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SPITE FENCE: A NEWLY CREATED CAUSE OF ACTION

The extent to which a landowner may vent his anger upon his neighbor by erecting a fence between their respective properties raises questions concerning the injured landowner's cause of action if any, and how his damages are to be ascertained if he does have a cause of action.

A recent Wyoming case,[1] held for the first time that a spite structure serving no useful purpose constituted a private nuisance when it injures the owner or occupant of the adjoining premises. The defendant, as a result of an altercation arising out of a quiet title suit decided two years earlier,[2] erected a fence six and one-half feet high which came to within five and one-half inches of the eaves of the plaintiff's house, which shut out the plaintiff's light, air, and view and which was but thirteen inches from the side of the plaintiff's house. The fence was painted with creosote, the defendant painting the side exposed toward his residence with white paint while omitting to frther paint the side of his neighbor. The plaintiff alleged that the fence was erected maliciously as a spite fence, was maintained as such and that his health had been damaged as a result of exposure to creosote fumes from which he had contracted dermatitis. The defendant argued that the fence was on his property, denied that it was a nuisance or that it was erected maliciously, but even if it were, that the court could not inquire into the motive he had in building it. However, the court held, that the fence was erected malevolently, constituted a nuisance, and should be abated to the extent that the height of the fence should be reduced to a height not exceeding the plaintiff's lower window sills, and that the plaintiff was entitled to nominal damages.

The element of malice involved in actions causing damages to others has been, in the most part, developed in the past century.[3] The common law rule is generally held to be that motive in doing an act that is not unlawful per se is immaterial[4] and does not constitute an element of a civil wrong.[5] There is substantial authority to the effect that such is not the true common law rule.[6] Be that as it may, the Wyoming Supreme Court has, in the past, considered such to be the rule, as evidenced by the statement made by Chief Justice Potter in the case of *Anthony Wilkinson Live Stock Co. v. McIlquam*,[7] that in determining whether the use of one's property is or is not a nuisance, the motive of the party has no connection with injury or bearing upon the result. The common law is still followed

1. Erickson et ux. v. Hudson et ux., 70 Wyo. 317, 249 P.2d 523 (1952).
2. Hudson et ux. v. Erickson et ux., 67 Wyo. 167 216 P.2d 379 (1950).
3. See note 1, supra.
4. Stevenson v. Newnham, 138 Eng. Reprints 1208 (1853), p. 1211.
5. Allen v. Flood, App. Cas. (1898), p. 1.
6. Walton: *Motive as an Element in Torts in the Common and in the Civil Law*, 22 Harv. L. Rev. 501 (1909); 22 Law Quarterly Review 118 (1906); Mogul Steamship Co. v. McCregor, Gow & Co., 23 Q. B. D. (1889), p. 598; Quinn v. Leathem, App. Cas. (1901), p. 495.
7. Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 Pac. 364, 3 L.R.A., NS, 733 (1905).

to a great extent today[8] and the injured neighbor is denied relief in the courts. But there is a growing group of jurisdictions that hold contra to the common law rule[9] and among whose ranks Wyoming has placed itself by its decision in the instant case. The reason tendered to support the rule of this latter group is that the right to use one's own property for the sole purpose of maliciously injuring another without serving any useful purpose is not one of the immediate and indestructible rights of ownership.[10] Special note should be given to the qualification that no useful purpose be subserved by the use, for courts will deny an injunction if they believe some benefit is derived to the defendant.[11]

Some of the jurisdictions whose supreme courts have felt that they were bound to follow the older rule have resorted to legislative relief, by the creation of a statutory cause of action for the plaintiff.[12] Such statutes have been held constitutional in the face of claims that they constitute a taking of property without due process of law, by the reasoning that though the right to erect a spite fence is a legal right it is not one of the immediate rights of property and for the further reason that such a right is so inconsequential that a state may validly deprive a property owner of it under its police power without the necessity of making compensation.[13] Municipal ordinances designed to prevent spite fences have also been held constitutionally valid when such a right to control is granted to the city from the state in its municipal charter.[14]

In those jurisdictions which have adopted the rule that a spite fence is an actionable wrong, the courts have been confronted with the problem of the selection of a suitable evidentiary test of the presence of malice on

