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Much Ado about Mighty Little - North Carolina and the Application of the Relative Hardship Doctrine to Encroachments of Permanent Structures on the Property of Another

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COMMENTS

MUCH ADO ABOUT MIGHTY LITTLE — NORTH CAROLINA AND THE APPLICATION OF THE RELATIVE HARDSHIP DOCTRINE TO ENCROACHMENTS OF PERMANENT STRUCTURES ON THE PROPERTY OF ANOTHER

INTRODUCTION

It was to be an ordinary property transaction much like any other transaction to buy or sell land. The landowner thought everything was in order and the sale would close without problems. The buyer requested a lot survey.¹ The survey revealed the adjoining landowner's home had been partially built on the property.² This encroachment prevented the closing.³ Ironically, earlier in the chain of title the original landowner held title to both properties.⁴ The owner brought an action in trespass against the encroaching landowner.⁵ The court held the encroachment a continuing trespass and granted a mandatory injunction to compel removal as a matter of law.⁶

In good faith, a landowner constructed a two-story brick apartment building on his land.⁷ Nine years later the landowner learned his building encroached one foot on the adjoining neighbor's property.⁸ Upon learning of the encroachment, the landowner approached his neighbor to discuss acceptable solutions to the

1. *Bishop v. Reinhold*, 66 N.C. App. 379, 381, 311 S.E.2d 298, 300 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

2. *Id.* at 382, 311 S.E.2d at 300.

3. *Id.*

4. *Id.* at 381, 311 S.E.2d at 300.

5. *Id.* at 380, 311 S.E.2d at 299.

6. *Id.* at 390, 311 S.E.2d at 304.

7. *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 666 (1986).

8. *Id.* at 382, 346 S.E.2d at 667.

problem.⁹ The neighbor offered to sell the one-third acre to the landowner for forty-five thousand dollars.¹⁰ The landowner declined the offer.¹¹ The neighbor brought an action in trespass against the landowner.¹² The court held the encroachment was a continuing trespass and granted a mandatory injunction to compel removal as a matter of law.¹³

"[Each] case involves mighty little, but [each] has given the parties and the Court a great deal of trouble."¹⁴ An encroachment on the land of another usually involves a small quantity of land.¹⁵ However, the encroachment frequently creates mighty problems for courts and the parties.¹⁶ If an encroachment was a mistake made in good faith, does a defendant have any recourse? What factors do the courts consider in determining an appropriate remedy? Should courts grant a mandatory injunction to compel removal as a matter of law? Is there a viable alternative to the standard remedy of mandatory injunctions to compel removal? This paper will address the problems these issues have presented to the courts and the parties.

An encroachment is an illegal intrusion upon the lands, prop-

9. *Id.* at 379, 346 S.E.2d at 666.

10. *Id.*

11. *Id.*

12. *Id.* at 378, 346 S.E.2d at 666.

13. *Id.* at 384, 346 S.E.2d at 669.

14. *North v. Bunn*, 128 N.C. 196, 198, 38 S.E. 814 (1901). The case involved an encroachment of the corner of a house on the adjoining landowner's property. Chief Justice Furches began the court's opinion with this statement.)

15. *See, e.g., Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 (1949) (Building encroached fifty feet on plaintiff's right of way); *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937) (wharf extended 3.8 feet onto riparian rights of plaintiff); *Leaksville Woolen Mills Co. v. Spray Water Power & Land Co.*, 183 N.C. 511, 112 S.E. 24 (1922) (embankment constructed twenty feet in length upon plaintiff's driveway); *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986) (two-story brick apartment building encroached one foot); *Bishop v. Reinhold* 66 N.C. App. 379, 331 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984) (house encroached fifty feet on plaintiff's lot).

16. *See, e.g. O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E 688 (1937) (granting a mandatory injunction to compel removal of a wharf which extended 3.8 feet onto riparian rights of plaintiff); *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986) (granting a mandatory injunction to compel removal of a two-story building which encroached one foot); *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984) (granting a mandatory injunction to compel removal of a house which encroached fifty feet on a vacant lot).

erty, or authority of another.¹⁷ The courts have characterized encroachments as either renewing, continuing, or permanent trespasses.¹⁸ Historically, North Carolina courts applied the law of continuing trespass to permanent structure encroachments.¹⁹ Applying the law of continuing trespass allows the true landowner an election of remedies.²⁰ The landowner can elect to keep the structure and pay its fair value to the builder or demand that the builder remove the structure and recover only actual damages to the land.²¹ Courts determine the appropriate remedy, damages or removal of the structure.²² In any equity action, courts consider the relative hardships to each party and the equities between them.²³ Recent North Carolina decisions purport to consider the relative hardships of the parties in determining the appropriate remedy.²⁴ The courts apply the relative hardship test in cases seeking a temporary restraining order or interlocutory injunction.²⁵ However, courts fail to directly apply the test in cases seeking mandatory injunction to compel removal of a permanent

17. BLACK'S LAW DICTIONARY 473 (5th ed. 1979). Encroachment as used in this paper is limited to an intrusion by an adjoining landowner onto the property of his neighbor by a permanent structure such as a house, dam, or wharf. It is presupposed that the adjoining landowner entitled to a remedy holds clear or superior title to the property in dispute. Cases dealing with encroachments upon easements will be included, but cases dealing with public lands or public rights will not be addressed.

18. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.4 (1973).

19. See *O'Neal v. Rollinson*, 212 N.C. 83, 192 S.E. 688 (1937); *Kinsland v. Kinsland*, 188 N.C. 810, 125 S.E. 625 (1924); *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986); *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984); *Steel Creek Dev. Corp. v. James*, 58 N.C. App. 506, 294 S.E.2d 23 (1982); *Thompson v. Hayes*, 17 N.C. App. 216, 193 S.E.2d 488 (1972); *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E.2d 354 (1970).

20. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 642, 175 S.E.2d 354, 357 (1970).

21. Dobbs, *Trespass to Land in North Carolina Part I. The Substantive Law*, 47 N.C.L. REV. 31, 61 (1968) [hereinafter Dobbs, *Substantive Law*].

22. D. DOBBS, *supra* note 18, at § 5.6.

23. *Id.*

24. See *Clark v. Asheville Contracting Co., Inc.*, 316 N.C. 475, 342 S.E.2d 832 (1986); *Huskins v. Yancey Hospital*, 238 N.C. 357, 78 S.E.2d 116 (1953); *Lance v. Cogdill*, 238 N.C. 500, 78 S.E.2d 319 (1953); *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986); *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

25. See *Huskins*, at 357, 78 S.E.2d at 116 (1953); *Lance*, at 500, 78 S.E.2d at 319 (1953).

structure.²⁶

This paper presents a legal argument for the application of the relative hardship test in all actions based on the encroachment of permanent structures on the land of another. First, the doctrine of relative hardship is presented. Second, this paper reviews the cases handed down by the North Carolina courts which have applied or discussed the application of the relative hardship test. Finally, this paper recommends the application of the relative hardship test as the most objective standard for determining an appropriate remedy where a mandatory injunction to compel removal is an issue.

