Chapter 2

ESTABLISHING ENTITLEMENTS TO DIFFERENT KINDS OF RESOURCES—AN INTRODUCTION TO RIGHTS AND REMEDIES

Section 1. THE BASIC BUILDING BLOCKS

GERAGOSIAN v. UNION REALTY CO.
Supreme Judicial Court of Massachusetts
289 Mass. 104, 193 N.E. 726, 96 A.L.R. 1282 (1935)

LUMMUS, J. In 1927 one Vartigian built a theatre in Somerville on land the rear of which adjoined the rear of land of one Aaronian. Both lots bounded also in the rear upon a private way called Sewall Court, which ran into Sewall Street. There is no finding as to the ownership of the fee in Sewall Court, but it is found that rights of way over Sewall Court are appurtenant to both the Vartigian land and the Aaronian land. The plaintiff, now owning the Aaronian land, seeks an injunction against the present owners of the theatre, for the removal of trespassing structures.

The platforms of the fire escape on the theatre at all three levels, and the stairway between the first and second levels, overhang the end of Sewall Court to a maximum extent of two to three feet. This overhang is all at a considerable height above the ground, and is close to the wall of the theatre, at a point where the use of the way could be of no benefit to the Aaronian land. The record does not show that the owner of the Aaronian land has a right to have Sewall Court kept open to the sky. The final decree was erroneous in ordering the removal of the fire escapes so far as they extend over Sewall Court. . . .

The theatre encroaches upon the Aaronian land itself in two respects. First, the platform of the fire escape on the theatre, at the third level, far above the ground, overhangs a piece of the Aaronian land eleven inches wide and three feet long, but causes no interference with the present use of that land. Second, a drain from the theatre runs, at a depth of eight or nine feet below the surface, about fifty-three feet through the unoccupied rear part of the Aaronian land, and a further distance through the soil of Sewall Court, to a manhole, where it empties into a sewer which runs from that manhole in Sewall Court through Sewall Street. This drain does not interfere with the use of the right of way over Sewall Court, and does not interfere with the present use of the Aaronian land, upon the front of which a block of thirteen one-story garages is maintained for hire.

The defendant Union Realty Company took from Vartigian two mortgages covering the theatre, and assigned the first one to the defendant Charlestown Five Cents Savings Bank in 1927. In 1928 Vartigian conveyed his equity of redemption to Sidney Realty Co., in which Union Realty Company held three fourths of the stock and Vartigian's wife held the rest. A dispute arose as early as 1929 between Union Realty Company and Vartigian over a candy stand which Vartigian or his wife maintained in the theatre. On January 28, 1930, Union Realty Company, controlling Sidney Realty Co., prevented the further maintenance of the stand.

On January 30, 1930, Vartigian induced his wife's stepbrother, the plaintiff Geragosian, to buy the Aaronian land for $6,500. Title passed to him on February 4, 1930. Vartigian then knew of the encroachments, and his purpose in inducing the plaintiff to buy the land was to control it and to make trouble for Union Realty Company. But when the theatre was built, the encroachments were unintentional on the part of Vartigian. The master does not find that Geragosian shared in the purpose of Vartigian, or is under the control of Vartigian. On June 12, 1931, Union Realty Company foreclosed its second mortgage on the theatre, and bought in the theatre at the foreclosure sale. The land and buildings of the plaintiff Geragosian are worth about $2,800. The theatre, with its land, is worth about $250,000. The cost of a new drain which would not trespass on the plaintiff's land would be $4,300. The small part of the fire escape platform that overhangs the plaintiff's land, it is found, "could be removed without much difficulty and without materially interfering with the defendant's use of its fire escapes."

This bill was filed on October 26, 1932, although the controversy had existed since early in 1932, and the fact of encroachment had been called to the attention of Union Realty Company in 1930 or 1931.

The right of property which the plaintiff seeks to protect is legal, not merely equitable. [Citations omitted.] It is not a mere easement. . . . although an injunction has often been granted for the protection of an easement. [Citations omitted.] Neither is the plaintiff's right a mere leasehold, soon to expire. [Citations omitted.] It is the fee.

