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Torts -- Overhanging Branches -- Remedy of Self Help

on the running board. The court also rejected the doctrine of *pari delicto*, predicating its holding on the premise that the adult hitchhikers brought on their own misfortune by their own "illegal conduct in using the 'speaking thumb'."[17] Penalizing the driver for his violation would result undesirably in giving the original violators an advantage instead of a penalty.

The court seemed to say that the hitchhikers entrapped the kindly motorist into an unwitting and careless act of generosity,[18] unhappily made unlawful by the legislature, and that such entrapment suspended or rendered nugatory the host's violation, thus transmuting his invitation into a lawful act. The argument that the first lawbreaker cannot take advantage of the second lawbreaker, whereas the second lawbreaker may assert the violation of the first lawbreaker implies an estoppel, although the nature of the violation was criminal. Statutory violation has both criminal and civil aspects. The ultimate issue here is one of civil liability.

Should the plaintiff's or the defendant's violation of a minor statute affect the outcome? Not all legislation is enforceable under any and all conditions. If two statutes conflict, the undoubted desire of the legislature to effectuate substantial justice should suffice to over-ride the lesser traffic statute in favor of the substantive type law—expressed in the guest statute.

TORTS — OVERHANGING BRANCHES — REMEDY OF SELF HELP

Plaintiff brought a suit for damages for injury to his realty from overhanging branches of trees rooted in the adjoining land, and for abatement of this nuisance. *Held*, plaintiff is not entitled to damages or an order of abatement. The sole remedy of self-help is adequate, though limited only to the overhanging limbs. *Sterling* v. *Weinstein*, 75 A.2d 144 (D.C. Munic. Ct. 1950).

The overwhelming weight of authority is to the effect that self-help is the sole remedy for overhanging branches, or invading roots, when they are not noxious.[1] However, self-help does not include a license to trespass against the adjoining owner.[2] Most courts will allow recovery for injury from noxious growths, but use the injury rather than the growth, as the

17. *Compare* Bateman v. Ursich, 200 P.2d 314 (Wash. 1950) *with* Dashiell v. Moore, 117 Md. 657, 11 A.2d 640 (1940).

18. Dobbs v. Sugioka, 117 Colo. 218, 219, 185 P.2d 784, 785 (1947), "This section (§ 371, the guest statute) was enacted to prevent recovery by those having no moral right to recompense, those carried for their own convenience, for their own business or pleasure, those invited by the operator as a mere generous gesture, 'hitch-hikers' and 'bums' who sought to make a profit out of soft-hearted and unfortunate motorists."

1. Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931); Cranberry v. Jones, 188 Tenn. 51, 216 S.W.2d 721 (1941); Cobb v. Western Union Telegraph Co., 90 Vt. 342, 98 Atl. 758 (1916); *accord*, Hickey v. Michigan C.R.R., 96 Mich. 498, 55 N.W. 989 (1893) (use self-help after notice to owner of tree); *see* Harndon v. Stultz, 124 Iowa 440, 441, 100 N.W. 329, 330 (1904) (involving a line hedge); Wegener v. Sugarman, 104 N.J.L. 26, 27, 138 Atl. 699, 700 (1927) (where defendant's contractor completely

criterion.[3] The injured party has no right to damages where the self-help doctrine is enforced because under it he does not have a cause of action except for those jurisdictions which have made a slight inroad upon the self-help rule by allowing recovery for "real and sensible injury,"[4] without, however, exactly defining the term.

The Restatement of Torts[5] has been followed by a few cases[6] which hold the defendant liable for growths resulting from human activity of the defendant or his predecessors, and which withhold liability for natural growths. The principal case has adequately denounced the prediction of liability based on the theory of the Restatement,[7] because of the probable impossibility of determining whether growth is natural or the result of human conduct. Planting several generations ago would bind a present grantee, by the rule which permits an ancient, "accidental" act, to determine the present tort liability of adjoining landowners. One can readily see how ludicrous this rule is in the case of the bona fide purchaser whose newly acquired land has a tree with hidden, but protruding roots.

We are now left with a fundamental, irreconcilable conflict between two ideas. The first, which states that the law exists for the peaceable settlement of disputes, conflicts with those courts, as the one in the instant case, which urge upon petitioners for redress of their grievances the dangerous remedy of self-help, considered adequate as late as July, 1950.[8] Self-help is dangerous and consequently never adequate because it contains the seeds of tort and crime such as assault, battery and even murder.

The Florida Constitution, in the Declaration of Rights, Section 4, provides that every person shall have a remedy for "any injury done him in his *lands*,[9] goods, person or reputation." The maxim, "for every wrong a remedy," was given vigor by this section and vitality by the courts.[10] Whenever

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destroyed a hedge); Skinner v. Wilder, 38 Vt. 115, 116 (1865) (conversion of the fruit on the overhanging branches); Mills v. Brooker, 1 K.B. 555, 557 (1919) (ownership of overhanging fruit). *Contra*: Ackerman v. Ellis, 81 N.J.L. 1, 79 Atl. 883 (1911); *see* Luke v. Scott, 98 Ind. App. 15, 187 N.E. 63, 64 (1933); Toledo, St. L. & K.C.R.R. v. Loop, 139 Ind. 542, 544, 545, 39 N.E. 306, 307 (1894) (Indiana allows either self-help after notice or an action for damages); see Granberry v. Jones, *supra*, (for overhanging branches) and Michalson v. Nutting, *supra*, (for protruding roots).