RELATIVE HARDSHIP DOCTRINE - THE BALANCE OF EQUITIES

The defendant invested several million dollars in a condominium.²⁷ He surveyed the land before the structure was built. A complete title search was done. A mistake was made in the ground survey. Consequently the defendant built the structure a fraction of a foot over his boundary line. A plaintiff in this situation has the option of requesting a mandatory injunction to compel removal.²⁸ However, removal of the structure would cost the defendant a great deal and would result in little benefit to the plaintiff.²⁹ Should the plaintiff be protected by injunctive relief regardless of the cost to the defendant or should a less drastic form of relief be granted by the court?

A. *In General*

Injunctions are issued, not as a matter of right, but in the courts' discretion.³⁰ In any equity action, it is proper to consider the balance of convenience or relative hardships of the parties before granting or denying injunctive relief.³¹ Balancing the equities is a doctrine commonly invoked in encroachment cases.³² Courts will deny equitable relief to the aggrieved party in favor of

26. See *Clark* at 475, 342 S.E.2d at 832, *Williams* at 378, 346 S.E.2d at 665; *Bishop* at 379, 311 S.E.2d at 298.

27. This hypothetical is based on a compilation of facts from various encroachment cases.

28. Annotation, *Injunction Against Trespasses*, 60 A.L.R. 2d 310, 316 (1958).

29. See Note, *Balancing the Equities*, 18 TEX. L. REV. 412 (1939).

30. 43 C.J.S. *Injunctions* § 14 (1978).

31. Dobbs, *Trespass to Land in North Carolina Part II. Remedies for Trespass*. 47 N.C.L. REV. 334, 359 (1969) [hereinafter Dobbs, *Remedies*].

32. BLACKS, *supra* note 17, at 130.

money damages if the encroachment was an innocent mistake.³³ Courts will deny equitable relief if the encroachment is slight compared with the injury to the defendant if he has to remove it.³⁴ Sometimes the doctrine is expressed as a "balance of convenience".³⁵ This does not properly set forth the weighing process or state the correct test.³⁶ An injunction is not granted merely because of the advantage to the plaintiff or denied because of the convenience to the defendant.³⁷ The problem is one of relative hardships and the court must balance all the equities of the situation.³⁸ The policies which uphold ownership rights and the uniqueness of real property give way to other public policies in balancing the equities.³⁹

"Injunctive relief against violation of the obligation arising out of a promise respecting the use of land will be denied if the harm done by granting the injunction will be disproportionate to the benefit secured thereby."⁴⁰ Many courts have taken this position.⁴¹ These courts consider the relative hardships of the parties where removal of the encroachment would cause damage to the defendant disproportionate to the plaintiff's injury.⁴² The disproportion between the harm to the defendant and the benefit to the plaintiff must be of considerable magnitude when it is the basis for refusing injunctive relief.⁴³ For example, a defendant builds an apartment building which encroaches several inches on a plaintiff's vacant lot. If the defendant is compelled to remove the structure, the expense and difficulty of removal will be great. However, if the structure is allowed to remain, the encroachment will cause little damage to the plaintiff and its removal will result in little benefit. Here, the disproportion between the harm to the defendant and the benefit to the plaintiff will be of considerable magnitude. An injunction will not issue simply because the defendant's injury will be greater

33. *Id.*

34. *Id.*

35. RESTATEMENT (SECOND) OF TORTS § 941 comment a (1979).

36. *Id.*

37. *Id.*

38. *Id.* (Including the relative hardships to the parties, the interest of third parties, and the interests of the general public).

39. For a complete discussion of public policy, see *infra* notes 113-34 and accompanying text.

40. RESTATEMENT OF THE LAW OF PROPERTY § 563 (1944).

41. 1 AM. JUR. 2D *Adjoining Landowners* § 133 (1962).

42. *Id.*

43. RESTATEMENT OF THE LAW OF PROPERTY, *supra* note 40, § 563 comment c.

than the plaintiff's benefit if the injunction is denied.⁴⁴ On the other hand, the court will not refuse an injunction merely because of the convenience it would give to the defendant.⁴⁵

In some jurisdictions a mandatory injunction to compel removal will not issue where the burden on the defendant outweighs the injury or benefit to the plaintiff.⁴⁶ There are other cases where the courts will not grant injunctive relief if the encroachment comes within the "de minimus" rule.⁴⁷ Relief may be denied where the granting of an injunction places an undue hardship on the defendant.⁴⁸ This is especially relevant where preliminary injunctions are an issue.⁴⁹ "In determining the propriety of issuing an interlocutory injunction, the hearing judge considers and weighs the relative conveniences and inconveniences"⁵⁰ An injunction will not issue "where its issuance would confer little benefit on the plaintiff and cause great inconvenience to the defendant."⁵¹ Subsequent damages caused by the encroachment are or can be remedied by a mandatory injunction to compel removal in the final disposition by the court at a trial on the merits of the case.⁵²

A plaintiff is entitled to monetary damages when a defendant's hardship is found disproportionate to the injury suffered by the plaintiff and injunctive relief is denied.⁵³ The defendant must compensate the plaintiff for the value of the property.⁵⁴ Upon payment, the defendant acquires either a fee simple title or permanent easement to the land on which the encroachment is located.⁵⁵ The

44. RESTATEMENT (SECOND) OF TORTS, *supra* note 35.

45. *Id.*

46. Annotation, *Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowners*, 28 A.L.R. 2d 679 (1953).

47. *Id.* The rule is based on the maxim "De minimus non curat lex"; the law is not concerned with trifles. A minority of courts usually refuse to grant an injunction where the defendant acted in good faith, the damage to plaintiff is minimal, and removal would place a tremendous hardship on the defendant and would result in little benefit to plaintiff. *Id.*

48. Dobbs, *Remedies*, *supra* note 31, at 358.

49. *Id.* North Carolina courts to date have applied the relative hardship doctrine only in cases where preliminary injunctions were an issue and only in these cases was injunctive relief denied. See *Huskins v. Yancey Hospital, Inc.*, 238 N.C. 357, 78 S.E.2d 116 (1953); *Lance v. Codgill*, 238 N.C. 500, 78 S.E.2d 319 (1953).

50. *Huskins*, at 361, 78 S.E.2d at 120.

51. *Id.*

52. *Id.*

53. D. DOBBS, *supra* note 18, at 356.

54. *Id.*

55. *Id.*

plaintiff can, if he wishes, restrict the defendant's interest in the property.⁵⁶ The defendant's interest can be limited to a conditional easement so that the land will revert to the plaintiff in the event anything happens to the structure.⁵⁷

In encroachment cases the invasion of property rights is always an issue.⁵⁸ The issue exists whether the encroachment is innocent or willful and intentional.⁵⁹ If the encroachment is intentional, the defendant should be punished so the conduct will not be repeated.⁶⁰ In the case of an innocent defendant, the court should consider the relative hardships of the parties and issue or deny an injunction as the balance indicates.⁶¹ "There would certainly be little equity in a doctrine that an injury could not be prevented if the one who was committing the wrong would greatly profit by it, and the doctrine that equity may balance the hardships involved should be rejected if it means only that it will weigh the respective pecuniary injuries."⁶²

B. Factors Evaluated

The doctrine of relative or comparative hardship is invoked when a landowner seeks equitable relief against an adjoining landowner who has encroached on his property.⁶³ "Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration . . ." regardless of the relative hardships of the parties.⁶⁴ "Where the encroachment was in good faith . . . the court should weigh the cir-

56. *Id.*

57. *Id.*

58. *Id.* at 350. The interest at issue in encroachment cases is not financial. It is an interest in the exclusive possession and right of quiet enjoyment. Monetary damages cannot replace nor restore these interests when the invasion is permanent in nature and will continue in fact unless it is abated. *Id.*

59. *See, e.g., Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 175 S.E.2d 354 (1970) (holding plaintiff could elect to keep the encroaching structure on the land or demand its removal despite the fact that defendant acted in good faith and did not encroach willfully or intentionally).