The protection by injunction of property rights against continuing trespasses by encroaching structures has sometimes been based upon the danger that a continuance of the wrong may ripen into title by adverse possession or a right by prescription. [Citations omitted.] Other cases point out that, since trespassing structures constitute a nuisance [citations omitted], and a plaintiff obtaining a second judgment for nuisance has a right to have the nuisance abated by warrant of the court (G.L. [Ter.Ed.] c. 243, § 3), the denial of an injunction would only drive the plaintiff to a more dilatory remedy to obtain removal or abatement. . . . But the basic reason lies deeper. It is the same reason "which lies at the foundation of the jurisdiction for decreeing specific performance of contracts for the sale of real estate. A particular piece of real estate cannot be replaced by any sum of money, however large, and one who wants a particular estate for a specific use, if deprived of his rights, cannot be said to receive an exact equivalent or complete indemnity by the payment of a sum of money. A title to real estate, therefore, will be protected in a court of equity by a decree which will preserve to the owner the property itself, instead of a sum of money which represents its value." Knowlton, J., in *Lynch v. Union Institution for Savings*, 159 Mass. 306, 308. Leaving an aggrieved landowner to remove a trespassing structure at his own expense and risk, would amount in practice to a denial of all remedy, except damages, in most cases. If a landowner should attempt to right his own wrongs, a breach of the peace would be likely to result.

The facts that the aggrieved owner suffers little or no damage from the trespass [citations omitted] that the wrongdoer acted in good faith and would be put to disproportionate expense by removal of the trespassing structures [citations omitted] and that neighborly conduct as well as business judgment would require acceptance of compensation in money for the land appropriated [citation omitted] are ordinarily no reasons for denying an injunction. Rights in real property cannot ordinarily be taken from the owner at a valuation, except under the power of eminent domain. Only when there is some estoppel or laches on the part of the plaintiff [citations omitted] or a refusal on his part to consent to acts necessary to the removal or abatement which he demands [citations omitted] will an injunction ordinarily be refused. It is true that in *Methodist Episcopal Society in Charlton City v. Akers*, 167 Mass. 560, the court refused an injunction for the removal of a building from a small piece of rough rural land; that in *Harrington v. McCarthy*, 169 Mass. 492 (compare *Tramonte v. Colarusso*, 256 Mass. 299; *Crosby v. Blomerth*, 258 Mass.

221), a slight encroachment of a foundation under ground was held not to require an injunction; that in *Laughlin v. Wright Machine Co.*, 273 Mass. 310, the court refused an injunction against the maintenance of a sewer across a useless six-inch strip owned by the plaintiff; and that in *Malinoski v. D. S. McGrath, Inc.*, 283 Mass. 1, 11, and cases cited, the right of the court to refuse an injunction because of hardship was stated. But such cases are exceptional. The general rule is that the owner of land is entitled to an injunction for the removal of trespassing structures. *Harrington v. McCarthy*, 169 Mass. 492. *Kershishian v. Johnson*, 210 Mass. 135. *Brown v. Peabody*, 228 Mass. 52, 56. *Nelson v. American Telephone & Telegraph Co.*, 270 Mass. 471, 481. *Tyler v. Haverhill*, 272 Mass. 313, 315, and cases cited. *Carter v. Sullivan*, 281 Mass. 217.

Nothing takes this case out of the general rule. No estoppel or laches is shown. The motives of Vartigian cannot impair the property rights of Aaronian or his grantee Geragosian. The final decree rightly restrained the further use of the drain across the plaintiff's land, and ordered the removal of the fire escape platform so far as it overhangs said land. . . . The final decree is modified by striking out the provision for an injunction requiring removal of the fire escape overhanging Sewall Court, and as modified is affirmed with costs.

Note

For more than you probably wanted to know about the *Geragosian* case, see Donahue, *A Legal Historian Looks at the Case Method*, 19 N.KY.L.REV. 17, 32–44 (1991).

Note on "Equity"

Geragosian was an "equity case." A "master" tried the case in the lower court. The remedy sought was the equitable one of an injunction. Today, we supposedly have "merger of law and equity," but the distinctions between the two, both procedural and substantive remain. A brief rehearsal of how we got to where we are may be in order:

1. The story of the branch of the English the central royal courts that came to be called the chancellor's court, the English side of the chancery, the court of conscience, and, most confusingly, equity has in many ways has never really been properly told. The nature of the sources makes it most difficult.

