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Article 7

# Remedies - Nuisance Abatement as Legal or Equitable

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# RECENT DECISIONS

Remedies—Nuisance Abatement as Legal or Equitable—Plaintiff asked in his complaint, that an injunction be issued against the owners of a neighborhood lot to restrain any further dumping of waste materials on that lot. Defendant, who was a former licensee of the owners, was joined. Plaintiff also requested an abatement of the nuisance plus damages. The defendant argued that, as it had ceased all dumping prior to the issuance of the complaint, no cause of action in equity existed against it to restrain further dumping; and, therefore, there was a misjoinder. The trial court refused defendant's motion for summary judgment, and defendant appealed. *Held,* order affirmed A court of equity, under a statutory action to abate a nuisance, had power to compel a defendant to abate the nuisance even though the defendant, as a former licensee, had no right to enter upon the land to abate it. In such a case a warrant could be issued to the proper officer under §280.04, Wis. Stats., directing him to abate the nuisance at defendant's expense. The defendant, on rehearing, claimed that because it could not be strictly enjoined by equity (as it had ceased dumping, and had no legal right on the owner's land), the plaintiff had merely a cause of action against it for abatement plus damages, which, defendant contended, was a legal remedy as a result of and amendent to §280.01, Wis. Stats., in 1935. The court answered that abatement plus damages under §280.01 is one cause of action, and it is an equitable, not a legal remedy. Consequently, there was no misjoinder, because the court of equity had jurisdiction over all parties to the action, despite the fact that different remedies were sought against different parties. *Kamke v. Clark,* 268 Wis. 465, 67 N.W.2d 841 (1955).[1]

Nuisance is not a species of acts, but consists, in its essence, of a condition producing a particular kind of damages; viz., an unreasonable interference with a possessory or other interest in neighboring lands.[2] Hence, the court correctly concluded that cessation by defendant of the acts creating the condition does not necessarily terminate the condition itself, nor the continuing breach of the injured party's right which flows therefrom. Failure to terminate the condition is in itself a nuisance.[3]

It is conceded, therefore, that plaintiff had a good cause of action against the defendant at least for damages. It is also conceded, that a court of equity, if it has proper jurisdiction over defendant in a nuisance case, can award damages by way of granting complete relief, even as a court of law can.[4]

[1] *Rehearing,* 68 N.W.2d 727 (Wis. 1955).
[2] RESTATEMENTS, TORTS §201, comment b and d (1934).
[3] Brown v. Milwaukee Terminal Ry., 199 Wis. 575, 227 N.W. 385 (1929).
[4] Kharas, *Century of Law-Equity Merger in New York,* 1 SYRACUSE L. REV. 186, 203.

The distinction, in Wisconsin, between actions at law and suits in equity has been abolished.[5] Whether a case be one at law or in equity may be important, however, to determine whether it will be tried to a jury, and also on the issue of apportionment of costs.[6] The question is also important when the issue of misjoinder is raised, as it was in the principal case; for if the case is tried in equity and the equitable jurisdiction does not cover all the parties to the action, there is a misjoinder.

> The defendant stated, and the court emphatically agreed, that: . . . damages cannot be awarded by a court of equity against a defendant as to whom no cause of action for equitable relief is maintainable.

and further:

> If at the time of commencement of the instant action the plaintiff's only remedy against appellant, whose acts have contributed to cause the nuisance, where an action at law for damages, there would be a misjoinder of causes of action if the action were not dismissed as to appellant.[7]

And so, the basic question to be settled in this case is: Was the plaintiff entitled to equitable relief against the defendant, or was the plaintiff's remedy solely one at law. If the remedy were solely one at law, as defendant asserted, there was a misjoinder of causes of action.

It is axiomatic that equity may not be appealed to except where the remedy at law is not adequate.[8] The plaintiff asked for an abatement of the nuisance. By corollary, it would follow that equity cannot be asked to abate the nuisance where there is any remedy afforded by a court of law by which the nuisance could be effectively terminated.

The question, therefore, becomes: Is there today in Wisconsin a legal remedy for abatement of nuisance. The court in the rehearing of the instant case seemed to imply that abatement is solely an equitable remedy. In rather ambiguous language, the court said:

> It is, therefore, our considered judgment that the 1935 amendment to Sec. 280.01, Stats., did not convert the nature of the action prescribed therein (abatement plus damages) from one at equity to one at law. (parenthesis added)[9]

Despite this language and other statements in the case by which court inferred that abatement under the present statute is solely equit-

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[5] Wis. Stats. (1935) §260.08.
[6] Wis. Stats. (1939) §271.01 (2).
[7] Kamke v. Clark, *supra* at note 1, 67 N.W.2d at 844.
[8] Prescott v. Everts, 4 Wis. 314 (1855); Shephard v. Genung, 5 Wis. 397 (1856); Donaher v. Prentiss, 22 Wis. 311 (1867); Knight v. Town of Ashland, 61 Wis. 246, 21 N.W. 72 (1884); Royal Indemnity Co. v. Sangor, 166 Wis. 148, 164 N.W. 821, 9 A.L.R. 397 (1917); see 4 WIS. L. REV. 474.
[9] Kamke v. Clark, 68 N.W.2d at 731.

able in nature, there seem to be three firm bases for the opposite contention.