60. Annotation, *supra* note 46, at 685 (One who intentionally or willfully encroaches on another's land does so at his own peril).

61. *Golden Press v. Rylands*, 124 Colo. 122, 126, 235 P.2d 592, 595 (1951).

62. H. McCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 145 (1948).

63. D. DOBBS, *supra* note 18, § 5.6.

64. *Golden Press*, at 122, 235 P.2d at 595. (holding plaintiff should be compensated due to defendant's intentional wrongdoing despite the fact that defendant's encroachment was only three inches).

cumstances so it shall not act oppressively.”⁶⁵

Before the relative hardship doctrine will apply, the court must first find that the defendant made an innocent mistake.⁶⁶ “[I]t is of great importance to see if defendant knew he was doing wrong and was taking his chances about being disturbed in doing it.”⁶⁷ An innocent mistake is one made by a person who does not have notice he is invading another’s property rights.⁶⁸ An innocent mistake also occurs when the person had notice but made a good faith error which resulted in slight damage to another’s property.⁶⁹ The burden of proving innocence is upon the defendant and carries a higher standard of proof than nonwillfulness which places the burden upon the plaintiff.⁷⁰ Once the defendant overcomes his burden of proof and establishes his innocence, the court will balance all of the equities between the parties before issuing or denying an injunction.⁷¹

In balancing the equities, courts should consider the relative hardships to the parties including the character of the conduct, property interest affected, and relative interests of each party.⁷² Although the court “must consider the peculiar equities of the case,” there is “no specific and universally accepted rule as to encroachments.”⁷³ Some jurisdictions take the position that an injunction should be denied if the encroachment was unintentional and there was only slight or no material damage to the plaintiff.⁷⁴ Other jurisdictions take the position that the amount of damage suffered by the plaintiff is irrelevant and is an insufficient reason to deny injunctive relief.⁷⁵

Jurisdictions which consider the relative hardships of the parties balance the hardship to the defendant against injury to the plaintiff.⁷⁶ The economic hardship which would result from the granting of an injunction must greatly outweigh the injury to the

65. *Id.*

66. *Norfolk Southern R.R. Co. v. Stricklin*, 264 F. 546, (E.D.N.C. 1920).

67. *Id.* at 574 (quoting *Smith v. Smith*, 20 L.R. 500 (1875)).

68. Note, *Comparative Hardship Doctrine Applied in Easement Action*, 38 WASH. & LEE L. REV. 709, 711 (1981).

69. *Id.*

70. *Id.*

71. *Id.*

72. H. McCLINTOCK, *supra* note 62, § 144.

73. *Golden Press v. Rylands* 124 Colo. at 125-26, 235 P.2d 592, 594-95 (1951)

74. 1 AM. JUR. 2D, *supra* note 41.

75. *Id.*

76. *Id.*

plaintiff.⁷⁷ When the economic hardship to the defendant would impose a burden slightly disproportionate to the plaintiff's, the hardship to the defendant would not be sufficient to deprive the plaintiff of an injunction.⁷⁸ This is especially true where the defendant proceeded to build without benefit of a survey or had notice but made a good faith error.⁷⁹ The plaintiff's interest must not be overshadowed by the hardship the defendant would suffer if an injunction was granted in balancing the relative hardships.⁸⁰ The decision should be based not on what the plaintiff will gain if equitable relief is granted but on the hardship he will be forced to endure if it is denied.⁸¹

The defendant is the wrongdoer in an encroachment case whether his conduct was innocent or intentional.⁸² The problem exists because he was either ignorant of the situation, knew but did not care, or made an honest mistake.⁸³ The defendant must prove his intent and conduct were innocent before the court will consider additional relevant factors.⁸⁴ The defendant, however, is but one of the parties to an encroachment case. The conduct of the plaintiff must also be considered.⁸⁵ If the character of the plaintiff's conduct is inequitable, although not illegal, it will weigh against the plaintiff.⁸⁶ The equities which the court will consider in opposing an injunction include misleading conduct by the plaintiff, prejudicial delay in asserting his rights, and coming before a court of equity with unclean hands.⁸⁷ In balancing these equities, the court may find the plaintiff is partially responsible for the hardships the defendant will suffer if an injunction is granted.⁸⁸

Property rights are the real issue in encroachment cases.⁸⁹ The property interests which will be affected must be considered. The courts will properly consider the property rights of each party and the effect granting or denying an injunction will have on the re-

77. *Id.*

78. *Id.*

79. *Id.*

80. RESTATEMENT (SECOND) OF TORTS, *supra* note 35, comment c.

81. *Id.*

82. *Id.* comment b.

83. *Id.*

84. D. DOBBS, *supra* note 18, § 5.6.

85. DOBBS, *Remedies*, *supra* note 31, at 358.

86. *Id.*

87. *Id.*

88. RESTATEMENT (SECOND) OF TORTS, *supra* note 35, comment b.

89. D. DOBBS, *supra* note 18, at 311.

spective rights of each party.⁹⁰ In encroachment cases the amount of property actually affected is generally small in terms of the land invaded.⁹¹ A substantial building constructed with a corner of the building partially on an adjoining landowner's vacant lot is representative of the amount and type of property interests involved.⁹² Other examples include foundations which cross the property line a fraction of a foot or structures with eaves which overhang several inches on the adjoining landowner's property.⁹³ In each of these examples, the property of the wronged landowner is rendered only slightly less valuable. Consider, however, the effect an injunction to compel removal would have on the defendant. An injunction would prevent the defendant from using his property, the building, for its only valuable purpose.⁹⁴ Courts can decline to order removal of an encroachment when the plaintiff's property rights and land value are only slightly affected by an encroachment and the defendant's rights would be substantially affected if the structure had to be moved.⁹⁵

One of the underlying policy considerations in encroachment cases is the unique and priceless quality of land.⁹⁶ The courts, therefore, consider the relative interests which will be lost by whatever action is taken.⁹⁷ If an injunction is denied, the plaintiff will be forced to accept monetary damages as just compensation for the land taken by the encroachment.⁹⁸ A plaintiff who does not want to lose title to the land may request the court to grant the

90. H. McCLINTOCK, *supra* note 62, § 144.

91. For examples of the amount of land involved, see *supra* note 15.

92. See, e.g., *Carolina Power & Light Co. v. Bowman*, 229 N.C. 682, 51 S.E.2d 191 (1949) (building encroached fifty feet); *Williams v. South & South Rentals, Inc.*, 82 N.C. App. 378, 346 S.E.2d 665 (1986) (building encroached one foot); *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984) (house encroached fifty feet).

