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NOTES

ENJOYMENT OF PROPERTY AS AFFECTED BY MALICE AND NEGLIGENCE

The law assures to every landowner the reasonable enjoyment of his property.[1] Conflicts between adjoining landowners, each asserting his right of enjoyment, have long demanded the attention of the courts.

The common law defined many of these rights of enjoyment by the recognition of so-called natural rights, which though technically restrictions on user, are, of necessity, guarantees of the rights of enjoyment. Acts which most frequently interfered with the enjoyment of land were forbidden by holding that an absolute property right existed in the adjoining landowner to be free therefrom. It is so apparent that violation of one of these rights will result in injury, that it is natural that we should find that liability for their violation is not predicated upon negligence or malice. These factors may be

[1]Ladner v. Siegel, 293 Pa. 310.

considered in fixing the amount of the damages.

It is clear that no set of rules could be drawn up which would recognize as naturally existing property rights all the privileges which landowners might desire in the lands of others. The diverse character of these desired but not essential rights and privileges made such a task impossible and undesirable. To cover this wide field, the law of easements developed. The same absolute liability for violation was imposed as in the case of a natural right.

Conflicts which arise as a result of a violation of a natural right or of an easement are decided easily as the rules of law on these subjects are well settled.

It must be conceded that interferences with the enjoyment of property may result from acts which are not justifiable from a moral, social or economic standpoint and yet are without the restrictions imposed by natural rights or easements. Most common among these injuries are those suffered by a lower riparian owner as a result of the diminution of a stream caused by an extraordinary use of the water by an upper owner, and those suffered by landowners as a result of a deprivation of light and air, percolating waters or natural gases. All courts agree that no *natural* right exists as to any of these things.[2]

At common law no right to be free from these injuries could exist other then by express grant, or, in certain limited cases, by implication arising from strict necessity or by prescription. Whether or not a right may exist or arise by any other method is the subject of this note.

The courts of this country are of two opinions. The great majority hold with the common law that no property right exists therein. Pennsylvania and Michigan apparently adopt another view.[3]

The Pennsylvania viewpoint will probably best be illustrated by example. A and B are adjoining property owners. B's house is built only a few inches from the boundary line. As a result of an altercation, A builds a spite fence on the edge of his property, thereby depriving B of light and air. The nature and extent of B's right is in question.

That a property right may exist in light and air and percolating waters, etc. was early the law of this Commonwealth. In *Wheatley v. Baugh*,[4] the

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[2]See 9 Ann. Cas. 732; Acton v. Blundell, 12 M. & W. 325, 152 Reprint 1223; 67 C. J. 837; Wheatley v. Crisman, 24 Pa. 298; 67 C. J. 690.

[3]Smith v. Burke, 37 N. W. 838; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381; Peck v. Roe, 67 N. W. 1080.

[4]25 Pa. 528.

court asserted the existence of such a right. In that case, a landowner, by digging on his own land, interrupted the flow of percolating waters which had formed a spring on the adjoining property. Speaking of the plaintiff's right to have the water flow through his land the court said :

> "The owner of land on which a spring issues from the earth has a perfect right to it against all the world except those through whose land it comes. He even has a right to it against them until it comes in conflict with the enjoyment of their right of property."

This right of enjoyment of property was more explicitly defined in the case of *Pfieffer v. Brown*[5] where the court said :

> "It is not to be lost sight of that the defendant's right to injure the land of another, at all, to any extent, is the exception and the burden is upon him to bring himself within it. His exception is founded upon necessity because otherwise he would be deprived of the beneficial use and enjoyment of his own land and unless this would be the substantial result of forbidding his action, he is not within the immunity of the case."

The existence of a qualified property right in B to be free from these injuries, is established by these cases. It is valid and enforceable until its exercise comes in conflict with a superior right of enjoyment in A. If A can show that the use which he is making of his property is reasonably necessary to its beneficial use and enjoyment, then his rights are superior to those of B.

The courts of Pennsylvania have held consistently, although by way of dicta, that if certain acts of a property owner are to be deemed reasonably necessary to its beneficial use and enjoyment, it must appear that such use is made without either negligence or malice.[6] A typical example of the expressions of the courts is found in *Pennsylvania Coal Co. v. Sanderson*,[7] where the court said :

> "It may be stated as a general proposition that every man has the right to the natural use and enjoyment of his property and if, while lawfully

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[5]165 Pa. 267.

[6]Hoy v. Starrett, 2 Watts 327; Wheatley v. Baugh, 25 Pa. 528; Penna. Coal Co. v. Sanderson, 113 Pa. 126; Collins v. Chartiers Valley Gas Co., 131 Pa. 143; Hague v. Wheeler,157 Pa. 324; Haldeman v. Bruckhart, 45 Pa. 514; Haverstick v. Sipe, 33 Pa. 368; Penna. Co. v. Sun Co., 290 Pa. 408; Beckershoff v. Bomba, 112 Pa. Super. 294; Penn. R. Co., v. Marchant, 119 Pa. 541; Penna. R. Co. v. Lippincott, 116 Pa. 472.

[7]113 Pa. 126.

> in such use and enjoyment of his property, and without malice or negligence on his part, an unavoidable loss occurs to his neighbor, it is damnum absque injuria."

There appears to be no case which directly interprets this dictum of the court. However the language used in the case of *Collins v. Chartiers Valley Company*[8] is enlightening.

