[VASSILIADES, P., TRIANTAFYLLIDES AND HADJIANASTASSIOU, JJ.]

COSTAS SYMEONIDES & ANOTHER,

Appellants-Defendants,

v.

EVANTHIA CHR. LIASIDOU,

Respondent-Plaintiff.

(*Civil Appeal No.* 4818).

Nuisance—Private nuisance—The Civil Wrongs Law, Cap. 148, *section* 48—*Remedies,* inter alia *injunction—Section* 3 *of the Civil Wrongs Law and section* 32 *of the Courts of Justice Law,* 1960 (*Law of the Republic No.* 14 *of* 1960)—*Smoke from chimney situate near plaintiff's bedroom—What constitutes private nuisance—Section* 48 *of Cap.* 148 (supra)—*Nuisance not sufficiently established in the present case—Standard of proof required in a nuisance case*—Palantzi *v.* Agrotis (1968) 1 *C.L.R.* 448, followed.

Nuisance—Private nuisance—Injunction—Form of—Courts of Justice Law, 1960, *section* 32 (supra).

Cases referred to:

Palantzi v. *Agrotis* (1968) 1 C.L.R. 448, *followed;*

Patsalides v. *Afsharian* (1965) 1 C.L.R. 134.

The facts sufficiently appear in the judgment of the Court allowing the appeal by the defendants in the action and setting aside the judgment of the trial Court.

Appeal.

Appeal by defendants against the judgment of the District Court of Nicosia (Ioannou Ag.D.J.) dated the 2nd June 1969 (Action No. 4322/68) whereby they were restrained from continuing to use a chimney of their house, the use of which constituted a private nuisance to the occupiers of plaintiff's house.

Chr. Kyriakides, for the appellants.

S. Sofocleous (*Miss*), for the respondent.

The judgment of the Court was delivered by:

VASSILIADES, P.: The appellants-defendants are husband and wife, living at No. 7 Pallados Street, in Prodromos quarter, Nicosia, in a house owned by the wife. The respondent-plaintiff owns a neighbouring building, at No. 14 Prodromos Street, where she lives with her husband and family.

On October 22, 1968, the plaintiff filed the present action for an injunction restraining the defendants, their servants and agents, from continuing to use a chimney of their house, the use of which constituted a private nuisance – the plaintiff alleged – to the occupiers of plaintiff's house.

The claim was founded on the relevant provisions of the Civil Wrongs Law (Cap. 148) section 46 of which deals with what constitutes a private nuisance; and section 3 of which provides that any person who suffers "damage" by reason of a civil wrong shall be entitled to the remedies which the Court has power to grant; injunction being one of such remedies as provided in section 32 of the Courts of Justice Law (No. 14 of 1960).

The case of the plaintiff as set out in the statement of claim is that the chimney of the washing place of defendants' house is so situated near the bedrooms of plaintiff's house that the smoke, smell and bits of burnt paper and other fuel used in the chimney, which is operated most of the days in the week – the plaintiff alleges – cause such discomfort to the occupiers of plaintiff's house as to constitute a private nuisance, which the defendants failed to abate, and intend to continue, in spite of repeated protests on the part of the plaintiff. Hence the action; and the prayer for injunction.

The case for the defendants as stated in their pleading, is that they only use the chimney in question for about two hours every week, on the day on which they do their homewashing; and that such use as they make of their chimney on such occasions, does not constitute a private nuisance as alleged, entitling the plaintiff to the remedy claimed.

The case went to trial on an early day, when the learned trial Judge inspected the locus in quo; and before proceeding with the hearing, made a commendable attempt to bring the parties to a settlement which, however, failed.

The plaintiff gave evidence in support of her case; and called one witness, a municipal health inspector. The second defendant – the wife – also gave evidence; and called three more witnesses for the defence, one of whom was another municipal health inspector.

The property of the defendants is their dwelling house. It was built in 1954; and belongs to the wife (the second defendant). They have been living there with their children ever since; and they have using the chimney in question for the same purpose.

The property of the plaintiff is a much bigger building. It was described as a block of flats, the second floor of which has not yet been completed. The ground floor was built in 1958. The plaintiff went to live there, with her family, in 1968. The house of the defendants is behind that of the plaintiff; and according to her evidence, the chimney complained of, is only 10 feet away from and at the same level with the window of plaintiff's bedroom. Her complaint, as she stated it when examined in chief, is that when defendants' chimney is being used and the wind is in the direction of her window, smoke and burnt bits of paper and other offensive smells come into her room, even if the window be closed, causing discomfort to persons living in the house and damage to furniture and clothing.

Answering questions from defendants' advocate in cross-examination, the plaintiff did not agree that the chimney is only used for a couple of hours once a week, on the washing day. She stated that her neighbours' washing is done for two days every week, Wednesdays and Thursdays and that the chimney works on both days for several hours. She admitted, however, that during the last two months before the trial, the defendants did not seem to be using any paper in their chimney; but the smoke, she claimed, was still offensive. She agreed that she was now on bad terms with the other side because of that chimney.

The witness called for the plaintiff stated that he went to see the place at the request of the plaintiff on three different occasions, the last of which was on September 3, 1968, some seven weeks before action; and more than six months before the trial. He saw smoke coming out of the chimney; and entering plaintiff's bedroom saw bits of burnt paper and soot

which caused blackening to curtains and clothing. Going to defendants' house on the same day, the witness saw rolls of pressed paper being burnt in the chimney. He agreed that he never went there again after that inspection on September 3rd.