93. See, e.g. *Golden Press v. Rylands*, 124 Colo. 122, 235 P.2d 592 (1951).

94. H. McCLINTOCK, *supra* note 62, § 144.

95. Note, *supra* note 68, at 709.

96. Dobbs, *Remedies*, *supra* note 31, at 354 At common law property is held to be unique. No two parcels of land are identical. When a seller breaches a contract for the sale of land, the buyer can request and the court will enforce specific performance of the contract. The court will grant a mandatory injunction to compel removal for the same reasons it will grant specific performance of a contract - to protect the peculiar nature of the right and subject matter invaded. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* § 10.5 (1984).

97. H. McCLINTOCK, *supra* note 62, § 144.

98. Dobbs, *Remedies*, *supra* note 31, at 367.

defendant an easement with a reversionary provision.⁹⁹ In the event the defendant's structure ceases to exist, the land will revert to the plaintiff.¹⁰⁰ The defendant will be granted either an easement to the land or a fee simple title.¹⁰¹ The interest the defendant receives will depend upon the interest the plaintiff decides to convey.¹⁰² In addition, the defendant will pay fair market value for the land interest he acquires.¹⁰³ If an injunction is granted, the defendant will be compelled to remove the structure.¹⁰⁴ He will have to pay the plaintiff for any damages caused by the encroachment itself or by removal of the encroachment.¹⁰⁵ The plaintiff's property interest will be vindicated, and the defendant will be punished at great cost to himself. The defendant is at a great disadvantage, although one of his own making, and usually the plaintiff is aware of this. For this reason, most mandatory injunctions are for sale.¹⁰⁶ The plaintiff will demand enforcement of the mandatory injunction only if the defendant does not come up with the right price for the land in question.¹⁰⁷

“[A] case can hardly occur in which land of more than monetary value is seriously threatened by a substantial encroachment.”¹⁰⁸ A landowner who considers his land or homesite priceless is not going to sit idly by and watch someone build a sizeable structure partially on his land without objecting before the structure is completed.¹⁰⁹ If a landowner observes and does nothing, courts may interpret this to mean the landowner does not think the property priceless and that money damages are an adequate remedy.¹¹⁰ There is only one situation in which this theory would not apply. It occurs when a landowner lives out of state or is away from home for an extended period of time and returns to find a completed structure encroaching on his property.¹¹¹ It may be unjust to make a landowner sell his land at a price set by the court if

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 369.

104. *Terry v. Jim Walter Corp.* 8 N.C. App. 637, 175 S.E.2d 354 (1979).

105. *Id.*

106. Note, *supra* note 29, at 416.

107. *Id.*

108. *Id.* at 414.

109. *Id.*

110. *Id.* at 414-15.

111. *Id.* at 415.

he does not want to part with it at any price. Would a landowner who values his land so highly stand by and watch someone else build on it?¹¹²

C. Policy Considerations

Encroachment cases present special problems for the courts. A situation is created which could result in a private eminent domain by the defendant or in extortion by the plaintiff.¹¹³ A hypothetical can best illustrate this point. The true landowner plaintiff, Top, had a vacant lot he purchased for investment purposes. Top noticed Ed, the encroaching defendant, building a warehouse on the adjoining land. Top also noticed the building's foundation appeared to be on or just over the dividing line between the property. The nearer the building drew to completion, the more certain Top became that the building encroached upon his property. He never spoke with Ed about his suspicions. Several years later Ed had the property surveyed for business reasons. The survey revealed the building was four inches over the property line. Ed went to Top, told him about the problem, and offered to pay fair market value for the land. Top immediately saw the potential for selling the land far above its worth. He told Ed he could purchase the four inch strip of land for ten thousand dollars. At this point neither party had clear marketable title to his respective property. To clear his title defect, Ed could either elect to pay the amount requested or remove the portion of his building which extended beyond the boundary line. Top also had a choice. He could either settle the dispute out of court or demand a mandatory injunction to compel removal.

Two central policy considerations are illustrated by the hypothetical. Denial of an injunction is a license to private eminent domain, and extortion is sanctioned if the injunction is granted.¹¹⁴ First, no individual should be allowed to take the land of another simply because he is willing to pay for it. This is a type of private eminent domain.¹¹⁵ Allowing private eminent domain sets a precedent. It could conceivably lead land developers and others to think they can acquire property by intentionally encroaching on an-

112. *Id.* at 414.

113. D. DOBBS, *supra* note 18, § 5.6.

114. *Id.*

115. *Id.*

other's land.¹¹⁶ This would be an unwise precedent to set, but consider the position of the defendant who innocently encroaches on his neighbor's land. Is this defendant to suffer the hardships which result from an injunction compelling removal when he had no intent to take land which was not his?

The second policy consideration is that extortion cannot be sanctioned by the courts.¹¹⁷ The nature of the trespass and the options available to the encroaching defendant place the wrongdoer in an untenable position. In effect, he is caught between a rock and a hard place. Regardless of his intentions, the defendant is the wrongdoer, and the plaintiff is very much aware of this fact. Under these circumstances, the plaintiff can be expected to compromise for an extortionate figure when the defendant's only alternative is the threat of a court issued injunction to compel removal.¹¹⁸

A middle ground is needed so that neither party can take undue advantage of the other. An objective standard for determining the issuance or denial of an injunction would alleviate the possibility of extortion by the plaintiff or an intentional taking by the defendant. The equitable hardship doctrine provides a standard by which the equities of the parties are balanced.¹¹⁹ Under this doctrine, one who intentionally encroaches on another's land will not be allowed to right his wrong by simply paying damages.¹²⁰ If the encroachment is intentional, the plaintiff will prevail, and an injunction will lie.¹²¹ The defendant will be forced to remove the encroachment and pay damages.¹²² This will be sufficient punishment to warn others against such intentional acts. If the encroachment is innocent, courts will consider the equities of both parties. The defendant gets an opportunity to prove his innocence and to save his property interests.¹²³ The plaintiff gets just compensation for his property. He can elect to retain a reversionary interest in the land.¹²⁴ Application of the relative hardship doctrine lessens the possibility of the extremes. The threat of an injunction is lessened and, with it, the possibility of extortion. However, extortion re-

116. *Id.*

117. *Id.*

118. *Id.*

119. RESTATEMENT (SECOND) OF TORTS, *supra* note 35.

120. D. DOBBS, *supra* note 18, § 5.6.

121. *Id.*

122. *Id.*

123. *Id.*

124. Dobbs, *Remedies*, *supra* note 31, at 367.

mains a policy consideration in the case of intentional encroachments. One who intentionally encroaches on another's land does so at his own peril.¹²⁵ He places himself at the mercy of the plaintiff and the courts. He will ultimately be punished by one or the other for his wrongdoing.

