

Equity - Adjoining Landowners - Encroachments

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it represents another unpunished crime. Against the reasons advanced in the decision, several criticisms may be projected. At the outset, conceding the status of the Indian as a ward, it is only reasonable that he should be protected as fully as possible, and not, if possible, by half way measures. Since Congress has failed to protect him as against all but eight major offences, what sound reason can be adduced against the state's filling the gap, and providing for the punishment for the other offences? None has been brought forward, except that since the Indian is not highly civilized, modern complex laws made for highly civilized society, should not be imposed on him. But it must not be forgotten that while this argument was unassailable a hundred years ago, it has lost most of its strength, until today it is of very doubtful force, in view of the increased civilization among the Indians. Then too, it is doubtful whether our modern criminal laws are actually so much more complex and more unsuited to a "primitive" people than were the laws of several hundred years ago.

It has been said further that the states shall not legislate on this subject since that is a matter exclusively for Congress. This exclusive right is rested on the theory that the Indians are wards of the United States, owe no allegiance to the states, and, what is more important, receive no protection from the states. But even conceding so broad a statement that the State does not protect the Indian, is it not largely because the federal government has taken from the states the right to legislate as to the Indian that the states are not offering the Indian the protection to which he may be entitled?

While the writer has no reason fervently to espouse the cause of the Indian, yet it seems to him that a humanitarian public policy should dictate fuller protection of the Indian. The present state of the law falls short of this. But state legislation would seem constitutionally possible, and not at all unsatisfactory.

M. WESLEY KUSWA.

EQUITY—ADJOINING LANDOWNERS—ENCROACHMENTS. In the case of *Fisher vs. Godman, et al.*, 237 N.W. 93 (Wis.), the plaintiff sought to obtain a mandatory injunction ordering the defendants to remove a part of their building which protruded into the soil of her lot. The complaint alleged that, in the process of constructing an apartment building on their own property, the defendants excavated and removed a portion of her lot and built the heavy foundation and wall which projected into her land and which the defendants claimed they had a right to maintain. It further alleged that the plaintiff was thereby prevented from the full use and enjoyment of her property, that the value

of it had greatly diminished, and that she had suffered damage because of such encroachment. Defendants demurred on the ground that the complaint did not state such facts as would entitle plaintiff to equitable relief.

The court found no difficulty in overruling the demurrer, but hesitated upon the question whether relief should be equitable or in the form of ejectment.

The general rule upon that question is stated in 14 A.L.R. 831 to be that "Mandatory injunction is a proper remedy for a landowner to invoke against an adjoining owner to compel the removal of structures which encroach upon complainant's land." The application of the rule to particular cases in Wisconsin may be traced historically by an examination of the cases decided within this state.

One of the first of these cases, *McCourt vs. Eckstein*, 22 Wis. 148, *153, 94 Am. Dec. 594, held that, where some of the stones of defendant's foundation wall projected 8 inches over plaintiff's land, plaintiff might treat this as a disseisin rather than a trespass, and might maintain ejectment. But if, when plaintiff excavated for his wall adjoining that of defendant, the latter offered to remove the projecting stones, so as to give plaintiff full possession, and was prevented by him from so doing, the action could not be maintained.

The next case directly in point is *Zander vs. Valentine Blatz Brewing Co.*, 95 Wis. 162, 70 N.W. 164, which is an action in ejectment to recover 14 inches of plaintiff's land occupied by the defendant through excavation and the erection of a building foundation and wall. Here, however, the plaintiff had always been in full possession of his entire lot, for he had built his own building upon defendant's wall and continued to use it as a support for his own building. Such possession precluded the action of ejectment and made the action necessarily one of trespass.

Rahn vs. The Milwaukee Electric Railway and Light Co., 103 Wis. 467, 79 N.W. 747, resembles the latter case very closely. Though the protruding foundation wall was built and maintained without plaintiff's consent and against her protest, the plaintiff could not maintain ejectment, because the wall was erected in such a manner as to project under her own building, which extended to the true boundary line.

The only case to the contrary is *Beck vs. Ashland Cigar and Tobacco Co.*, 146 Wis. 324, 130 N.W. 464, Ann. Cas. 1912C, 239, which holds that an invasion of the surface of the soil by a protruding wall constitutes disseisin, and that the remedy of ejectment is exclusive. This holding is expressly overruled by the case at bar.

In addition to these pertinent Wisconsin cases, the court considered *Hahl vs. Sugo*, 169 N.Y. 109, 62 N.E. 135, 61 L.R.A. 226, 88 Am. St.