Throughout the Middle Ages, there were certain types of cases that could not be heard in the central royal courts of common law. A notable example of this is certain types of cases that involved the king himself. For example, when the defendant in a land action traced his title to a charter, he was entitled to call the grantor to court so that the grantor would warrant the charter. But if the charter were a royal charter, the justices could not call the king to come to court. Therefore in such cases, they dismissed the case and the plaintiff went without a day.

The justices cannot call the king, but the king is the fountain of all justice and the place to petition him is in his highest court, the High Court of Parliament or in his Council, and that is where many such plaintiffs went. These petitions would allege that the common law courts have dismissed the case because they cannot handle it. Therefore the plaintiff had no remedy at common law. The absence of remedy is key, and it is to become even more important as time goes on. At some point, perhaps very early, it becomes associated with the "due process" clause in Magna Carta (c. 29 [1225]). If a remedy is available at common law, then other central royal courts cannot intervene. But the king is still the fountain of all law. As early as 1406, however, the CJCB (Gascoigne) will remark that the king has committed all his judicial powers to divers courts and in the 17th century Lord Coke will argue to James I that the king has exhausted all his jurisdiction in delegating it to his courts and can no longer participate in its decisions.

But the assumption of the petitioners in the earlier cases is that the king can give a remedy if he will. Early in the reign of Edward III (1327–1377) we hear of a court being held in the chancery. It is a little hard to figure out what the nature of the jurisdiction is but it looks like it is

dealing with rather ordinary land cases that cannot be heard in the common law courts because they involve suits against royal officers and interpretation of royal charters. The procedure in this court is in Latin, and it uses forms quite like those in the other central royal courts. A later age will call it the Latin side of the Chancery, and it remains a significant but narrow part of the Chancery's business well into the early modern period.

2. In the late fourteenth century, perhaps because of the troubled nature of the times, the Council began to receive more and more petitions, alleging that something had gone seriously wrong with the normal course of justice, riots and affrays, the poverty of the petitioner, something with which the common law courts could not deal substantively. There may be some connection with the decline of regular hearing of petitions in Parliament. There is almost certainly a connection with the growth of the Council as a permanent aspect of governance. It may be one of just those serendipitous happenings, but people start to petition the Chancellor directly about these things rather than stopping off at the Council on the way. Out of this was born the English side of the Chancery.

3. In the early fifteenth century the petitions grow into the hundreds per year. Unfortunately in most cases the petitions is all we have. But they do tell a story. Riots and affrays, poverty, predominate as the reasons for seeking the Chancellor's help, but we begin to see more of special kinds of substantive claims: my land is held to use and the feofees haven't done what they're supposed to do; someone has agreed to convey land to me and he won't do it; I discharged my bond but I have no acquittance. These are good examples of early chancery jurisdiction, and they are going to have a glorious future. We will spend more time on the problem of feofees to uses, but the basic concept is simple. I convey land to someone else but the understanding is that that is person is to manage the land for my benefit. The common law sees only the legal title in the feofee, but equity will enforce the benefit in me. The analogy to the modern trust is strong. The second problem is not that the common law is conceptually deficient. The common law will enforce the contract, but the remedy will be money damages. Equity will compel the defendant to make the conveyance. This is the source of equitable jurisdiction for the specific performance of contracts. The third problem is the illustration of a broader class: to make the debtor pay twice in these situations would be inequitable. Perhaps the notion is that the creditor is committing a kind of fraud, perhaps the notion is that to make the debtor pay twice would be a penalty. When the common law cleaned up its act so far as evidence is concerned, something that did not occur until the end of the 17th century (see Stat. 4&5 Anne c. 16 § 11 (1705)), this specific jurisdiction dropped out, but equity remained the home for people seeking relief from fraud and penalties.

