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Equity -- Easement -- Mandatory Injunction to Remove Encroachment

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of the trial court for newly discovered evidence (obtaining a stay of execution from the governor in the meantime if necessary).[20] But here again the burden would be on the defendant to show that he was prejudiced by not having been able to produce this newly discovered evidence at the original trial.

Therefore, it would seem that, though North Carolina recognizes the existence of this fundamental right which is guaranteed one accused of a crime, the essence of the right is denied him unless he can prove that he will be aided by the exercise thereof. Further it would appear that this requirement placed upon the defendant is opposed to another of our fundamental doctrines, that a person is presumed innocent until proved guilty (the burden being on the state to prove him guilty). Possibly, under the North Carolina rule, a person could be proved guilty because of a denial of adequate time for preparation and being thus convicted, the burden would be shifted to him to introduce evidence which would bear on his innocence at a new trial, *i.e.,* show that the denial of the motion was prejudicial.

The North Carolina rule is plainly an attempt to keep the wheels of justice moving rapidly by avoiding useless new trials where the only end to be accomplished is a delay in the conviction of the accused. The Supreme Court, by taking the burden upon itself, endeavors to separate the wheat from the chaff by deciding each case from its circumstances. Nevertheless, it is doubtful that the Supreme Court of the United States would sustain this North Carolina view as being a sufficient guarantee of this fundamental right to the accused.[21]

A. A. ZOLLICOFFER, JR.

Equity—Easement—Mandatory Injunction to Remove Encroachment

Plaintiff power company acquired an easement over the defendants' land by condemnation proceedings for the construction, inspection and repair of its power lines. The defendants built a brick building across the right-of-way and ten feet below the high-voltage lines. *Held:*— three judges dissenting—the plaintiff was entitled to mandatory injunc-

[20] State v. Gibson, 229 N. C. 497, 50 S. E. 2d 520 (1948); State v. Dunheen, 224 N. C. 738, 32 S. E. 2d 322 (1944); State v. Edwards, 205 N. C. 661, 172 S. E. 399 (1933); State v. Casey, 201 N. C. 620, 161 S. E. 81 (1931).

[21] Certiorari was denied by the United State Supreme Court in State v. Whitfield, 206 N. C. 696, 175 S. E. 93 (1934), *cert. denied,* 293 U. S. 556 (1934). There the defendant was indicted and convicted of rape. Counsel had two days in which to prepare, his motion for a continuance having been overruled. The facts were simple and there were only two witnesses, the defendant and the prosecutrix. Thus the case was reduced to a question of veracity between the two and there was no plea of insanity.

tion to compel the defendants to remove their building from the plaintiff's easement.[1]

It is well settled that where a right-of-way is substantially obstructed the person offended may get a mandatory injunction to compel the removal of the obstruction.[2] If the interference with the easement is in violation of an interlocutory decree, mandatory injunction may be granted before final hearing to compel the restoration of the easement to its former condition.[3] Since easements are incorporeal interests in the land

[1] Carolina Power & Light Co. v. Bowman *et al.*, 229 N. C. 682, 51 S. E. 2d 191 (1949).

[2] Stallard v. Cushing, 76 Cal. 472, 18 Pac. 427 (1888) (stairway placed in alley through which plaintiff had right-of-way); Trueblood v. Pierce, 116 Colo. 221, 179 Pac. 2d. 671 (1947) (curb built in plaintiff's driveway); Carpenter v. Capital Electric Co., 178 Ill. 29, 52 N. E. 973 (1899) (cross-arm and two wires placed over plaintiff's at height of 14 feet); Lake Erie & W. R. v. Essington, 27 Ind. App. 291, 60 N. E. 457 (1901) (plaintiff's driveway obstructed—the sort of obstruction does not appear); Aboud v. Bailen, 289 Ky. 536, 159 S. W. 2d 410 (1942) (heavy barrels, iron box and pipe placed on plaintiff's passway); Schaidt v. Blaul, 66 Md. 141, 6 Atl. 669 (1886) (stone wall across plaintiff's right-of-way); St. Louis Deposit & Savings Bank v. Kennett Estate, 101 Mo. App. 370, 74 S. W. 474 (1903) (alley between plaintiff's and defendant's buildings obstructed by projecting smokestack); Bailey v. Schnitzius, 53 N. J. Eq. 235, 32 Atl. 219 (1895) (right-of-way obstructed by overflowing it with water); Carolina and Northwestern Ry. Co. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949) (fence and other obstructions upon plaintiff's right-of-way); Broocks v. Muirhead, 223 N. C. 227, 25 S. E. 2d 889 (1943) (two brick walls, fence, shrubbery and badminton court across alley-way); Davis v. Alexander, 202 N. C. 130, 162 S. E. 372 (1932) (defendant "closed" abandoned public highway); Leaksville Woolen Mills v. Spray Water Power & Land Co., 183 N. C. 511, 112 S. E. 24 (1922) (seven-foot embankment placed across driveway); Wheeler v. Charlotte Construction Co., 170 N. C. 427, 87 S. E. 221 (1915) (stables and other obstructions placed upon street right-of-way); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S. E. 2d 217 (1942) (sand and gravel placed on plaintiff's easement which plaintiff used for maintainence of its pipelines).