2. Newberry v. Bunda, 137 Mich. 69, 100 N.W. 277 (1904); Luke v. Scott, *supra* note 1; Wegener v. Sugarman, *supra* note 1, (self-help excludes trespass).

3. Buckingham v. Elliot, 62 Miss. 296 (1884) (mulberry roots injured a well, therefore noxious); Crowhurst v. Burial Bd. of Amersham, L.R. 4 Ex. D. 5 (1878) (yew trees poisoned cattle therefore noxious); Smith v. Giddy, 2 K.B. 448 (1904) (where the court said noxiousness was immaterial and applied the rule of Rylands v. Fletcher, L.R. 3 H.L. 330 [1858]).

4. Tanner v. Wallbrun, 77 Mo. App. 262 (1898); Countryman v. Lighthill, 24 Hun 405 (N.Y. 1881); Lemmon v. Webb, 3 Ch. 1 (1894); see Gulf C. & S.F. Ry. v. Oakes, 94 Tex. 155, 58 S.W. 999(1900) (for an interesting variation, predicating liability and plaintiff's right of action on proof of defendant's negligence).

5. RESTATEMENT, TORTS §§ 839, 840 (1939).

6. Griefield v. Gibraltar Fire & Marine Ins. Co., 199 Miss. 175, 24 So.2d 356 (1946).

7. *See* Sterling v. Weinstein, 75 A.2d 144, 146 (D.C. Munic. Ct. 1950).

8. Date of the principal case.

9. Emphasis supplied by the writer.

10. *See* Williams v. Mayes, 155 Fla. 129, 133, 19 So.2d 709, 711 (1944) (concerned the liability of a sheriff for negligently shooting his deputy); Lawson v. Woodruff, 134 Fla.

one party alleges a wrong done to him by another, the courts should adjudicate the complaint, rather than deny or defeat the plaintiff's prayer for relief on some such grounds as self-help.[11]

It would appear that legislation is in order to correct this defect in the common law which permits of self-help. States like California, Oklahoma, and Washington have met the problem squarely and solved it safely by including overhanging branches and protruding roots in the judicial interpretation of their nuisance statutes which confer upon the aggrieved party a right of action. Under these modern provisions,[12] plaintiffs have a remedy in damages,[13] as well as the injunctive relief,[14] which was nonexistent at law, in trespass or ejectment, whether the courts were disposed to grant relief or not.

The argument, that thus conferring a right of action would clog the courts with numerous, vexatious suits is ill-founded[15] when recovery can be limited to nominal damages[16] and in any event is preferable to the dangers of self-help which confront the community.

The law of trespass, where the injury determines the amount of damages and not the right of legal action, should logically be applied to branches or roots which are trespassing, though in the air or under the ground. New Jersey followed this rule in the absence of legislation in *Ackerman v. Ellis*,[17] where the court said the degree of the injury goes to the extent of recovery and not to the right of action. Legislation requiring other courts to follow New Jersey and the code states already mentioned is essential to achieve uniformity under the more civilized rule of resorting to the courts for settlement of disputes.

437, 445-446, 184 So. 81, 83 (1938) (". . . it is expressly made the duty of all courts of this state to administer 'right and justice' 'by due course of law' to 'every person for *any injury* done him in his *lands*, goods, person or reputation.' ") (Emphasis supplied by the writer).

11. *See* McDuffie v. McDuffie, 155 Fla. 63, 67, 19 So.2d 511, 513 (1944) (a divorce case).

12. CAL. CIV. CODE § 3479 (1949); CAL. CODE CIV. PROC. ANN. § 731 (1949); OKLA. STAT. tit. 50, §§ 1, 6, 12, 13 (1941); REMINGTON'S WASH. REV. STAT. (1915), §§ 943, 945.

13. CAL. CODE CIV. PROC. ANN. § 731 (1949), Crance v. Hems, 17 Cal.App.2d 450, 62 P.2d 395 (1936), Shevlin v. Johnson, 56 Cal. App. 563, 205 Pac. 1087 (1922), Stevens v. Moon, 54 Cal. App. 737, 202 Pac. 961 (1889); OKLA. STAT. tit. 50 § 6 (1941), Mead v. Vincent, 199 Okla. 508, 187 P.2d 994 (1947); REMINGTON'S WASH. REV. STAT. (1915), § 943, Forbus v. Knight, 24 Wash.2d 397, 163 P.2d 822 (1946), Gostina v. Ryland, 116 Wash. 228, 199 Pac. 822 (1921).

14. OKLA. STAT. tit. 50, § 13 (1941); cases cited note 11 *supra*.

15. Gostina v. Ryland, *supra* note 13 (where vexatiousness of plaintiff's cause under a nuisance statute was no defense).

16. As in numerous trespass actions, or as in Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366 (1899) (where the code conferred a right of action which the court did not deny, although in its adjudication of the dispute it found no nuisance, recognized self-help and held for the defendant because of a lack of any injurious effect upon the plaintiff).

17. 81 N.J.L. 1, 79 Atl. 883 (1911).