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Remedies for Intruding Branches and Roots--Sterling v. Weinstein

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Recent Cases

REMEDIES FOR INTRUDING BRANCHES AND ROOTS — STERLING v WEINSTEIN

When the free use of one's property is obstructed by intruding trees which are owned by, and are on the land of, his neighbor, what remedies are open to him? This question was presented in the recent case of *Sterling* v *Weinstein*,[1] decided by the District of Columbia Municipal Court of Appeals. The parties were adjoining landowners and the condition complained of was the protruding branches of a tree from which leaves fell and clogged a gutter.[2] Judgment of the lower court for damages and abatement was reversed. *Held:* The plaintiff's only remedy was self-help; *viz.*, cutting to the boundary regardless of whether the tree was a natural growth of the soil or was artificially planted.

The remedy of self-help for intruding branches and roots has been universally adopted as part of our common law.[3] But is this the only remedy? The Municipal Court of the District of Columbia, holding that it was, quoted from a Massachusetts case[4] which seems to be the leading authority for that view:

> "The common sense of the common law had recognized that it is wiser to leave the individual to protect himself, if harm results to him from the exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious."[5]

The court's attention was called to RESTATEMENT OF TORTS[6] which

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[1] 75 A. 2d 144 (1950).

[2] The dangerous condition of another tree, which, because of sand having been washed away around its roots, leaned towards the plaintiff's house, was not considered in the majority opinion.

[3] Drummond v. Franck, 252 Ala. 474, 41 So. 2d 268 (1949); Grandona v. Lovdal, 70 Cal. 161, 11 Pac. 623 (1886); Jurgens v. Wiese, 151 Neb. 549, 38 N.W 2d 261 (1949); Murray v. Heabron, 74 N.E. 2d 648 (Ohio 1947); Cobb v. Western Union Tel. Co., 90 Vt. 342, 98 Atl. 758 (1916). *See* also Fick v. Nilson, 220 P 2d 752 (Cal. 1950); Harndon v. Stultz, 124 Iowa 440, 100 N.W 329 (1904); Gnefield v. Gibraltar Fire & Marine Ins. Co., 199 Miss. 175, 24 So. 2d 356 (1946); Buckingham v. Elliott, 62 Miss. 296 (1884); Tanner v. Wallbrunn, 77 Mo. App. 262 (1898); Wegener v. Sugarman, 104 N.J.L. 26, 138 Atl. 699 (1927); Countryman v. Lighthill, 31 N.Y.S.C. Rep. (24 Hun.) 405 (1881); Mead v. Vincent, 199 Okla. 508, 187 P 2d 994 (1947); Granberry v. Jones, 188 Tenn. 51, 216 S.W 2d 721 (1949); Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298 (1921).

[4] Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931).

[5] Id. at —— 175 N.E. at 491.

[6] Section 839, 840.

states the general rule that liability for conditions on one's land depends upon whether the condition is artificial for which there is liability, or is a natural condition for which there is no liability. A few courts, following the RESTATEMENT,[7] have held trees to be conditions on land to which this rule is applicable,[8] i.e., holding trees of natural growth to be natural conditions, and trees which have been planted to be artificial conditions.[9] The District of Columbia court expressly repudiated this rule as applicable to trees for the logical reasons that, (1) it is relatively impossible to prove whether a tree is a natural condition of the land or whether it has been planted, (2) the difficulty in establishing liability for planting an attractive tree and denying liability for letting an unattractive tree of natural growth remain unmolested, and (3) the fact that a tree of natural growth might, in part at least, be the result of human activity, such as cultivating, fertilizing and trimming.[10]

The view of the dissenting judge, who agreed that self-help was available, but maintained that it was not the only remedy, seems to be the majority view in this country.[11] In examining the other remedies available, the writer will consider the right of the injured party to receive compensatory damages, and the right to compel the owner of the tree to remove it.

The right to receive compensatory damages seems to be the most frequent remedy given by the courts although a few courts, as in the principal case, refuse to allow such a recovery.[12] The view that damages should be allowed a plaintiff where he has suffered an injury was formulated in *Buckingham* v *Elliott*,[13] where the roots of mulberry trees had protruded into the plaintiff's land, damaging his well and polluting the water. The court allowed recovery, drawing a dis-

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Section 840, Illus. 4.

[8] Buckingham v. Elliott, 62 Miss. 296 (1884); Griefield v. Gibraltar Fire & Marine Ins. Co., 199 Miss. 175, 24 So. 2d 356 (1946).

[9] This section of the RESTATEMENT OF TORTS seems to be founded upon the decision of Sparke v. Osborne, 7 C.L.R. 51 (1908), where it was said: "It is not he who injures the neighbor, it is nature, and he is not responsible for nature's doings."

[10] Another sound reason for cutting down on the rule of the RESTATEMENT is the urbanization of society which is discussed in PROSSER, TORTS 607.

[11] 2 C.J.S. 33.

[12] Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931), appears to be the leading case for the view that there can be no recovery. Here, even though there appeared to be a sensible injury, the court said, "We see no distinction in principle between damage done by shade, and damage caused by overhanging branches or invading roots. The principle involved is that an owner of land is at liberty to use his land, and all of it, to grow trees. Their growth naturally and reasonably will be accompanied by the extension of boughs and the penetration of roots over and into the adjoining property of others."