The following cases are based on facts similar to those of the principal case: Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868 (1926) (five-room house built fifteen feet over on right-of-way which plaintiff had acquired for the maintenance of its power lines); Willingham v. Georgia Power Co., 193 Ga. 801, 20 S. E. 2d 83 (1942) (lumber stacked on land over which plaintiff had easement to construct and maintain its power lines); Arkansas-Louisiana Gas Co. v. Cutrer, 30 So. 2d 864 (Court of Appeal of La., 1947) (frame house built over plaintiff's high pressure gas line); *cf.* Babler v. Shell Pipe Line Corp., 34 F. Supp. 10 (E. D. Mo. 1940) (plaintiff was held to have right to maintain building over defendant's pipe lines).

[3] Vicksburg S. & P. Ry. v. Webster Sand, Gravel & Construction Co., 132 La. 1051, 62 So. 140 (1913) (defendant ordered to replace plaintiff's rails and crossties); Leaksville Woolen Mills v. Spray Water Power & Land Co., 183 N. C. 511, 112 S. E. 24 (1922) (defendants ordered to remove embankment placed across driveway). In Keys v. Alligood, 178 N. C. 16, 100 S. E. 113 (1919) where the defendant was ordered to replace ditch banks of a road over which the plaintiff had a right-of-way, the North Carolina Court expressly said that the injunction was mandatory and repudiated the old form of stating a mandatory order in prohibitory terms. For a decision allowing, in effect, a mandatory injunction but which, in so doing, followed the old form of words, *see* Westbrook v. Comer, 197 Ga. 433, 29 S. E. 2d 574 (1944) (fence and shrubbery placed in alley over which plaintiff had easement).

of another[4] giving the grantee limited rights of user in the land for certain purposes (or, in the case of negative easements, rights that the owner of the fee refrain from using his own land in certain ways) a particular use or obstruction by the grantor is not enjoinable unless it seriously interferes with the easement.[5] If the obstruction is not substantial in character it may be that the owner of the easement has an adequate remedy by way of self-help or damages.[6]

When mandatory injunction is sought to compel the removal of a trespassing encroachment from land it may be refused if other remedies are found to be as adequate as injunction.[7] Having successfully passed the adequacy test[8] injunctive relief may still be denied if the balance of hardships[9] inclines in favor of the defendant. Such a suit puts a court in this dilemma: If it refuses to grant the injunction and awards damages for the strip involved because the balance of hardships is in favor of the defendant, it may be accused of exercising private eminent domain.[10] On the other hand, to grant injunction where the order for

[4] Korricks Dry Goods Co. v. Kendall, 83 Ariz. 325, 264 Pac. 692 (1928); Transcontinental Oil Co. v. Emmerson, 298 Ill. 394, 131 N. E. 645 (1921); St. Cecelia Soc. v. Universal Car and Service Co., 213 Mich. 569, 182 N. W. 161 (1921); Davis v. Robinson, 189 N. C. 589, 127 S. E. 697 (1925); GALE, A TREATISE ON THE LAW OF EASEMENTS 9 (Tenth Ed., W. J. Byrne, 1925).

[5] Bitello v. Lipson, 80 Conn. 597, 69 Atl. 21 (1908); Farmers' Grain & Supply Co. of Warsaw v. Toledo, P. & W. R. R., 316 Ill. App. 116, 44 N. E. 2d 77 (1942); Cleveland, C., C. & St. Louis Ry. v. Central Illinois Public Service Co., 380 Ill. 130, 43 N. E. 2d 993 (1942); Hildebrand v. Southern Bell Telephone & Telegraph Co., 219 N. C. 402, 14 S. E. 2d 252 (1941) (by implication); Raleigh Savings Bank & Trust Co. v. Vass, 184 N. C. 295, 114 S. E. 309 (1922); Fendall v. Miller, 99 Ore. 610, 196 Pac. 381 (1921); Taylor v. Heffner, 359 Pa. 157, 58 A. 2d 450 (1948).