1) There was a legal remedy for abatement at common law. Granting that in most cases the relief sought was equitable, because of the threatening nature of the nuisances, there was, nevertheless, a distinct legal remedy for the abatement of presently existing nuisances. This legal remedy was originally known as the Assize of Nuisance, and was available for abating nuisances on lands neighboring the complainant's.[10] There was a writ which issued from this legal action and was addressed to the sheriff:

> The King to the Sheriff, Greeting. N. complains to me that R. unjustly and without judgment has raised a certain dyke in such a Vill or thrown it down to the nuisance of his freehold in the same Vill since my last voyage into Normandy.[11]

There was, besides the Assize of Nuisance, another common law legal remedy to abate a nuisance. This was the Writ of Right or Writ of Quod Permittat.[12] Again the writ which issued from such a judgment was directed to the sheriff:

> The King to the Sheriff, Greeting. I command you, that without delay, you command R. that, justly and without delay, he permit H. to have his Easements in the Wood and in the Pasture of such a Vill, which he ought to have, as he says; as he ought to have them and usually has had them; and that you permit not the aforesaid R. or any other to molest or injure him.[13]

2) The legal remedy for abatement of nuisances was available in Wisconsin and recognized in many early cases;[14] moreover, it has never previously been abrogated either by statute or judicial decision. Our court, as early as 1865, expounded the principle that a statute is not to be construed as changing the common law rule if the statutory language is not inconsistent with the idea that the rule of the common law is still to prevail.[15] This maxim is cited with approval in the case under consideration.[16] If that principle is to be followed, it is not logically possible to conclude, as did the court in the instant case, that the common law legal remedy for abating nuisances has been abrogated, and that there exists today solely an equitable remedy. There is no statutory language which could be even broadly construed to do away

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[10] CLARK, EQUITY 261 n.1 (1928).
[11] McRae, *The Development of Nuisance in the Early Common Law*, 1 FLA. L. REV. 31.
[12] AMES, LECTURES ON LEGAL HISTORY, 231 (1930).
[13] McRae, *supra* note 11, at 27.
[14] Remington v. Foster, 50 Wis. 608, 8 N.W. 217 (1877); Pennoyer v. Allen, 50 Wis. 308, 6 N.W. 887 (1880); 51 Wis. 360, 8 N.W. 268 (1881); Fraedrich v. Flieth, 64 Wis. 184, 25 N.W. 28 (1885); Stadler v. Grieben, 61 Wis. 501, 21 N.W. 629 (1884).
[15] Meek v. Pierce, 19 Wis. 300 (1865).

with the legal remedies for abatement. Section 280.01, as amended in 1935, now reads:

> 280.01 Jurisdiction over nuisances. Any person may maintain an action to recover damages for and to abate a private nuisance or any person, county, city, village, or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the camplainant are suffered, so far as necessary to protect the complainant's right and to obtain an injunction to prevent same.[17]

Certainly, the words "any person may maintain an action . . . to abate a private nuisance . . ." are not inconsistent with maintaining a common law legal action to abate a nuisance. And chapter 190 of the Laws of 1882 (Section 280.01 before amended) read:

> Jurisdiction over Nuisances. The circuit courts shall have jurisdiction of actions to recover damages for and to abate private nuisances or a public nuisance from which any person suffers a private or special injury peculiar to himself, so far as necessary to protect the rights of such person, and to grant injunctions to prevent the same; and in case such nuisance may work irreparable injury, interminable litigation, a multiplicity of actions or either, or the injury is continuous and constantly recurring, or there is not an adequate remedy at law, or the injury is not susceptible of adequate compensation in damages at law, then an action in equity may be maintained and an injunction be issued therein, and an equitable action may be brought before the nuisance or the infringement of the plaintiff's right is established at law.[18]

It is acknowledged that this chapter restored the equitable remedy to complainants in nuisance cases, but nowhere in the statute or the cases interpreting it is there any suggestion that the long standing legal action had been abrogated by its language. In fact, cases cited by the court in its decision expressly hold that an action at law may be maintained under chapter 190 of the Laws of 1882.[19]

3) Section 280.04, Wis. Stats., provides for the issuance of a warrant addressed to the proper officer directing him to abate the nuisance at the defendant's expense, if the plaintiff has received a judgment that the nuisance be abated.[20] Such a warrant smacks of remedy at law. As Morgan observes:

> In actions at law . . . the judgment is not a command of the court to the defendant. If the defendant does not satisfy the

[16] Kamke v. Clark, 68 N.W.2d at 729.
[17] Wis. Stats. (1935) §280.01.
[18] Wis. Stats. (1882) Ch. 190.
[19] Karns v. Allen, 135 Wis. 48, 115 N.W. 357 (1908); Fraedrich v. Flieth, *supra*, note 14.
[20] "280.04 Execution and warrant. In case of judgment that the nuisance be abated and removed, the plaintiff shall have execution in the common form for his damages and costs and a separate warrant to the proper officer requiring him to abate and remove the nuisance at the expense of the defendant."

