not recover in the absence of a showing of material injury to their health or property, for it is against public policy to interfere with normal industrial activity.[1]

Ever since Aldred's Case[2] it has been the settled law that one may not so use his private property as to permeate the air with "disgusting smells" and thus render the occupancy of adjoining property uncomfortable.[3] The courts unanimously pronounce the common law axiom that one has " . . . the natural right to have the air diffused over his premises reasonably free from smoke, fumes, gases and other impurities."[4] However, in the expediency of encouraging industrial enterprise, modern tribunals have so excepted and construed the "reasonably free" clause that private property owners have been compelled to sacrifice many of their "natural" rights to comfortable enjoyment of their premises to the public interest in fostering industry.[5]

1. Gardner et al. v. International Shoe Company, 319 Ill. App. 416, 49 N.E. (2d) 328 (1943).
2. William Aldred's Case, 9 Co. 57b, 77 Eng. Rep. R. 816 (K.B. 1610).
3. See Camfield v. United States, 167 U.S. 518, 523 (1897).
4. Emil Feder v. Perry Coal Company, 279 Ill. App. 314, 318 (1935); accord, United States v. Luce et al., 141 Fed. 385, 414 (1905); Higgins v. Decorah Produce Company et al., 214 Iowa 276, 242 N.W. 109, 111 (1932). Professor Harper stated this rule as follows: "But while the doctrine of ancient lights and the easement of air over adjoining lands is repudiated, it is a nuisance to unreasonably pollute the air with soot or smoke, dust, foul odors, gases, and other annoying and offensive substances to the damage of adjoining land occupiers in the use and enjoyment of their property." Harper, "Torts" (1933) 383. See 39 Am. Jur. (1942) §53, p. 335.
5. In denying an injunction against a sawmill the Washington Supreme Court said: "The manufacture of lumber is the most important business of Western Washington, and no unnecessary interference therewith will be permitted." Bartel et ux. v. Ridgefield Lumber Company, 131 Wash. 183, 229 Pac. 306, 309 (1924). See Higgins v. Decorah Produce Company et al., 214 Iowa 276, 242 N.W. 109, 111 (1932). See also Harper, "Torts" (1933) 185.
6. The Alabama Supreme Court, citing several cases, has said, "In general, home owners and occupants, as well as all others, must endure, without legal recourse, all those petty annoyances and discomforts ordinarily and necessarily incident to the conduct of those trades and businesses which are usually a part of municipal life, and which are more or less essential to the existence and comfort and progress of the people." Dixie Ice Cream Company et al. v. Blackwell et al., 217 Ala. 330, 116 So. 348, 349 (1928). See The Illinois Central Railroad Company v. Catharine Grabill, 50 Ill. 241, 244 (1869), wherein it is said, "Such consequences of the

It is common knowledge that industry has its necessary concomitants which must be borne by the public without hope of legal redress.[6]

There are innumerable instances of the clash of the interests of industry and private property.[7] The extent of the industrial privilege to burden home owners with its inescapable inconveniences depends upon the locality,[8] utility of the industry,[9] and the effect upon the neighbors' comfort.[10] Conceding the liability of industry for nuisance in residential areas,[11] for actual injury to health and property,[12] and

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construction and use of railroads must be borne by all living near them, without complaint and without hope of redress, for they are inseparable from the purposes and objects of such structures." See also Strachan et al. v. Beacon Oil Company, 251 Mass. 479, 146 N.E. 787, 790 (1925); Haber v. Paramount Ice Corporation, 239 App. Div. 324, 267 N.Y. Supp. 349, 352 (2d Dep't 1933).

7. Interesting dicta is found in a Pennsylvania Supreme Court opinion where the court in speaking of this clash said, that although the public is benefited by industry, still industry is the result of private enterprise, conducted for private profit and under the control of the producer. "The interests in conflict in this case are therefore not those of the public and of an individual, but those of two private owners, who stand on equal ground as engaged in their own private business." Sullivan et al. v. Jones & Laughlin Steel Company, 208 Pa. 540, 57 Atl. 1065, 1070 (1904).

8. See Stevens et al. v. Rockport Granite Company, 216 Mass. 486, 104 N.E. 371, 374 (1914); De Muro et al. v. Havranek et al., 153 Misc. 787, 275 N.Y. Supp. 186, 191 (Sup. Ct. Westchester Co. 1934); Kennedy v. Frechette, 45 R.I. 399, 123 Atl. 146, 148 (1924); Scruggs v. Wheeler, —— Tex. Civ. App. ——, 4 S.W. (2d) 616, 618 (1927).

9. See Monroe Carp Pond Company v. River Raisin Paper Company et al., 240 Mich. 279, 215 N.W. 325, 328 (1927); William Daughtry v. Samuel B. Warren et al., 85 N.C. 119 (1881). See also 39 Am. Jur. (1942) §16, p. 298.