One of the underlying reasons for granting mandatory injunctions to compel removal is punishment.¹²⁶ One who does wrong should not escape punishment simply because he is willing and capable of paying for his wrongdoing. A mandatory injunction to compel removal not only vindicates the plaintiff, it also punishes the defendant.¹²⁷ Punishing the defendant serves two purposes. One purpose is to make the defendant pay for the wrong he has done.¹²⁸ The other purpose is to serve as a general deterrent.¹²⁹ Theoretically, granting injunctions against encroachments will discourage similar wrongdoing by others.¹³⁰ An alternative to injunctive relief would be to allow the plaintiff to recover both compensatory and punitive damages.¹³¹ However, this is not possible in all jurisdictions.¹³² In some jurisdictions a mandatory injunction is the only available device for discouraging intentional encroachments because punitive damages are not allowed.¹³³

A mandatory injunction is sufficient punishment to discourage intentional encroachments. However, the deterrent factor is not applicable when the encroachment is accidental.¹³⁴ The defendant who invaded the plaintiff's property by accident or mistake had no intent to take property which he did not own. The punishment for intentional and accidental encroachments is the same, however, if the relative hardship doctrine is not applied.¹³⁵ An innocent defendant is forced to remove the encroachment and pay any damages caused by the removal. He is punished severely for an innocent mistake, and the deterrent factor serves no useful purpose.

Protection of property rights is a policy consideration in any

125. Annotation, *supra* note 46, at 685.

126. Note, *supra* note 29, at 415.

127. *Id.*

128. *Id.* at 417.

129. *Id.* at 412-13.

130. *Id.*

131. *Id.* at 416.

132. *Id.* at 416-17.

133. *Id.* at 417.

134. *Id.* at 414.

135. *Id.* at 413.

encroachment case.¹³⁶ When the encroachment is accidental and the relative hardship doctrine is applied, the defendant must overcome this policy which is more concerned with the protection of the plaintiff's property rights than with the hardships the defendant will suffer if an injunction is granted.¹³⁷ The courts are more concerned with the protection of individual rights than with the profits that inure to the parties as a result of the invasion of those rights.¹³⁸ The defendant's hardship must overcome the plaintiff's injury and the policy which protects the plaintiff's property rights before an injunction will be denied.

NORTH CAROLINA COURTS AND THE RELATIVE HARDSHIP DOCTRINE

A. Overview

Except where title is an issue, there is little evidence that North Carolina courts consider the relative adequacy of a legal remedy where equitable relief is requested in encroachment cases.¹³⁹ A remedy at law is consistently found to be inadequate.¹⁴⁰ North Carolina courts grant mandatory injunctions to compel removal without reluctance when requested by the plaintiff.¹⁴¹

An injunction is an equitable remedy.¹⁴² Courts should consider the relative hardships of the parties and the equities between them where equity has jurisdiction.¹⁴³ North Carolina courts have applied the equitable hardship doctrine only in cases where the relief requested was a temporary restraining order or interlocutory injunction.¹⁴⁴ The courts discussed, but did not directly deal with, the doctrine and its application in cases where a mandatory injunction was at issue.¹⁴⁵ This paper presents a brief summary of North

136. H. McClintock, *supra* note 62, § 144.

137. *Id.* § 145.

138. *Id.*

139. *See*, Conrad v. Jones, 31 N.C. App. 75, 228 S.E.2d 618 (1976).

140. *See* O'Neal v. Rollinson, 212 N.C. 83, 192 S.E. 688 (1937); Williams v. South & South Rentals, 82 N.C. App. 378, 346 S.E.2d 665 (1986); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984); Steel Creek Dev. Corp. v. James, 58 N.C. App. 506, 294 S.E.2d 23 (1982); Thompson v. Hayes, 17 N.C. App. 216, 193 S.E.2d 488 (1972); Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

141. Dobbs, *Remedies*, *supra* note 31, at 358.

142. *Id.*

143. *Id.*

144. *Id.* at 367.

145. *Id.*

Carolina decisions which have addressed the relative hardship doctrine. This paper then examines why the doctrine has been applied to temporary injunctions but not to mandatory or permanent injunctions.

B. *Opinions of the Court*

Very few appellate opinions address or deal with the relative hardship doctrine in encroachment cases. A brief summary of these opinions follows.

1. *Huskins v. Yancey Hospital, Inc.*¹⁴⁶

The encroaching structure was a driveway used by ambulances at a hospital.¹⁴⁷ The plaintiff and the defendant owned adjoining property.¹⁴⁸ The driveway was located on a narrow strip of land near the boundary line between the property.¹⁴⁹ The plaintiff's lot was vacant.¹⁵⁰ The driveway was the only practical route for patients to be driven to the hospital for admittance and discharge.¹⁵¹ The defendant's predecessor in title originally established the driveway.¹⁵² The defendant excavated the strip of land in order to remodel and pave the drive.¹⁵³ After the paving was completed, the plaintiff brought an action in trespass and alleged the defendant was trespassing on his land and would continue to trespass unless he was enjoined.¹⁵⁴ The plaintiff requested an interlocutory injunction and prayed for a mandatory injunction and damages after a trial on the merits.¹⁵⁵ The trial court issued a temporary restraining order until the propriety of an interlocutory injunction could be determined.¹⁵⁶ The court later denied an interlocutory injunction.¹⁵⁷ The plaintiff challenged the validity of the order.¹⁵⁸

146. 238 N.C. 357, 78 S.E.2d 116 (1953).

147. *Id.* at 358, 78 S.E.2d at 118.

148. *Id.*

149. *Id.*

150. *Id.* at 358, 78 S.E.2d at 118.

151. *Id.* at 363, 78 S.E.2d at 121.

152. *Id.* at 358, 78 S.E.2d at 118.

153. *Id.*

154. *Id.* at 358, 78 S.E.2d at 118.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 359, 78 S.E.2d at 119.

On appeal, the supreme court affirmed the order of the lower court which refused to issue an interlocutory injunction.¹⁵⁹ The court stated that the hearing judge considers and weighs the relative hardships the parties will suffer by the granting of the writ in determining the propriety of its issuance.¹⁶⁰ The court further stated that an interlocutory injunction against a trespass should be denied where its issuance would confer little benefit to the plaintiff and cause great hardship to the defendant.¹⁶¹ The relative hardship doctrine was operative in this case. The supreme court held that, based on the proofs of the parties, the granting of an interlocutory injunction against the defendant under the circumstances would result in no benefit to the plaintiff but would result in great hardship to the defendant.¹⁶² The plaintiff had no present use for the land in question, but continued use by the defendant was essential to the operation of the hospital.¹⁶³ Denial of an interlocutory injunction was proper.¹⁶⁴

2. *Lance v. Cogdill*¹⁶⁵

The court applied the relative hardship doctrine in this case to determine whether a temporary restraining order should be continued.¹⁶⁶ The plaintiff alleged the defendant set off large explosions of dynamite which blasted rocks upon his property and made the property unsafe for occupancy.¹⁶⁷ The plaintiff further alleged he suffered great and irreparable damage which would continue as long as the defendant continued to blast with explosives.¹⁶⁸ The plaintiff owned a one-half undivided interest in 109 acres of land which was adjacent to the leasehold estate upon which the defendant's rock quarry was located.¹⁶⁹ The plaintiff brought a civil action to enjoin the defendant from further blasting and for damages caused by rocks which covered many acres of the plaintiff's land.¹⁷⁰

159. *Id.* at 363, 78 S.E.2d at 122.

160. *Id.* at 361-62, 78 S.E.2d at 120.

161. *Id.* at 362, 78 S.E.2d at 120.