[6] RESTATEMENT, TORTS §950 (1939).

[7] Howell v. Township of Sewickley, 352 Pa. 552, 43 A. 2d 121 (1945); Smith v. Holt, 174 Va. 213, 5 S. E. 2d 492 (1939).

[8] RESTATEMENT, TORTS §933 (1939) Special Note. "The availability of injunction against tort has usually been stated in terms of the inadequacy of the remedy at law, inadequacy of damages, and irreparable injury. . . . Moreover, the elliptical, shorthand expressions quoted are misleading. They imply that injunction will be refused unless other remedies are inadequate in the sense of being wholly unservicable or worthless, . . . As applied by the courts, however, the adequacy test has a relative meaning; it is founded upon the adequacy of injunction as the standard of comparison. When the courts have analyzed these adequacy formulae, they have always concluded that other remedies are to be deemed adequate if they are as efficient to the ends of justice as the injunction; otherwise, they are to be deemed inadequate."

[9] Johnson v. Killian, 157 Fla. 754, 27 So. 2d 345 (1946); Coombs v. Lenox Realty Co., 111 Me. 178, 88 Atl. 477 (1913); Triulzi v. Costa, 296 Mass. 24, 4 N. E. 2d 617 (1936); Methodist Episcopal Soc. v. Akers, 167 Mass. 560, 46 N. E. 381 (1897); Lynch v. Union Institution for Savings, 159 Mass. 306, 34 N. E. 364 (1893); Hunter v. Carroll, 64 N. H. 572, 15 Atl. 17 (1888); Crocker v. Manhattan Life Ins. Co., 61 App. Div. 226, 70 N. Y. Supp. 492 (1901).

[10] Bemmerly v. Lake County, 55 Cal. App. 2d 829, 132 P. 2d 249 (1942) (injunction granted because the court feared that to deny injunction upon balancing the hardships would be private eminent domain); Lynch v. Union Institution of Savings, 158 Mass. 384, 33 N. E. 603 (1893); Hark v. Mountain Fork Lumber Co., 127 W. Va. 586, 34 S. E. 2d 348 (1945) (injunction granted, the court expressing fear that to balance the hardships and award damages in lieu would

removal places a relatively large hardship upon the defendant and the plaintiff has suffered only slight harm may make the court a party to extortion.[11]

The problem is not present, however, where an easement is substantially obstructed as in the principal case.[12] It is one thing to place a building a few inches over upon a person's land and quite another to erect a building across his easement and just below high voltage wires. In the former case the victim may be deprived of only a small strip of land; in the latter he may be compelled to yield his entire interest (*i.e.*, his right of user) since the presence of the building may make the exercise of the easement dangerous or impossible.

The court does not, in the principal case, attempt to balance the hardships. It is submitted that it properly refrains from so doing. The plaintiff is seriously affected by the presence of the defendants' building upon its easement. Projected improvements would be interfered with and repairs would be made difficult, with possible consequent decline in the standard of service to the public. Should lightning strike or the plaintiff's wires touch the building[13] the plaintiff might be subjected to actions for personal injuries and wrongful death. These factors, coupled with the expense and difficulty of acquiring new easements and adjusting equipment to them, make it apparent that the plaintiff will insist upon the enforcement of the injunctive decree. The danger of the injunction's being used as a tool of extortion reaches the vanishing point here. To deny injunction and to award damages for an easement upon the easement would be an intolerable adjustment. The public interest[14] in the prevention of interference with the service performed

amount to private eminent domain). See Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 176 (1936) where, in speaking of denying injunction in nuisance cases upon balancing the hardships, it is said that the use of the technique "has sometimes verged uncomfortably close to a judicial grant of the power of eminent domain to private persons for private purposes." For an effective answer to such accusations, see RESTATEMENT, TORTS §941 (1939) comment d, where it is stated that refusal of injunction because of balancing the hardships is not private eminent domain, but "the result is incidental to a fair adjustment of a largely unintended situation."

[11] RESTATEMENT, TORTS §941 (1939) comment c.

[12] The plaintiff's right-of-way was 50 feet wide. The defendants' building covered 35 feet of this width for the entire length of the right-of-way; the roof was 10 feet below the wires.

[13] It appears from the report of the principal case that these dangers were pointed out by an electrical engineer who testified for the defendants.