[13] 62 Miss. 296 (1884).

tinction between actions which were "groundless and vexatious" and those where a "sensible injury" had occurred, and stated:

> "It seems to be settled law that overhanging branches are a nuisance, and it must follow that invading roots are. The person intruded on by branches may cut them off; it must be true that one may cut off invading roots; it must be true that he who is injured by encroaching roots from his neighbor's tree can recover damages sustained from them. The right of action seems clear."[14]

This court, recognizing the rule that overhanging branches constitute a nuisance, thus giving rise to the remedy of self-help, pointed out that before such a nuisance would give rise to an action for damages, there must also be an injury over and above the mere intrusion and, therefore, constituting a "sensible injury" Most of the cases in which the sensible injury rule has been applied involved trees poisonous or noxious in character; however, trees need not necessarily be of this particular character in order to come within the rule.[15]

Once the plaintiff is allowed compensatory damages for such invasions, it would seem to be logical to go one step further and allow him affirmative equitable relief by forcing the defendant to remove the injurious tree. The fact that such trees constitute a continuing trespass and give rise to many successive actions at law is a sufficient basis for equitable jurisdiction. Some courts of equity have ordered abatement,[16] and a Vermont court enjoined the defendant from planting trees which would cause serious injury to the plaintiff.[17] Before equity can give such relief, the circumstances of each case must be considered in proportion to the extent of injury, the seriousness of it, the probability of greater damage, and the cost to the defendant. As the Missouri Appellate Court said in *Tanner* v *Wallbrunn:*[18]

> "The extraordinary relief awarded in this case should not be granted except where the right thereto is clear and the necessity therefore imperative.
>
> "Before this equity power can be successfully invoked there should be a strong and mischievous case of pressing necessity!"[19]

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[14] *Id.* at 301.

[15] Ackerman v. Ellis, 81 N.J.L. 1, 79 Atl. 883 (1911); Mead v. Vincent, 199 Okla. 508, 187 P 2d 994 (1947); Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298 (1921); *see* also Countryman v. Lighthill, 31 N.Y.S.C. Rep. (24 Hun.) 405 (1881); Smith v. Hold, 174 Va. 213, 5 S.E. 2d 492 (1939) 2 C.I.S. 33.

[16] Fick v. Nilson, 220 P 2d 752 (Cal. 1950); Shevlin v. Johnston, 56 Cal. App. 563, 205 Pac. 1087 (1922); Stevens v. Moon, 54 Cal. App. 737, 202 Pac. 961 (1921); Mead v. Vincent, 199 Okla. 508, 187 P 2d 994 (1947); Gostina v. Ryland, 116 Wash. 228, 199 Pac. 298.

[17] Brock v. Conn. & P R. Co., 35 Vt. *373 (Vt. Rep., Book 11, 133).

[18] 77 Mo. App. 262 (1898).

[19] *Id.* at 265.

The opinion in *Sterling* v *Weinstein*, allowing self-help as the only remedy for intruding trees, is certainly contrary to the majority rule. The reasonable solution to the problem is to make the remedy depend upon the extent of injury If the action is "groundless and vexatious," not showing any real injury, the remedy of self-help would appear to be sufficient. When the injury is increased so as to be classified as a "sensible injury" one should have an action at law for the actual damages caused. If, however, the injury is serious and threatens to involve many successive law suits for the continuing trespass, or threatens to become serious, one should have, besides an action at law for the actual damages sustained, an action in equity to enjoin planting or force removal.

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THE QUESTIONABLE USE OF RES GESTAE – DAWS v COMMONWEALTH

One of the most controversial subjects in the field of evidence is *res gestae*. This legal concept was introduced into the law to admit statements surrounding the commission of an act so that the nature of the act could be clearly understood. If the words surrounding an act are not admitted, the act alone may be incomplete and ambiguous. The Kentucky court has applied the term *res gestae* to at least five distinct rules of evidence: verbal act, spontaneous exclamation, circumstantial evidence, mental and physical condition, and admissions of an agent.[1] Since it has been extended to include more than one rule of evidence, the courts and lawyers have tended to intermingle some of the elements of these well defined principles and created a great deal of confusion as to the exact grounds upon which certain utterances are admitted or excluded.

Res gestae is a Latin phrase which means "things done."[2] In its use in the law it has been defined as "Matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction, and without a knowledge of which the main fact might not be prop-

[1] Mann v. Cavanaugh, 110 Ky. 776, 62 S.W 854 (1901) (verbal act); Norton s Adm r v. Winstead, 218 Ky. 488, 291 S.W 723 (1927) (spontaneous exclamation); Sterns Coal Co. v. Evans Adm r, 33 Ky. L. Rep. 755, 111 S.W 308 (1908) (circumstantial evidence); Louisville & N. R. Co. v. Owens, 164 Ky. 557, 175 S.W 1039 (1915) (mental and physical condition); *see* Niles v. Steiden Stores, Inc., 301 Ky. 80, 190 S.W 2d 876 (1945) (admissions of an agent).

[2] WEBSTER S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (2d ed. 1944).