162. *Id.* at 363, 78 S.E.2d at 121-22.

163. *Id.* at 363, 78 S.E.2d at 121.

164. *Id.* at 363, 78 S.E.2d at 121.

165. 238 N.C. 500, 78 S.E.2d 319 (1953).

166. *Id.* at 504, 78 S.E.2d at 322.

167. *Id.* at 502, 78 S.E.2d at 320.

168. *Id.* at 501-02, 78 S.E.2d at 320.

169. *Id.* at 501, 78 S.E.2d at 320.

170. *Id.*

The court entered a temporary restraining order.¹⁷¹ At a later hearing the order was dissolved upon a showing of cause by the defendant why the order should not have been continued to final hearing.¹⁷² The plaintiff appealed.¹⁷³

The supreme court affirmed the dissolution of the restraining order and stated the general rule which should be applied in determining whether to grant an injunction.¹⁷⁴ The court stated that it is the duty of the trial court to consider the relative hardships of the parties before granting or denying injunctive relief.¹⁷⁵ The court further reasoned that the rule applies in determining whether to continue a temporary restraining order.¹⁷⁶ The supreme court presumed that the lower court's judgment was correct, and that the lower court, in exercising its discretion considered the relative equities of the parties.¹⁷⁷ Therefore, the lower court's ruling on the issue was not disturbed.¹⁷⁸

3. *Clark v. Asheville Contracting Co., Inc.*¹⁷⁹

The plaintiffs requested a mandatory injunction to compel the removal of waste materials.¹⁸⁰ The defendant's highway project damaged the plaintiff's property.¹⁸¹ In specific, the plaintiff's alleged their property was damaged by the defendant's deposits of rock waste material on property adjacent to, near to, or on their property.¹⁸² The plaintiffs prayed for a mandatory injunction and pecuniary damages and, in the alternative compensation for the interest in land taken by the defendant.¹⁸³

At trial, the plaintiffs elected to pursue an equitable remedy instead of damages.¹⁸⁴ The trial court found the plaintiffs were entitled to a judgment against the defendant because the acts of the

171. *Id.* at 502, 78 S.E.2d at 321.

172. *Id.* at 503, 78 S.E.2d at 321.

173. *Id.* at 502-03, 78 S.E.2d at 321.

174. *Id.* at 504, 78 S.E.2d at 322.

175. *Id.* at 504, 78 S.E.2d at 322.

176. *Id.*

177. *Id.*

178. *Id.*

179. 316 N.C. 475, 342 S.E.2d 832 (1986).

180. *Id.* at 479, 342 S.E.2d at 834.

181. *Id.* at 478, 342 S.E.2d at 834.

182. *Id.*

183. *Id.* at 479, 342 S.E.2d at 834.

184. *Id.* at 482, 342 S.E.2d at 836.

defendant were not for a proper public purpose.¹⁸⁵ The trial court further found that the plaintiffs would suffer irreparable harm for which there was no adequate remedy at law if the defendant was allowed to continue.¹⁸⁶ The court ordered the defendant to remove all the waste material from the plaintiffs' property and to discontinue its nonconforming use.¹⁸⁷ The defendant appealed.¹⁸⁸

The court of appeals reversed the judgment of the lower court on the issue of the propriety of allowing a motion for summary judgment.¹⁸⁹ The court, in dicta, addressed the mandatory injunction issue.¹⁹⁰ The court stated there was evidence that removal of the waste would take nine years at a cost of \$13,500,000.00 to the defendant.¹⁹¹ The court further held that the lower court made no findings on this evidence, and, in this case, findings of fact should be made before ordering removal of the material.¹⁹² The lower court must consider the relative hardships and comparative injuries to the parties before determining whether to grant or deny an injunction.¹⁹³

The Supreme Court granted the defendants petition for discretionary review.¹⁹⁴ The supreme court held that substantial issues of material fact existed which precluded summary judgment.¹⁹⁵ The holding of the court of appeals was modified and affirmed.¹⁹⁶ The supreme court, again in dicta, addressed the mandatory injunction issue.¹⁹⁷ The court stated that, because the plaintiffs elected to pursue only a remedy of injunctive relief, the case must be remanded to the trial court for further proceedings.¹⁹⁸ The court then stated, "[W]e find it worthwhile to repeat the cautionary statement of the Court of Appeals"¹⁹⁹ The court reiter-

185. *Id.* at 483, 342 S.E.2d at 836.

186. *Id.*

187. *Id.*

188. *Id.* at 483, 342 S.E.2d at 836.

189. *Id.* at 149, 323 S.E.2d at 769.

190. *Clark v. Asheville Contracting Co.*, 72 N.C. App. 143, 323 S.E.2d 765 (1984).

191. *Id.* at 149, 323 S.E.2d at 768.

192. *Id.*

193. *Id.* at 149, 323 S.E.2d at 769.

194. *Clark*, 316 N.C. at 484, 342 S.E.2d at 837.

195. *Id.* at 488, 342 S.E.2d at 839.

196. *Clark*, 316 N.C. at 488, 342 S.E.2d at 839.

197. *Id.*

198. *Id.*

199. *Id.*

ated the court of appeals' statement that the relative hardships and injuries of the parties should be considered before determining whether to issue a mandatory injunction.²⁰⁰ In the case at hand, findings of fact should be made before ordering the defendant to remove the waste.²⁰¹ Here, the defendant's encroachment was not intentional, and the deposits of waste materials were substantial.²⁰² To comply with the court's issuance of a mandatory injunction, the defendant would be forced to remove from 1,300,000 to 1,500,000 cubic yards of waste materials.²⁰³ It would take nine years to remove the rock deposits at a cost of \$13,500,000.00 to defendant.²⁰⁴

4. *Williams v. South & South Rentals, Inc.*²⁰⁵

The defendant built a two-story brick apartment building, the corner of which encroached eleven inches on the plaintiff's property.²⁰⁶ At the time the building was constructed, neither party knew of the encroachment.²⁰⁷ Nine years after construction the defendant had the land surveyed.²⁰⁸ The survey revealed the encroachment, making it clear that the defendant did not have clear marketable title.²⁰⁹ The defendant went to the plaintiff and told him about the encroachment.²¹⁰ The defendant told the plaintiff he did not want any problems with the title.²¹¹ The plaintiff responded by telling the defendant he could purchase the adjoining property for \$45,000.00.²¹² The plaintiff's property was an oddly shaped tract of land which was located substantially in a creek bed and consisted of one-fourth to one-third acre.²¹³ The defendant refused to purchase the land for \$45,000.00, so the plaintiff brought an action in trespass and requested a mandatory injunction to

200. *Id.* at 488.

201. *Id.*

202. *Id.* at 381, 342 S.E.2d at 835.

203. *Id.*

204. *Id.* at 481, 342 S.E.2d at 835.

205. 82 N.C. App. 378, 346 S.E.2d 665 (1986).

206. *Id.* at 378, 346 S.E.2d at 666.

207. *Id.* at 379, 346 S.E.2d at 667.

208. Brief for Appellee at 4, *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986) (No. 8524 SC 1219).

209. *Id.*

210. *Williams*, 82 N.C. App. at 379, 346 S.E.2d at 666.