8. Russell v. State, 32 Ind. 243, 69 N.E. 482 (1904); Truplett v. Jackson, 5 Kan. App. 777, 48 Pac. 931 (1897); Saddler v. Alexander, 21 Ky. L. Rep. 1835, 56 S.W. 518 (1900); Lord v. Langdon, 91 Me. 221, 39 A. 552 (1898); Rideout v. Knox, 148 Mass. 368, 19 N.E. 390 (1889); Bordeaux v. Greene, 22 Mont. 255, 56 Pac. 218 (1899); Mahan v. Brown, 13 Wend. (N.Y.) 261 (1885); Letts v. Kessler, 54 Ohio St. 73, 142 N.E. 765 (1896); Maioriello v. Arlotta, 364 Pa. 557, 73 A.2d 374 (1950); Karasek v. Peier, 22 Wash. 419, 61 Pac. 33 (1900); Koblegard v. Hale, 60 W.Va. 37, 53 S.E. 793 (1906); Metzger v. Hochreim, 107 Wisc. 267, 83 N.W. 308 (1900).
9. Norton v. Randolph, 176 Ala. 381, 58 So. 283 (1912); De Mers v. Groupner, 186 Ark. 214, 53 S.W.2d 8 (1932); Hornsby v. Smith, 191 Go. 491, 13 S.E.2d 20 (1941); Parker v. Harvey, La. App., 164 So. 507 (1935); Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888); Stroup v. Rauschcelbach, 217 Mo. App. 236, 261 S.W. 346 (1924); Bush v. Mockett, 95 Neb. 553, 145 N.W. 1001 (1914); Horan v. Byrnes, 72 N.H. 93, 54 A. 94 (1903); Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Hibbard v. Halliday, 58 Okla. 244, 158 p. 1158 (1916); Musumeci v. Leonardo, R.I., 75 A.2d 175 (1950); Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937); McCorkle v. Driskell, Tenn., 60 S.W. 172 (1900).
10. Bush v. Mockett, note 9, supra.
11. Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 569, 93 So. 652 (1922); Racich v. Mastrovich, note 9, supra; Stroup v. Rauschelbach, note 9, supra; Demers v. Groupner, note 9, supra; McCorkle v. Driskell, note 9, supra; Green v. Shick, 194 Okla. 491, 153 P.2d 821; Musumeci v. Leonardo, note 9, supra.
12. Conn. Gen. Stat. c. 413, sec. 8311; Rev. Stat. Me. 1949, c. 128, sec. 6; Gen. L. of Mass. 1932, c. 49, sec. 21; Rev. Stat. N.H. 1942, c. 269, sec. 32; Vt. Stat. Rev. 1947, c. 175, sec. 3906; Rem. Rev. Stat. of Wash. 1932, c. 4, sec. 720; N.Y. Real Prop. L. 1922, Art. 1, sec. 3; Ky. Rev. Stat. 1948, sec. 433.860.
13. Rideout v. Knox, note 8, supra.
14. Midland Park Coal & Lumber Co. v. Turhune et al., 136 N.J. 442, 56 A.2d 717 (1948).

the part of the defendant. A general guide was set out, and has been followed in subsequent cases, in the case of *Gallagher v. Dodge*,[15] that a structure is erected for spite when from its character, or location, or use, it would strike the ordinary beholder as manifestly erected with a leading purpose to annoy the adjoining owner or occupant in his use of his premises. This rule has subsequently been held not to mean that it should be relied upon to the exclusion of all other evidence which is legitimate to cast light upon the issue.[16] Such evidence must be clear and convincing.[17] One may also prove the intent to injure by proof of any depreciation in value of the plaintiff's land.[18] The evidentiary hurdle of a suitable standard by which to judge whether a particular annoyance constitutes a nuisance was summarily dealt with by the Wyoming court when it expressly adopted the rule propounded in American Jurisprudence.[19] The criterion for determining whether a particular annoyance or inconvenience is sufficient to constitute a nuisance is its effect upon an ordinarily reasonable man, — that is, a normal person of ordinary habits and sensibilities, — and not its effect upon supersensitive persons, those of too fastidious tastes, those in ill health, afflicted with disease or abnormal physical conditions, or, on the other hand, those who are hardened or imune to annoyances or disturbances of the kind in question.

