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RIGHTS IN LAND-LEGAL STATUS OF THE SPITE FENCE

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RIGHTS IN LAND—LEGAL STATUS OF THE SPITE FENCE—Defendants erected a brick wall upon their lot in a manner that cut off light and air to the first floor window of the adjoining premises belonging to plaintiffs. Plaintiffs brought a bill in equity to compel removal of the wall. Upon finding that the wall was built merely to annoy plaintiffs, and that it was of no beneficial use to defendants, the chancellor ordered it removed. On appeal, *held*, reversed. Defendants being lawfully entitled to erect the wall upon their land, the court will not inquire into their motive for so doing. *Cohen v. Perrino*, (Pa. 1947) 50 A. (2d) 348.

The early common law rule was that an owner of land could erect a spite fence [1] or similar structure without being subject to an action in law or equity.[2]

[1] "A spite fence is one which is of no beneficial use to an owner of premises, but was erected and is maintained by him for the purpose of annoying his neighbor," 22 AM. JUR., Fences, § 43.

[2] Mahan v. Brown, 13 Wend. (N.Y.) 261 (1835); Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896); Metzger v. Hochrein, 107 Wis. 267, 83 N.W. 308 (1900);

This is the rule in England today.[3] In 1888 the Michigan court challenged this doctrine in *Burke v. Smith*,[4] holding that no person has a right to erect a fence that is of no benefit to himself simply for the purpose of injuring his neighbor. Dean Ames refers to spite structures in an article written in 1905. "That the conduct of the defendants in these cases is unconscionable no one will deny. That they should be forced to make reparation to their victims, unless paramount reasons of public policy forbid, would seem equally clear. But the absence of such reasons is evident from the fact that in France and Germany and so many of our states the courts have allowed reparations, and the further fact that in at least six states statutes have been passed making the erection of spite fences a tort." [5] Since Dean Ames' writing, the number of statutes making the erection of a spite fence actionable has increased to at least fourteen,[6] and there has been a decided tendency to abandon the rule of the earlier authorities denying relief against spite fences.[7] Writers uniformly agree that even in the absence of statute the weight of authority of the modern view is in accord with the doctrine adopted by the Michigan court in *Burke v. Smith*.[8] It appears to be well settled, however, that where a fence or other structure, which was built partly because of malice or spite, serves a useful purpose, it is not actionable and cannot

11 VA. L. REV. 122 (1924); 26 CAL. L. REV. 691 (1938); 52 L.R.A. (n.s.) 736 (1914); 133 A.L.R. 691 (1941).

[3] Mayor v. Pickles, 20 A.C. 587 (1895); Capital Bank v. Henty, 7 A.C. 741 at 766 (1882); Gutteridge, "Abuse of Rights," 5 CAMB. L. J. 22 (1933).

[4] 69 Mich. 380, 37 N.W. 838 (1888). The holding was by an evenly divided court. Subsequent decisions affirmed the doctrine as the law in Michigan. Flaherty v. Moran, 81 Mich. 52, 45 N.W. 381 (1890); Kirkwood v. Finegan, 95 Mich. 543, 55 N.W. 457 (1893); Peek v. Roe, 110 Mich. 52, 67 N.W. 1080 (1896); Krulikowski v. Tide Water Oil Sales Corp., 251 Mich. 684, 232 N.W. 223 (1930), dictum.

[5] Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411 at 415-416 (1905).

[6] Freeland, "Statutory Regulation of Spite Fences in American Jurisdictions," 25 KY. L. J. 356 (1937). A Pennsylvania statute makes a spite fence a private nuisance. 53 Pa. Ann. Stat. (Purdon, 1946) § 4231.

