North Dakota Law Review

Volume 27 | Number 3 Article 11

1951

Real Property - Adjoining Landowners - Easements - Light and Air

Lavern C. Neff

persons are conclusively presumed to know the law; it has, however, met with limited approval[17] on the ground that the analogy to the *Neirbo* case should be rejected.

As the federal venue statute was designed for the convenience of defendants, it would seem that the involuntary waiver rule of the instant case deprives the non-resident not of any substantial right, but only of an advantage over residents. The majority view as enunciated by the instant case, while admittedly fictitious, is not only more consonant with justice but embraces elements which militate against the minority view, namely, (a) convenience of attending witnesses, (b) elimination of frequently unsatisfactory depositions, (c) elimination of unnecessary expenses, (d) fairness to all who use the highways.

Clinton R. Ottmar

REAL PROPERTY—ADJOINING LANDOWNERS—EASEMENTS—LIGHT AND AIR. Plaintiff and defendant owned adjoining lots which had been acquired through a common grantor. Defendant erected a concrete wall ten feet high and three inches from the party line and plaintiff's kitchen windows, thus preventing the free passage of light and air. Plaintiff brought suit in equity to compel the defendant to remove the wall. The lower court decreed that the height of the wall be reduced to six feet, having found that the common grantor's subsequent separate conveyance created an easement of light and air by implication because of necessity. Defendant appealed. It was *held* that plaintiff had not established that defendant's land had become the servient tenement; that there was no absolute necessity upon which the court could base an implied easement, since a small amount of light and air was admitted through the kitchen windows, thus constituting only a partial obstruction; and that construction of a skylight in the kitchen ceiling would supply ample amounts of light and air. *Maiorella v. Arlotta,* 364 Pa. 557, 73 A.2d 374 (1950).

An easement to light and air cannot, in Pennsylvania, be acquired by prescription.[1] Neither is the English doctrine of ancient lights a part of the law of that state,[2] that doctrine being in almost complete disrepute in the United States.[3] Easements to light and air acquired by express grant are, however, recognized.[4] In that state equity has also refused to order the removal of a wall shutting out light and air, even where it was maliciously constructed, and of that type commonly referred to as "spite fence", the court instead has held that where a defendant is lawfully entitled to erect the wall upon his land, the court will not inquire into the motive for so doing.[5] It would therefore seem obvious that the plaintiff in the instant case had no alternative except to attempt to establish an easement by implication because of necessity. This court held he had failed

---

[17] Waters v. Plyborn, 93 F.Supp. 651 (E.D.Tenn. 1950).

[1] Haverstick v. Sipe, 33 Pa. 368 (1859).

[2] Beckershoff v. Bomba, 112 Pa. 294, 170 Atl. 449 (Super. Ct. 1934). "Ancient lights" is the doctrine that long-continued enjoyment of lights and windows creates a prescriptive right to continued unobstructed use therof. 3 Words and Phrases 388 (Perm. ed. 1940).

[3] Humble, *Limitations On The Use of Property By Its Owners,* 5 Va. L. Rev. 297, 306 (1918).

[4] Rennyson's Appeal, 94 Pa. 147, 153 (1880).

to do so and further stated that even if an absolute necessity would imply an easement, the obstruction was only partial and the plaintiff had a remedy by expending a reasonable sum to construct a skylight. Court decisions involving implied easements to light and air can be broadly categorized into three groups: (1) the first group of courts indicate that they will imply an easement of light and air where really or absolutely necessary;[6] (2) the second group of decisions would imply easements of light and air in the same manner as they imply an easement of a way of necessity;[7] (3) the last group of de cisions hold that no easement of light and air can be acquired except by express grant or covenant.[8] Clearly Pennsylvania comes within the first group of cases and has established the test of "absolute necessity."

However, where a structure has been erected which serves no useful purpose or where its usefulness is incidental and the dominant reason for its erection is to annoy adjoining landowners, courts are in sharp conflict as to their abatement as a nuisance, even though recognizing them as "spite fences." It is now generally recognized that equity will act to restrain the erection of "spite fences"[9] and the leading case[10] establishing this "modern rule"[11] presumed equity to have the inherent authority to authorize their abatement as nuisances or enjoin their construction even in the absence of statute. The court there reasoned that no man had the legal right to make a malicious and unbeneficial use of his property to damage his neighbor. Many states have adopted this view,[12] while others have given an injured landowner statutory relief[13] by declaring such acts to be a tort.

It is submitted that those jurisdictions which have not adopted the rule of *Burke v. Smith* would lessen the injustice to an injured plaintiff by implying an easement of light and air whenever *reasonably* necessary. Application of such a test would not absolutely bind courts but would allow them to exercise a discretionary latitude as the individual facts warranted. The courts' concept of a reasonable necessity will permit them to vary the interpretation as the growth of the community and urban areas warrants.

Lavern C. Neff

---

[6] Cohen v. Perrino, 355 Pa. 455, 50 A.2d 348 (1947).
[7] Rennyson's Appeal, *supra* note 4; Powell v. Sims, 5 W.Va. 1 (1871).
[8] Fowler v. Wick, 74 N.J. Eq. 603, 70 Atl. 682 (1908).
[9] Baird v. Hanna, 328 Ill. 436, 159 N.E. 793 (1927); *accord*, Morrison v. Marquardt, 24 Iowa 35 (1867).
[10] Daniel v. Birmingham Dental Mfg. Co., 207 Ala. 659, 93 So. 652 (1922).
[11] Burke v. Smith, 69 Mich. 380, 37 N.W. 838 (1888). For a later case where it was held that moving a structure maliciously within a few feet of an adjoining owner's property was not actionable because the structure served a useful purpose, see Kuzniak v. Kozminski, 107 Mich. 444, 65 N.W. 275 (1895).
[12] 1 Cooley, Torts §56 (4th ed. 1932).
[13] See, *e.g.*, Hornsby v. Smith, 191 Ga. 491, 13 S.E.2d 20, 24 (1941) (wherein the court said ". . . malicious use of property resulting in injury to another is never a 'lawful use' but is in every case unlawful."); Dunbar v. O'Brien, 117 Neb. 245, 220 N.W. 278 (1928); Racich v. Mastrovish, 65 S.D. 321, 273 N.W. 660 (1937) (spite fence photographically illustrated).
[13] See, *e.g.*, Conn. Gen. Stat. §5907 (1930); Mass. Ann. Laws c. 49, §21 (1932); For discussion of cases wherein courts have interpreted "spite fence" statutes, see Note, 133 A.L.R. 691, 704 (1941).