[14] Public interest was made the basis for refusing mandatory injunction in: Wilkins v. Diven, 106 Kan. 283, 187 Pac. 665 (1920); Bell v. Louisville Water Co., 29 Ky. L. 866, 96 S. W. 572 (1906) (encroaching structures part of water system supplying Louisville, Ky.); Andrews v. Cohen, 163 App. Div. 580, 148 N. Y. Supp. 1028 (1914). The following cases granted mandatory injunction because of public interest: Welton v. 40 East Oak St. Building Corp., 70 F. 2d 377 (C. C. A. 7th 1934), 13 N. C. L. REV. 233 (1935) (violation of zoning ordinance). In Southern Ry. Co. v. Stricklin, 264 Fed. 546 (E. D. N. C. 1920) the court

by a power company renders less important the distinction often drawn in private tort cases between willfulness and negligence on the part of a defendant[15] and the effect of possible laches or acquiescence on the part of the plaintiff.[16]

The decision in the principal case is supported by the few decided cases in this field.[17]

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Evidence—Confessions—Admissibility Thereof

Prior to 1942, when the famous *McNabb* decision[1] was handed down, the law as to the admissibility of confessions had been that such an instrument was admissible if voluntarily made and inadmissible if not.[2]

said by way of dictum: "If this were a controversy respecting a private way I would not hesitate to deny the mandatory injunction . . . but it is manifest that, by reason of the relation which the complainant bears and its duty to the public, a judgment for damages would be totally inadequate to meet the situation."

[15] Clough v. Healy & Co., 53 Cal. App. 397, 200 Pac. 378 (1921); Bauby v. Krasow, 107 Conn. 109, 139 Atl. 508 (1927); Waterbury Trust Co. v. G. L. D. Realty Co., 124 Conn. 191, 199 Atl. 106 (1938); Tucker v. Howard, 128 Mass. 361 (1880); Walter v. Danisch, 133 N. J. Eq. 127, 29 A. 2d 897 (1943).

[16] In the following cases injunction was refused because of the plaintiff's laches or acquiesence: Waterbury Trust Co. v. G. L. D. Realty Co., *supra* note 15; Perry v. Hewitt, 314 Mass. 346, 50 N. E. 2d 48 (1943) (use of right-of-way by defendant for about 44 years); Levi v. Worcester Consol. St. Ry., 193 Mass. 116, 78 N. E. 853 (1906) (facts not clear but plaintiff appears to have "unreasonably" delayed in protecting his rights); Starkie v. Richmond, 155 Mass. 188, 29 N. E. 770 (1892); Andrews v. Cohen, 163 App. Div. 580, 148 N. Y. Supp. 1028 (1914) (defendant told plaintiff that he intended to build passway over plaintiff's easement and plaintiff made no objection then or during construction).

[17] Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868 (1926) (five-room house built fifteen feet over on right-of-way which plaintiff had acquired for the maintenance of its power lines, ordered removed); Willingham v. Georgia Power Co., 193 Ga. 801, 20 S. E. 2d 83 (1942) (lumber packed on land over which plaintiff had easement to construct and maintain its power lines, ordered removed); Arkansas-Louisiana Gas Co. v. Cutrer, 30 So. 2d 864 (Court of Appeal of La., 1947) (frame house built over plaintiff's high pressure gas line upon plaintiff's easement, same result); Moundsville Water Co. v. Moundsville Sand Co., 124 W. Va. 118, 19 S. E. 2d 217 (1942) (sand and gravel placed upon easement which plaintiff used for maintenance of its water pipe lines, same result); Norfolk Southern Ry. Co. v. Stricklin, 264 Fed. 546 (E. D. N. C. 1920) (buildings, fences and other structures were ordered removed from plaintiff railroad's easement); *cf.* Babler v. Shell Pipe Line Corp., 34 F. Supp. 10 (E. D. Mo. 1940) (not a suit for injunction but plaintiff was held to have the right to maintain a building over the defendant's pipe lines).

[1] 318 U. S. 332 (1942).

[2] *E.g.*, Lisenba v. United States, 314 U. S. 219 (1941); Wan v. United States, 266 U. S. 1 (1924); Wilson v. United States, 162 U. S. 613 (1896); Sparf and Hansen v. United States, 156 U. S. 51 (1895); State v. Thompson, 227 N. C. 19, 40 S. E. 2d 620 (1946); State v. Patrick, 48 N. C. 443 (1856); State v. Roberts, 12 N. C. 259 (1827); Rex. v. Warickshall, 1 Leach 263, 168 Eng. Rep. 234 (1783). That this had been the test in England even before 1775 *see* Rex v. Rudd, 1 Leach 115, 118, 168 Eng. Rep. 160, 161 (1775). "The instance has frequently happened, of persons having made confessions under threats or promises: the consequence as frequently has been that such examinations and confessions have not been made use of against them on their trial."