The other municipal health inspector who was called for the defence stated that when he inspected the place this year (1969) he saw smoke coming out of defendants' chimney; but it was thin and unoffensive. He did not see smoke going into plaintiff's bedroom. He had requested the defendants to light a test fire in their chimney so that he could see for himself.

In her evidence, the second defendant stated that in Nicosia where she had been living for the last 25 years, a great number of houses use chimney-fires, at least three of which in the vicinity of the parties' houses. She also stated that she used the chimney in question only for a couple of hours every week on the day on which the household washing was done; and that since she had this complaint from the plaintiff, she ceased using any paper in her chimney, where only fire-wood fuel is now used; and where she has placed a wire netting to stop burnt bits from going up the chimney.

Another housewife, living opposite the house of the plaintiff and next to that of the defendants, saw the chimney in operation; but never noticed offensive smell from the smoke, or paper being burnt there. As far as she could say, the fuel used was fire-wood. Another witness, a plumber, who happened to be in defendants' house for work, one day in October, 1968, and heard the plaintiff and her husband shouting protests for the smoke coming out of defendants' chimney, he saw some smoke and confirmed that the fuel used was firewood.

From this evidence before him, the learned trial Judge proceeded to make his findings. Accepting the evidence of the plaintiff, he found that the smoke from defendants' chimney which was being used for the household washing once, and occasionally twice a week, and which (chimney) was only 10 feet from the bedroom windows of plaintiff's appartment, offensive smell and bits of burnt paper and other such matter, entered the house of the plaintiff, causing damage to the furniture, curtains and other clothing; and causing discomfort and unhealthy conditions for the persons living in plaintiff's house. Taking the view that in a developing part of the town, which was now thickly populated, such conditions were

undesirable, the trial Judge found for the plaintiff; and granted her the injunction claimed "in paragraph 8(A), (B) and (D)" of the statement of claim; with £40 costs.

In presenting the appeal of the defendants against this judgment, learned counsel relied mainly on three grounds: First that the injunction, as made in the terms of the claim, is vague and unenforceable; secondly that the trial Judge's findings are against the weight of the evidence taken as a whole; and thirdly that the evidence in support of the claim does not establish the existence of a private nuisance, as known to our law.

We are inclined to think that there is merit in the first ground, regarding the form in which the injunction was granted; but in view of our decision on the substance of the claim, we prefer to take the other grounds first. One cannot but appreciate, the trial Judge's progressive view of the matter in the light of present-day methods of dealing with household washing; but here we must concern ourselves only with the law applicable to the facts of the case before us, as established by the evidence.

The case of the plaintiff rests entirely on her own evidence. The witness called to support her, described the conditions as he assessed them when he went to plaintiff's house considerable time before action; and long before the trial and the material time for the making of the injunction.

At the highest, the effect of her evidence is that the second defendant (the wife) as owner and occupier of her house, is making normal and ordinary use of her washing chimney, once and occasionally twice a week, to do her house-hold washing, using fire-wood fuel. And that the smoke from her chimney, such as it may naturally be, is carried towards the windows of plaintiff's house, about three or four yards away, when the wind blows in that direction. When the windows are closed, the smoke may be noticed in the room. Any finding beyond that, would be clearly unsatisfactory and untenable. (See *Patsalides* v. *Afsharian* (1965) 1 C.L.R. 134; *Palantzi* v. *Agrotis* (1968) 1 C.L.R. 448).

There is no suggestion of any blackening of the face of the wall; or of any re-painting which had to be made because of the smoke from defendants' chimney for a period of more than ten years since the plaintiff's house has been there (1958–1969). And no satisfactory evidence of any actual

damage to curtains, furniture, clothing or other articles in the plaintiff's house. Surely for an occurrence which was as frequent as stated, and as intensive as to justify an injunction, more positive and independent evidence could easily be made available regarding damage and discomfort, to support such a claim in a Court of law.

On the facts, as they emerge from the whole evidence, stripped from exaggeration and gloss, we have no difficulty in coming to the conclusion that the plaintiff (on whom the burden lies) has not sufficiently established the civil wrong complained of, against the defendants. She has not proved that the defendants' or any of them, have been using their house in such a manner as to interfere habitually with the reasonable use and enjoyment by the plaintiff of her neighbouring house, having regard to the situation and nature thereof. The appeal must, therefore, succeed; and the injunction be discharged.

The matter before us is fully covered by *Palantzi* v. *Agrotis* (*supra*) where the law concerning private nuisance has been usefully expounded and discussed. Unfortunately, it seems that the attention of the trial Judge was not drawn to that case. The standard of proof required to establish in a case of this nature, sufficient interference with the plaintiff's reasonable use and enjoyment of her property, is well illustrated in that case: and the proper balancing of the conflicting claims of the two sides, is practically reflected in the terms of the injunction granted. Needless, of course, to add that if in the future, the defendants or the occupiers of their house, make such use of their property (and particularly of the chimney in question) as to cause a nuisance to the persons using the plaintiff's neighbouring house (or for that matter, any other house in the vicinity) the personal remedy of injunction shall always be there to stop them from doing so. The present appeal decides only the matter as standing before us in this action; and no more.

Appeal allowed.

Injunction discharged.

With costs against the plaintiff in the action and in the appeal.

Appeal allowed with costs of the appeal and the Court below.