Rep. 539, and *Hirschberg vs. Flusser*, 87 N.J. Eq. 588, 101 A. 191, in arriving at its decision. In the former case, the plaintiff had recovered in an action in ejectment for the land encroached upon, execution had issued, and the sheriff had returned the execution as impossible of performance. A motion was then made and denied to compel the defendant to remove the wall. Afterwards the equitable action was begun and an order was entered, directing the defendant to remove the wall. On second appeal, this judgment was reversed on the ground that the judgment in the previous action was a bar to the maintenance of the equitable action. In the latter case, the sheriff had been unable to remove the encroachment, because a large part of the wall which protruded into the plaintiff's land was built with stones so large that they not only encroached upon plaintiff's land, but extended into and formed part of the wall of the defendant's building on his own land, and it was impossible to remove that encroachment without trespassing upon the defendant's land and injuring his building. The legal action, however did not prevent the plaintiff from subsequently obtaining a decree in equity, as it did in New York.

Judge Owen, in writing the opinion of the case at bar, says, "It seems to be the settled law of this state that where a wall of an adjoining property owner protrudes into the soil of the premises of the plaintiff, the latter may have either equitable relief or treat the invasion as a disseisin and have the remedy of ejectment." (*McCourt vs. Eckstein*, *Zander vs. Valentine Blatz Brewing Co.*, and *Rahn vs. The Milwaukee Electric Railway & Light Co.*, *supra*, *accord.*)

The Wisconsin court has held disseisin to be either (1) *in spite* of the owner or (2) at his election. *McCourt vs. Eckstein*, *supra*. The first is disseisin in fact, i. e., such open, known, exclusive, adverse, and uninterrupted dispossession of the true owner as would render it an absolute title in fee after the passage of the statutory number of years. The second is disseisin in construction of law. "Where an act is done, which is equivocal, and may be either a trespass or disseisin according to the intent, there the law will not permit the wrong-doer to qualify his own wrong, and to explain it to be a mere trespass, unless the owner elects so to consider it." *McCourt vs. Eckstein*, *supra*. Disseisin in fact is unquestionably ground for an action in ejectment; disseisin in construction of law may give rise either to ejectment or to trespass, as the owner chooses. The latter action implies that there has been intrusion upon the plaintiff's land, either above or below the surface, and that his possession has been otherwise undisturbed. Ejectment implies both intrusion and dispossession.

"The theory upon which a mandatory injunction is held a proper remedy is in brief the inadequacy of the remedies at law." 14 A.L.R.

838. That the enforcement, by the sheriff, of a judgment in a legal action is unreasonable and often impossible is shown by the two cases above cited. (*Hahl vs. Sugo*, and *Hirschberg vs. Flusser*.) A sheriff is guilty of trespass if in removing the invading portion of a wall or foundation he invades by a hair line the property of the defendant. "The proceeding is as delicate and impracticable as the taking of the pound of flesh. The responsibility of removing the wall should, in justice, be left to the party who built it, and this the remedy of mandatory injunction does." *Fisher vs. Goodman*, *supra*. Therefore, ejection is inadequate. Trespass, on the other hand, gives immediate relief in damages, but that relief is not final, and a continuing trespass is merely the source of a multiplicity of actions.

Since both of these possibly remedies are easily proved inadequate, the court holds that equity must give relief, and decrees that the order overruling the demurrer shall be affirmed.

DOROTHY N. KORTHAL.

EQUITY—SALES—INJUNCTION. *E. L. Hustings Co. vs. Coca Cola Co. et al.*, 237 N.W. 85 (Wis.). The named defendants in this action were the Coca Cola Co., Western Coca Cola Bottling Co., Wisconsin Coca Cola Bottling Co., and Milwaukee Coca Cola Bottling Co. In a previous action brought by the Hustings Co. against the Western Coca Cola Bottling Co., the Hustings Co. was defeated, and their attempts to include the Western Co. in this suit were unsuccessful. There was only a contractual relation between the named defendants, with the exception of the Wisconsin and Milwaukee Coca Cola Bottling companies. The Milwaukee Co. is a subsidiary of the Wisconsin Co.

This suit was brought by the E. L. Hustings Co., a Wisconsin corporation, against the defendants in equity, to enjoin the defendants from an unlawful interference with plaintiff's rights acquired under a contract between the plaintiff and the defendant Western Coca Cola Bottling Co., whereby the plaintiff was given exclusive right to purchase Coca Cola syrup for bottling purposes, to bottle and sell bottled Coca Cola, and to use the trade-mark, trade name, labels, etc. in Milwaukee County. The contract stated among other things, that the Hustings Co. was to use a minimum of 2,000 gallons of syrup per year, that they should sell no other product that was a substitute for Coca Cola, and that they should vigorously push the sale of Coca Cola, and that if they failed to push the sales, the Western Coca Cola Bottling Co. would terminate the contract. There were two contracts, the second a renewal of the original contract. At no time during the existence of