> judgment, the plaintiff may secure a writ ordering the sheriff to take appropriate action, but there will be no order requiring the defendant to do anything. . . . Equity, on the other hand, usually operates by ordering a party to act or to refrain from acting.[21]

This point loses much of its force, however, in the light of more recent developments in principles of equity. The old distinction between relief granted *in personam* and *in rem*[22] as setting off equity from law has faded, and equitable decrees may now be carried out by what were hitherto legal processes.[23] Nevertheless, in discussing the precise point, the court, in 1885, three years after the forerunner of the present section was passed, observed:

> *In an action at law,* if an abatement of the nuisance be adjudged, unless the defendant gives security that he will remove it, a warrant issues to the proper officer, requiring him to abate the same. R.S. Secs. 3182, 3183 (now secs. 280.04 and 280.05). (emphasis added)[24]

By this language, the court indicates that, a short time after the statute was passed, it was regarded as an ancillary procedure for executing a judgment of abatement in an action at law.

Two circumstances which arose, somewhat irrelevantly, in the principal case are worthy of mention. The first involves the somewhat "toothless lion"[25] which the court declares to be the appropriate injunctional decree to be issued under the circumstances. Not every nonperformance of an injunctional order, of course, necessitates that the nonperformer be punished by contempt proceedings; but it is a strange sort of decree indeed which prejudges the innocence of contempt in favor of an anticipated nonperformer, and provides by its original terms that no contempt citation may issue against the violater.[26]

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[21] MORGAN, INTRODUCTION TO THE STUDY OF LAW 74-75 (1948).

[22] 1 POM. EQ. JUR. §§135,170 (3d ed.).

[23] McMillan v. Barber Asphalt Paving Co., 151 Wis. 48 (1912); MORGAN, *op. cit., supra* note 21, at 77.

[24] Fraedrich v. Flieth, *supra* at 187.

[25] "While the appellant cannot be compelled to go upon the premises of the defendants Clark and abate the nuisance, a warrant can be issued to the sheriff under the provisions of §280.04 which would empower that officer to so enter upon such premises and abate the nuisance. . . . The judgment for abatement could well provide that plaintiffs should have no right to institute contempt proceedings for failure of a defendant to abate the nuisance, as required by the judgment, where such defendant is without legal right to enter upon the premises upon which the nuisance exists; and that plaintiffs' only remedy in case of non-compliance by such defendant as to the enjoined abatement be limited to the issuance to the sheriff of the warrant authorized by §280.04." Kamke v. Clark, 67 N.W.2d at 846-847.

[26] "A court of common law never lays a command upon a litigant, nor seeks to secure obedience from him. It issues its commands to the sheriff (its executive officer); and it is through the physical power of the latter, coupled with the legal operation of his acts and the acts of the court, that rights are protected by common law.
. . . Equity, however, has always employed, almost exclusively, the very method

In the circumstances above-mentioned, where compliance with the decree was recognized as impossible unless defendant-appellant either trespassed upon the lands of another or obtained a license-consent to enter the same, such peculiarity of language is understandable. But it seems to suggest that the injunctional decree is itself a rather pointless appendage, sandwiched between the normal procedures of legal relief.

The same point is emphasized by the second circumstance. While the principal case was pending on appeal, another action was brought to abate the identical dump, but was brought against the City of Milwaukee, which had also contributed to the "erection" of the nuisance. The lower court had, prior to the decision on appeal, granted judgment in abatement, and had authorized issuance of a warrant to the sheriff under the provisions of Sec. 280.04, under which, presumably, the nuisance was in the process of actual abatement. Nothing resembling an injunctional order in equity attended these proceedings. Granting that such later-arising circumstances could not properly control the propriety of the present appeal, the fact does tend to argue rather strongly against the theory, on the question whether or not the legal remedy of abatement is an adequate one under the circumstances.

To summarize: If there is a legal remedy in Wisconsin which is adequate to abate nuisances, and there is every indication that one exists, then equity should not intervene in such cases. The defendant has ceased all dumping and has given no cause to fear that he will create any new nuisance or a recurrence of the old, there is no threat of interminable litigation or a multiplicity of actions; therefore, the remedy at law is adequate, and equity should not have assumed jurisdiction over appellant in the instant case.

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**Conditional Sales—Refiling of Contract on Removal of Goods—** Plaintiff, a corporation in Oklahoma, brought a replevin action to recover possession of an automobile. Plaintiff had sold a new automobile employing a conditional sales contract. In the event of any default in payments, the whole balance became due and payable, and the plaintiff would be entitled to immediate possession. This contract was recorded in Oklahoma as required by their law. The buyer made no payments, and took the car to Texas and subsequently to Cali-

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of compulsion and coercion which the common law, like most other legal systems, has wholly rejected; for when a person is complained of to a court of equity, the court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then, by its order or decree, it commands him to do or refrain from doing what it has decided he ought to do or refrain from doing; and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience." Langdell, *A Brief Survey of Equity Jurisdiction,* 1 HARV. L. REV. 111, 116-118.