211. *Id.*

212. *Id.*

213. *Id.*

compel removal.²¹⁴

The lower court found the encroachment was a continuing trespass and applied the statute of limitations governing continuing trespasses.²¹⁵ The court found that the statute of limitations barred the action because the complaint was filed nine years after the original trespass.²¹⁶ The court dismissed the plaintiff's claim, and the plaintiff appealed.²¹⁷

On appeal, the court of appeals reversed and remanded the lower court's judgment.²¹⁸ The court held that the action was not barred by the statute of limitations because the plaintiff requested a permanent remedy which was subject to the twenty-year statute of limitations for adverse possession.²¹⁹ The court stated that the usual remedy for a continuing trespass is a permanent injunction which, in the instant case, would be a mandatory injunction to compel removal.²²⁰

In its opinion, the court of appeals discussed the relative hardship doctrine and the underlying policy considerations which are eliminated by the doctrine.²²¹ The court stated, "[T]here may be situations . . . where sufficient public interests exist to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent damages be awarded."²²² The court then held, "We are compelled by this Court's prior holding in *Bishop v. Reinhold* to hold that since the encroachment and continuing trespass have been established and since defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to the relief prayed for, namely removal of the encroachment."²²³ The court remanded the case to the lower court for entry of a mandatory injunction.²²⁴

The prior holding in *Bishop*²²⁵ is based on facts clearly distin-

214. *Id.* at 379, 346 S.E.2d at 666.

215. *Id.* at 380, 346 S.E.2d at 667.

216. *Id.*

217. *Id.*

218. *Id.* at 384, 346 S.E.2d at 669.

219. *Id.* at 382, 346 S.E.2d at 668.

220. *Id.* at 383, 346 S.E.2d at 669.

221. *Id.* at 384, 346 S.E.2d at 669.

222. *Id.* at 384-85, 346 S.E.2d at 669.

223. *Id.* at 384, 346 S.E.2d at 669.

224. *Id.*

225. *Bishop v. Reinhold*, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

guishable from the instant case. In *Bishop*,²²⁶ the defendant built a house partially on the plaintiff's land. Originally, the defendant conveyed the land to the plaintiff.²²⁷ According to one of the trial witnesses, the encroachment was so obvious it could be detected by the naked eye.²²⁸ Surely, if an objective third party could detect the encroachment, the defendant knew or should have known he was building on the wrong property. During the time of construction, the plaintiff was serving as an officer in the United States Air Force and was stationed in various places.²²⁹ The plaintiff returned to the location of his property for the purpose of putting it on the market for sale.²³⁰ Only after the plaintiff had the land surveyed at the request of a prospective buyer did he learn of the encroachment.²³¹ The trial court found no mutual mistake between the parties and no mistake in the survey as the defendant alleged.²³² Based on the facts of the case and the court's holding, one can presume that the defendant either intentionally or negligently encroached on the plaintiff's property. In encroachment cases, the courts treat negligent and intentional encroachments the same.²³³ The courts find a remedy at law inadequate and issue a mandatory injunction to compel removal.²³⁴

Basing the holding in *Williams* on the prior holding in *Bishop* because the encroachments were both continuing trespasses and the defendants were not quasi-public entities was not a logical rationale. The court in *Williams* should have considered additional factors, and it should have applied the relative hardship doctrine. Justice Webb wrote a dissenting opinion in *Williams* in which he disagreed with the court's reasoning that the plaintiff was entitled to a mandatory injunction as a matter of law based on the fact that

226. *Id.*

227. *Id.* at 381, 311 S.E.2d at 300.

228. *Id.* at 382, 311 S.E.2d at 300.

229. *Id.* at 381, 311 S.E.2d at 299.

230. *Id.* at 381, 311 S.E.2d at 300.

231. *Id.* at 381-82, 311 S.E.2d at 300.

232. *Id.* at 389, 311 S.E.2d at 304.

233. D. DOBBS, *supra* note 18, § 5.6.

234. *Leaksville Woolen Mills v. Spray Water Power & Land Co.*, 183 N.C. 511, 515, 11 S.E. 24, 25 (1922) (quoting *Broome v. Tel. Co.*, 42 N.J. Eq. 141 (1887) stating that "Where there is a deliberate, unlawful, and inexcusable invasion by one of another's land . . . , and there has been neither acquiescence nor delay in applying to the court for relief, the mere fact that the trespass was complete when the bill was filed will not prevent an injunction . . .").

the defendant was not a quasi-public entity.²³⁵ Justice Webb stated that the rule in *Clark v. Asheville Contracting Co., Inc.*²³⁶ governed in the instant case.²³⁷ Justice Webb set forth the *Clark* rule as follows; "In determining whether to grant an injunction, the court must consider the relative convenience - inconvenience and the comparative injuries to the parties."²³⁸

C. Analysis

Where plaintiffs requested preliminary injunctions the courts applied the relative hardship doctrine. The courts did not apply the doctrine where mandatory injunctions were at issue. Why? Did the fact that the hardship defendant would suffer if an injunction was granted make it easier to justify the withholding of an interlocutory injunction as opposed to a mandatory injunction? Or, did the temporary character of the relief sought make the application of the doctrine more feasible when preliminary injunctions were requested?

Preliminary injunctions are granted to preserve the status quo of the parties until there is a trial on the merits, while mandatory injunctions are granted after a trial on the merits.²³⁹ Why invoke the relative hardship doctrine in the former and not the latter when both are equitable remedies? The general rule is that where equity has jurisdiction the relative hardships of the parties and the equities between them should be considered before granting or denying injunctive relief.²⁴⁰

The only logical rationale for applying the doctrine in one situation and not the other is the permanency of the decision. A preliminary injunction is temporary, and the parties are entitled to a trial on the merits to determine the final disposition of the issues. A mandatory injunction is a final judgment issued after a trial on the merits. Where a preliminary injunction is requested there is no

235. *Williams*, 82 N.C. App. at 384, 346 S.E.2d at 669.

236. 316 N.C. 475, 342 S.E.2d 832 (1986).

237. *Id.* at 385, 346 S.E.2d at 669.

238. *Id.* In a telephone interview, the attorney of record for the defendant was asked why the case was not appealed to the supreme court. The attorney's response was that it was a matter of economics. The case was settled out of court after it was remanded on appeal. The defendant purchased the land in dispute for several thousand dollars. Telephone interview with Chester E. Whittle, Jr., Attorney for Defendant-Appellee (July 19, 1987).

239. See *Huskins v. Yancey Hospital*, 238 N.C. 357, 78 S.E.2d 116 (1953).

240. Dobbs, *Remedies, supra* note 31, at 358.

chance the defendant will acquire an easement in or title to the plaintiff's property until there is a trial on the merits. It would be interesting to know whether the courts applied the relative hardship doctrine in preliminary injunction cases at a trial on the merits. An educated guess would be no.