[7] Decisions after 1905 denying the right to erect a structure wholly for spite: Barger v. Barringer, 151 N.C. 433, 66 S.E. 439 (1909); Norton v. Randolph, 176 Ala. 381, 48 S. 283 (1912); Hibbard v. Holliday, 58 Okla. 244, 158 P. 1158 (1916); Dunbar v. O'Brien, 117 Neb. 245, 220 N.W. 278 (1928), noted in 27 MICH. L. REV. 349 (1928); 7 NEB. L. BUL. 291 (1929); Parker v. Harvey, (La. App. 1935) 164 S. 507; Racich v. Mastrovich, 65 S.D. 321, 273 N.W. 660 (1937); Hornsby v. Smith, 191 Ga. 491, 13 S.E. (2d) 20 (1941), noted in 3 GA. B. J., No. 4, p. 61 (1941). Decisions after 1905 affirming the right to construct a spite fence: Koblegard v. Hale, 60 W. Va. 37, 53 S.E. 793 (1906); Metz v. Tierney, 13 N.M. 363, 83 P. 788 (1906); Haehlen v. Wilson, 11 Cal. App. (2d) 437, 54 P. (2d) 62 (1936), suggests that spite fences of a height less than that prohibited by statute are legal.

[8] 4 TORTS RESTATEMENT, § 829 (1939); 1 COOLEY, TORTS, 4th ed., § 56 (1932); HARPER, TORTS, § 187 (1933); PROSSER, TORTS 583 (1941); 26 CAL. L. REV. 691 (1938); 2 UNIV. CIN. L. REV. 164 (1928); 11 VA. L. REV. 122 (1924); 22 AM. JUR., Fences, § 43 (1939); 133 A.L.R. 691 (1941); 52 L.R.A. (n.s.) 736 (1914).

be abated even if it be assumed that such a structure would constitute an actionable or abatable nuisance if it served no useful purpose.[9] The court in the instant case reasons that since a property owner is entitled to build a wall that obstructs and closes the windows of the adjoining owner, and in view of the fact that it is the general rule of the common law that motive for doing a lawful act will not be inquired into by the court, a property owner has a legal right to erect a spite fence.[10] By such reasoning the court denies relief to the plaintiff without squarely meeting the problem of whether a landowner has such an absolute property right that he might exercise it from a wholly improper motive. Dicta in prior Pennsylvania cases suggested that the court would deny the right of a landowner to act in this malevolent manner.[11] The broad statement used in the instant case that the motive for doing a lawful act is immaterial and will not be inquired into by the court is a doubtful proposition of law. In a number of situations the wrongful motive of the actor is an important factor in making an act unlawful.[12] In view of the fact that a contrary result in the principal case would not preclude the landowner from erecting a structure at any time that serves some useful purpose, even though it might injure the adjoining landowner, it is difficult to conceive of a sound argument in support of the decision. It has been argued that the plaintiff should not be allowed to complain because to him the injury is the same whether the defendant is motivated by malice or is actually making beneficial use of his property.[13] The argument is not persuasive; a principle more in accord with the best judicial thinking is that a proprietary right must not be utilized for the sole purpose of injuring one's neighbors.

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[9] Kuzniak v. Kozininski, 107 Mich. 444, 65 N.W. 275 (1895), where a coal and wood shed was maliciously moved within a few feet of adjoining owner's property in such a way as to cut off light and air, held, not actionable because the structure served a useful purpose; Bixby v. Cravens, 57 Okla. 119, 156 P. 1184 (1916), the court held that a board fence erected to keep trespassers off and to prevent people using the adjoining alley from invading defendant's privacy was not a nuisance even though it cut off light and air to plaintiff's dining room window; Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 659, 93 S. 652 (1922), injunction was denied because the ten foot board fence erected to injure complainant was of some use to defendant. 43 A.L.R. 27 (1926); 133 A.L.R. 691 at 701 (1941).

[10] Principal case at 349.

[11] Haverstick v. Sipe, 33 Pa. 368 (1859); Wheatley v. Baugh, 25 Pa. 528, 64 Am. Dec. 721 (1855).

[12] Christie v. Davey, 1 Ch. 316 (1893), held that a degree of noise not otherwise actionable may become actionable nuisance if it is caused maliciously. Clayberg, "The Law of Percolating Waters," 14 MICH. L. REV. 119 (1915); Ames, "How Far an Act May be a Tort Because of the Wrongful Motive of the Actor," 18 HARV. L. REV. 411 (1905).

[13] Letts v. Kessler, 54 Ohio St. 73, 42 N.E. 765 (1896).