> "It is that the use which inflicts the injury must be natural, proper and free from negligence and the damage unavoidable. If the plaintiff showed that the injury was plainly to be anticipated and was easily preventable with reasonable care and expense then he has brought himself within the exception of all the cases from Wheatley v. Baugh to Pennsylvania Coal Company v. Sanderson inclusive."

In other words, if it is shown that the injury inflicted could have been avoided with reasonable care and expense, the qualified right in the plaintiff to be free from injury is superior to the right of enjoyment in the party whose acts result in the injury. This is because the presence of negligence makes the use unreasonable. Thus the primary requisite necessary to justify injurious use, i. e. reasonableness, is absent.

Using this interpretation of the language of the courts, their reason for demanding that the use be "without malice" clearly appears. A man's use of his property rightfully is considered unreasonable when he should have forseen the injury and could have avoided it easily with reasonable care and expense. It is logical that the court should hold that if a man not only forsees the injury but actually intends that it should be inflicted, even more certainly liability will be imposed upon him. Also in cases where the injury is purely malicious, the party is put to no expense in avoiding it.

It is imperative that we bear in mind that there are other factors which bear upon the reasonableness of the use of property other than malice or negligence. If the use is necessary to the defendant or if he derives a substantial economic benefit therefrom, the law will hold that the use is reasonable and the fact that it is done maliciously or negligently rightly is not controlling. Malice and negligence, then, are factors to be considered in determining the reasonableness of the use of the property. If a person derives a substantial economic benefit from the use, or if the use has been shown necessary to the enjoyment of his property, then reasonableness has been shown and his defense established.

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[8]131 Pa. 143.

It seems that this interpretation invites the most equitable decisions as to these many controversies between parties asserting conflicting rights of enjoyment. The law does not place malice or negligence forward as the controlling factors in determining the reasonableness of the use. If a man uses his property in a way so as to secure to himself the reasonable benefits to which he is entitled by his ownership, the law will not inquire as to his motive in so doing. Thus if a man wishes to build a house upon his property but he can forsee that in so doing he will deprive the adjoining owner of light and air, he will not be restrained from this improvement of his property no matter what his motive in so doing may be. The courts have said that if a use is to be reasonable, it must be made without malice or negligence. This is said to enable the courts to restrain injuries inflicted for no justifiable reason and yet are not prohibited by any generally recognized rule of law.

Objections to the Pennsylvania holding have been advanced by many courts and upon different grounds. The Supreme Court of Massachusetts has been outspoken in their rejection of the the Pennsylvania theory.[9] The late Justice Holmes expressed the reason for the rejection. After citing Pennsylvania cases holding that malice may be considered as a factor restrictive of use of property the learned justice said:

> "We do not so understand the common law; and we concede further, that to a large extent, the power to use one's property malevolently in any way which would be lawful for other ends is an incident of property which can not be taken away even by legislation. It may be assumed that under our constitution the legislature would not have the power to prohibit the putting up or maintaining of stores or houses with malicious intent, and thus make a large part of the property of the Commonwealth dependent upon what a jury might find to have been the past or to be the present motive of the owner."

With an almost reverent respect for the words of that distinguished jurist, we submit that he misinterpreted the law of Pennsylvania on this point. As we have pointed out, the economic benefit and the reasonableness of the construction of homes and stores assure to the builder the full protection of the law. The case in which this opinion of Justice Holmes was given involved the same facts as used in the example. A spite fence had been constructed. Such a case would fall directly within the operation of the Pennsylvania rule. No economic gain was alleged and no benefits other than the

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[9]Rideout v. Knox, 148 Mass. 368, 12 Am. St. Rep. 600.

satisfaction of the builder's personal malice. Clearly the presence of malice here would cause the courts of this state to hold that the use was unreasonable and thus assert the superiority of the plaintiff's qualified right to light and air. No prolonged inquiry into the motive of the builder is required. Unless it appears that the structure is of economic benefit or reasonably necessary to the beneficial enjoyment of the property, its construction or maintenance must be either malicious or negligent.

It is often urged that malice can not make unlawful, that which is of its essence lawful. This is the law of Pennsylvania. This rule is in no way inconsistent with the law as interpreted above. Injury is of its essence unlawful. Factors which justify it in cases as the one under discussion, are economic gain and necessity to the reasonable enjoyment of property. If the use is unreasonable then the injury is unlawful. Malice here is but one of the factors bearing upon the reasonableness of the use. Malice prevents the act from being shown lawful rather than rendering the act unlawful.

The above then appears to be the state of the law in this Commonwealth regarding the qualifying effect of malice or negligence upon a man's right to enjoy his property. The great majority of the states condemn the Pennsylvania view as unsound. It appears that the reasons advanced for rejecting the Pennsylvania theory are based upon a misconception of the qualified character of these rights and a misinterpretation of the effect given the presence of malice or negligence upon those factors which qualify these rights.

Robert Lewis Blewitt.

CONSTRUCTION OF "DIRECTLY OR INDIRECTLY" EXEMPTION CLAUSE IN INSURANCE POLICIES

The case of *Runyon v. Western Life Ins. Co.*[1] presents an interesting problem involving the construction of a clause exempting the insurance company from liability in certain situations. R took out a life insurance policy on his own life which provided for double indemnity in case of accidental death unless "caused or attributed to as the result, *directly or indirectly*,[2] of any violation of law by the insured." R was convicted of a felony and was sentenced to the penitentiary. While there, serving as a cook, he was accidently

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[1]192 N. E. 882 (Ohio).

[2]Italics added.