The question of the proper damages to be awarded presents a more difficult problem. In the instant case the court held, that if the order of the court cutting down the fence is correct, plaintiff would be entitled to at least nominal damages because of the discomforts that plaintiffs might have suffered by reason of the obstruction of the light caused by the height of the fence. But the damage for such discomfort would be hard to estimate. The court has a number of times held that ordinarily a case will not be reversed because plaintiffs would be entitled to nominal damages only. Thus, indicating that more substantial damages would be allowed if sufficiently proven, particularly if they consist of anything in the nature of impairment of health. Should the fence be a continuing nuisance, a plaintiff should be entitled to a sum that would reasonably compensate him for the diminution in value of his premises as well as constitute a reasonable recovery for the annoyance and vexation caused by its presence.[20] It has been held that a plaintiff will not be entitled to recover punitive damages nor damages for injury to feeling or embarassment,[21] which must necessarily accompany such contests between neighbors.

In conclusion, it is submitted that the proper choice was made by the court in recognizing the existence of such a cause of action. In recognizing

15. Gallagher v. Dodge, 48 Conn. 387 (1880).
16. Karasek v. Peier, note 8, supra.
17. Hornsby v. Smith, note 9, supra.
18. See note 14, supra.
19. 39 Am. Jur., par. 31, p. 311.
20. Humphrey v. Mausbach, 251 Ky. 66, 64 S.W.2d 454 (1933).
21. See note 9, supra.

the wrong that would have gone unremedied had the common law been followed, the court heeded the dictates of common sense as well as basic morality. In the language of the court, a rule of law carried to its extreme conclusion is often extreme injustice.

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PREFERRED'S RIGHT TO SURPLUS IN ABSENCE OF AN EXPRESS LIQUIDATION PROVISION

Priorities as between classes of stock are creatures of contract.[1] If one class of stock has a priority to dividends over another class of stock, it is commonly referred to as "preferred stock". Preferred stock can, by express provision, be given a priority as to return of the capital investment on dissolution. It quite often is also preferred on dissolution to an amount equal to the unpaid and accrued dividends. The articles of incorporation may state or deny many other priorities or rights to preferred stock.

In the absence of an express provision in the articles of incorporation, creating a priority or right for preferred stock on dissolution, several problems can arise. It has been generally accepted that if on dissolution *capital* remains to be distributed, the so-called "equality rule" is applied in the absence of an express provision for capital distribution on dissolution.[2] Under the "equality rule" all classes of stock share in the distribution in proportion to their investment. However, if on dissolution, after payment of the corporate debts, and after return of the capital investment to all classes of stock, assets remain to be distributed, the question arises as to the respective rights of each class of stock to such *surplus* in the absence of an express provision covering *surplus* distribution on dissolution.

Four variations of this problem can arise:

FACT SITUATION NUMBER 1:

a) Preferred has a prority as to dividends, but none accrued or unpaid.
b) Preferred has a liquidation preference as to *capital,* but there is no provision for the distribution of *surplus* on dissolution.
c) Assets to be distributed on dissolution, after payment of debts, are greater than capital, therefore *surplus* remains to be distributed as well as *capital.*

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1. Hamlin v. Toledo, St. L. & K.C. R. Co., 78 Fed. 664, 36 L.R.A. 826 (6th Cir. 1897); Lloyd v Pennsylvania Electric Vehicle Co., 75 N.J. Eq. 263, 72 Atl. 16, 21 L.R.A. (N.S.) 228, 138 Am. St. Rep. 557, 20 Ann Cas. 119 (1909); Williams v. Renshaw, 220 App. Div. 39, 220 N.Y.S. 532 (1927); Drewry, Hughes Co. v. Throckmorton, 120 Va. 859, 92 S.E. 818 (1917). See also 1 COOK ON CORPORATIONS sec. 269 7th ed. 1913); 11 FLETCHER CYCLOPEDIA CORPORATIONS sec. 5295 (per. ed. 1932); and 1 MACHEM sec. 525 (1st ed. 1908).
2. Guaranty Trust Co. v. Galveston City R. Co., 107 Fed. 311 (5th Cir. 1901); Teller v. Wilcoxen, 110 Iowa 565, 81 N.W. 772 (1900); Coltrane v. Baltimore, etc. Assoc., 110 Fed. 281 (1901); People v. New York, etc., Co., 50 N.Y. Misc. Rep. 23 (1906). See also 5 THOMPSON ON CORPORATIONS sec. 6590 (2d ed. 1910); 1 COOK ON CORPORATIONS sec. 278 (7th ed. 1913); 1 MACHEN, MODERN LAW OF CORPORATIONS sec. 564 (1st ed. 1908).