10. The Pennsylvania Supreme Court, quoting from 46 C.J. 655, in propounding a test for nuisance, said: " . . . whether a business lawful in itself . . . constitutes a nuisance, is the reasonableness or unreasonableness of conducting the business or making the use of the property complained of in the particular locality and in the manner and under the circumstances of the case." Ebur et al. v. Alloy Metal Wire Company, 304 Pa. 177, 155 Atl. 280, 282 (1931). Harper determines the privilege by " . . . reference to all the conditions of the parties, the circumstances of the situation and the balancing of advantages and disadvantages incident to the defendant's conduct for all concerned." Harper, "Torts" (1933) 376. Professor Prosser has said that the extent of this industrial privilege is determined " . . . by weighing the gravity of the harm to the plaintiff against the utility of the defendant's conduct." Prosser, "Torts" (1941) §73. See Note (1938) 185 L.T. 351, 352; Prosser, "Nuisance Without Fault" (1942) 20 Tex. L. Rev. 399.

11. See note 8 supra.

12. See E. Harold Wineland, State's Attorney, ex rel. William Abeln et al. v. M. Huber, Inc., et al., 275 Ill. App. 264, 279 (1934); J. S. Wylie et al. v. James G. Elwood, 134 Ill. 281, 288, 25 N.E. 570, 571 (1890).

for negligence,[13] the real problem arises when an essential industry unavoidably delimits the right to enjoyment of private homes.[14] Under such circumstances is actual injury to health or property a condition precedent to industrial liability?

State statutes generally include interference with comfortable enjoyment of life and property among those things for which a cause of action for nuisance will lie, thus clearly implying that one has a right to the enjoyment of his premises over and above his right to freedom from actual injury.[15] Legal scholars uniformly agree that a plaintiff is entitled to recover for discomfort and inconvenience.[16] It was declared in a celebrated federal case that a nuisance was that " . . . which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrongoer. . . . "[17] Thus it appears well established that personal discomfort is a distinct element of damages.[18]

Confronted with the fact that the weight of authority clearly asserts that personal discomfort is a distinct element of damages,

13. The Illinois Supreme Court has said " . . . that a recovery can and should be had for such damages as arise out of the careless or negligent acts of a railroad company in regard to any usual and necessary appurtenance to their road, cannot be denied." The Illinois Central Railroad Company v. Catharine Grabill, 50 Ill. 241, 244 (1869). See Adam Eckart et al. v. City of Belleville, 294 Ill. App. 144, 13 N.E. (2d) 641 (1938); Henry Sawyer & another v. Charles G. Davis & others, 136 Mass. 239, 242 (1884). See also Harper, "Torts" (1933) §§180, 181.

14. A recent comment on a Washington Supreme Court decision used the following language: "No showing of negligence was made; in fact is 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." Comment (1943) 18 Wash. L. Rev. 31, 32.

15. Ind. Acts 1881, (Spec. Sess.), c. 38, §709, Ind. Stat. Ann. (Burns, 1933) §2–505; Ill. Rev. Stat. (1943) c. 38, §466 (8), Ill. Stat. Ann. (Jones, 1936) §37.415.

16. See Harper, "Torts" (1933) §§180, 186; Prosser, "Torts" (1941) 575; Restatement, "Torts" (1939) §822, p. 228. A case comment severely criticizing a recent decision, analogous to the decision in the principal case, has cited a long line of judicial decisions emphasizing the point that damages are recoverable solely on the basis of discomfort. Comment (1943) 18 Wash. L. Rev. 31.

17. Baltimore & Potomac Railroad Company v. Fifth Baptist Church, 108 U.S. 317, 329 (1883).

18. See United States Smelting Company v. Sisam, 191 Fed. 293, 302 (C.C.A. 8th, 1911); Baltimore & Potomac Railroad Company v. Fifth Baptist Church, 108 U.S. 317, 330 (1883); Judson v. Los Angeles Suburban Gas Company et al., 157 Cal. 168, 106 Pac. 581, 582, 583 (1910); Boyd v. City of Oskloosa, 179 Iowa 387, 161 N.W. 491, 492 (1917); Oklahoma City v. Eylor, 177 Okl. 616, 61 P. (2d) 649, 651 (1936); Chandler et al. v. City of Olney, 126 Tex. 230, 87 S.W. (2d) 250 (1935); Mattson et ux. v. Defiance Lumber Company, 154 Wash. 583, 282 Pac. 848, 850 (1929).

is it not manifestly inconsistent to deny damages because there is proof of no actual injury to health or property? It is submitted that proof of the absence of actual material injury to the plaintiffs' health or property is nothing more than evidence as to the reasonableness of the defendant's conduct.