RELATIVE HARDSHIP DOCTRINE - AN OBJECTIVE STANDARD

Jurisdictions which take the position that a legal remedy is inadequate to protect the plaintiff's property interest grant injunctive relief without great reluctance.²⁴¹ A relatively slight injury suffered by the plaintiff compared to a great hardship suffered by the defendant is deemed an insufficient reason to deny a mandatory injunction.²⁴² This rationale is based on a public policy which is more concerned with the protection of an individual's property rights than the pecuniary interest suffered by denial of an injunction.²⁴³ Denial of injunctive relief allows the defendant to acquire an interest in the plaintiff's property to which he has no right. This amounts to a type of eminent domain which sets an unwise precedent for future litigation.²⁴ Granting injunctive relief, however, vindicates the plaintiff, punishes the defendant, and serves as a deterrent to others.²⁴⁵

It is an established fact that an individual who encroaches on another's land is a trespasser.²⁴⁶ He places himself in an untenable position of his own making. Whether the encroachment is intentional or accidental, the defendant is still guilty of invading the property interests of another individual. A mandatory injunction vindicates the plaintiff and punishes the defendant regardless of the defendant's intent, or lack of intent, to take the plaintiff's land.²⁴⁷ Is justice served when one who encroaches accidentally is judged by the same standard as one who encroaches intentionally? A defendant who builds on another's land through innocence or error will not make the same mistake again. He has no intent to

241. *Id.*

242. 1 AM. JUR. 2D, *supra* note 41, § 133.

243. D. DOBBS, *supra* note 18, § 5.4.

244. *Id.* at 355.

245. Note, *supra* note 29, at 415.

246. Dobbs, *Substantive Law, supra* note 21, at 32-33 Encroachment cases deal with an ancient and simple tort - an illegal intrusion upon land owned or possessed by another. *Id.* at 31.

247. See, e.g. Terry v. Jim Walter Corp., 8 N.C. App. 637, 175 S.E.2d 354 (1970).

take property which does not belong to him. Therefore, an injunction to compel removal does not serve as a deterrent to him or to others in his position.

Jurisdictions which grant mandatory injunctions because of the inadequacy of a legal remedy adjudicate cases of intentional and innocent encroachments in the same manner.²⁴⁸ The relative hardships to the parties and the equities between them, if considered, are deemed insufficient reasons to deny a plaintiff his property rights.²⁴⁹ The defendant's intent is irrelevant.²⁵⁰ This places the plaintiff in the position of the devil's advocate. The plaintiff knows he can ask for injunctive relief and receive it. He also knows he has the defendant at a complete disadvantage. All the plaintiff must do is determine how important it is to the defendant to keep his building intact, and how much the defendant is willing to pay for the privilege. If the defendant is unwilling or unable to meet the plaintiff's demand, then the plaintiff reminds him of the alternative. Is this extortion? By any standard, yes. Although extortion is not sanctioned, the basis for it is established where the defendant knows he must pay the plaintiff's price or be compelled to remove the structure by court order. In either situation, the defendant who intentionally encroaches receives his just reward. The defendant who accidentally crosses the boundary line pays dearly for his mistake.

North Carolina is among the jurisdictions which have consistently held a remedy at law inadequate.²⁵¹ North Carolina courts grant mandatory injunctions where the encroachment is established as a continuing trespass and the defendant is a private citizen.²⁵² In North Carolina, all encroachments of permanent struc-

248. Annotation, *supra* note 46 In encroachment cases, the majority view is that the landowner does not have an adequate remedy at law; therefore, equity has jurisdiction. *Id.*

249. 1 AM. JUR. 2D, *supra* note 41, § 133.

250. *Id.*

251. *See, e.g.,* Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1942); O'Neal v. Rollinson, 212 N.C. 83, 192 S.E. 688 (1937); Leaksville Woolen Mills v. Spray Water Power & Land Co., 183 N.C. 511, 112 S.E. 24 (1922); Williams v. South & South Rentals, 82 N.C. App. 378, 346 S.E.2d 665 (1986); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

252. *See, e.g.,* Clark v. Asheville Contracting Co. 316 N.C. 475, 342 S.E.2d 832 (1986); Williams v. South & South Rentals, 82 N.C. App. 378, 346 S.E.2d 665 (1986); Bishop v. Reinhold, 66 N.C. App. 379, 311 S.E.2d 298 (1984), *disc. review denied*, 310 N.C. 743, 315 S.E.2d 700 (1984).

tures are characterized as continuing trespasses.²⁵³ Few defendants are quasi-public entities.²⁵⁴ The bottom line is that private citizens who encroach on another's land, whether intentionally or accidentally, are adjudged and penalized in the same manner. The North Carolina Supreme Court acknowledged this in dicta in a 1986 decision,²⁵⁵ and it was later addressed in the dissenting opinion of a 1986 court of appeals decision.²⁵⁶ Both courts in their respective opinions stated that the relative hardship doctrine is the proper rule for determining the issuance or denial of injunctive relief.²⁵⁷ In theory, the courts have acknowledged the doctrine and the propriety of its application in deciding encroachment cases. The courts have yet to practice what they preach.

There are some situations in which a remedy at law is inadequate. There are other situations in which a mandatory injunction to compel removal can be avoided and the plaintiff provided with an adequate substitute. An injunction is not issued as a matter of right.²⁵⁸ It is issued at the discretion of the court.²⁵⁹ The relative hardship doctrine provides a standard by which the court can objectively decide the fate of the parties and determine whether an injunction can be avoided and the plaintiff provided with an adequate substitute. Application of the doctrine also eliminates the extremes of extortion and private eminent domain which are major policy considerations.

The property rights of the parties will always be of major importance to the courts. However, in encroachment cases, the scale tips heavily in favor of the plaintiff's rights at the expense of the defendant. A balance is needed so that neither party suffers unjustly. The relative hardship doctrine provides that balance. The North Carolina Court of Appeals made the statement, "There may be situations where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent dam-

253. For a list of cases in which the courts have characterized a permanent structure as a continuing trespass, see *supra* note 19.

254. Dobbs, *Remedies*, *supra* note 31, at 346.

255. *Clark v. Asheville Contracting Co.*, 316 N.C. 475, 342 S.E.2d 832 (1986).

256. *Williams v. South & South Rentals*, 82 N.C. App. 378, 346 S.E.2d 665 (1986).

257. *Clark* at 475, 342 S.E.2d at 832; *Williams* at 378, 346 S.E.2d at 665.

258. 43 C.J.S. *Injunctions* § 14 (1978).

259. *Id.*

ages be awarded.”²⁶⁰ It is time for the courts to put theory into practice and adopt the relative hardship doctrine as the balancing standard in encroachment cases.

CONCLUSION

Where property interests have been an issue, the North Carolina courts have held to tradition and have been reluctant to accept change. Granted, not all change is in the best interests of the courts or the individuals whose lives are affected by their decisions. There are changes in the area of encroachment cases, however, which would allow the courts to protect individual property rights while avoiding the hardship an injunction would pose.

Over the past few years, North Carolina courts have recognized the relative hardship doctrine as a standard for determining the issuance or denial of a mandatory injunction to compel removal. Although the courts have not directly dealt with the issue, the supreme court addressed the propriety of applying the doctrine in encroachment cases. Now is the time for the courts to make a change. The foundation has been laid for the adoption of the relative hardship doctrine by the North Carolina courts as the balancing standard in encroachment cases.

Olivia Leigh Weeks

260. *Williams*, 82 N.C. App. at 383, 346 S.E.2d at 669.