4. Although relatively few documents tell us what happened, a few do, and a number of the petitions give us enough to indicate what the petitioners hoped the chancellor would do: subpoena the defendant, take his deposition and that of the witnesses, issue an injunction or an order. It would seem that judgment was almost always had on the basis of a written record without a jury, after argument before the Chancellor himself or his chief deputy, the Master of the Rolls. We are badly informed about remedies in this period, but it seems rarely to have been a money judgment. There are elements of ecclesiastical procedure in all of this. To the extent that the modern rules of civil procedure are based on the old equity rules (and many of the most important ones are) our modern civil procedure is more a civil-law type of procedure than it is a common-law one.

5. Throughout the fifteenth century the jurisdiction of the Chancellor continued to expand both numerically and as to subject matter. By the end of the century he was not only deeply involved in the enforcement of uses and trusts of land, but he had some, as yet ill-defined jurisdiction with regard to the enforcement of contracts and considerable jurisdiction in relieving from the enforcement of contracts: penal bonds and the debtor without a release being among the most notable. By the early 16th century, it became clear to common lawyers that something was going on that was worth considering. But what was it? Two words were in common use, "equity" and

"conscience." The distinction between the two is subtle, and we cannot deal with it here. Let us see if we can make sense of "equity" because that is the one that was to last.

a. The idea of equity is older than the court of equity. The word is derived from Latin *aequitas* which is an abstract noun derived from the adjective *aequus* which means flat, plain, like or similar, equal. *Aequitas* as an abstract noun means a lot of things, but equality is not the most common of them; it is better translated by "reasonableness" or "similarity" depending on the context. In Roman law and Roman legal philosophy the word *aequitas* took on three specialized meanings:

i. It referred to the principle that like cases were to be judged alike; it is not too far from the mark that the word was one of the ways the Romans expressed the basic idea of the rule of law.

ii. It referred to a body of principle that lay beyond the law, or at a higher level of abstraction than the law. In this context it was frequently qualified by the adjective "natural". It was a principle of natural equity that emancipated children should inherit equally with unemancipated, and the positive law was changed to conform to this principle. It was a principle of natural equity that treasure trove should belong to the finder, though the positive law did not always conform to this principle.

iii. Finally, equity was a principle of interpretation which allowed the jurist to create exceptions to the positive law in situations where it did not seem fair that the law should apply. In this meaning the word is very close to Aristotle's *epieíkeia* the necessity of which is stated in the Nichomachean Ethics this way: "The data of human behavior simply will not be reduced to uniformity. So when a case arises where the law states a general rule, but there is an exception to the rule, it is then right . . . to fill the gap by such a modified statement as the lawgiver himself would make if he was present at the time, and such an enactment as he would have made, if he had known the special circumstances." When Lord Ellesmere, the Chancellor in the early 17th century, says that the office of the chancellor was founded because "men's actions are so diverse and infinite that it is impossible to make any general law which may aptly meet with every particular and not fail in some circumstances" (Baker, p.90), it's pretty clear that the man had been reading his Aristotle.

b. Legal philosophers of the Middle Ages picked up all three ideas. They tended to associate natural equity with the principles of Christian morality and to use *epieíkeia* to argue that the strict law should be interpreted in the light of Christian morality. The most sophisticated of them, Thomas Aquinas is a notable example, saw how this could create a tension with the first principle, the rule of law. Many medieval authors, Thomas among them, were also quite clear that morality and law were not the same thing. "The church does not judge about things that are hidden" was a necessary maxim in a system of morality which devotes so much to the state of mind of the actor.

c. English churchmen and intellectuals in the Middle Ages shared a common culture with the continent and they were well aware of these ideas. Notions of equity in all three senses can be found in *Glanvill* at the end of the 12th c., even more so in *Bracton* in the first half of the 13th. And there is no notion in either of these writers that the common-law courts were somehow precluded from applying these ideas in appropriate cases. At the end of the 13th and the beginning of the 14th centuries when statutory interpretation first became an important part of the business of the common law courts, we hear the phrase "equity of the statute" and what it means is something quite close to Artistotle's *epieíkeia*, coupled with the related notion that the statute might be applied in some situations where the strict language of the statute did not fit.

d. The development of a separate court of conscience in the late 14th century, then, cannot be attributed to any sudden discovery of these ideas. It must be attributed to the jurisdictional limits of the central royal courts. Once it happens, however, the two jurisdictions tend to settle down

into law and equity, and by the 16th century it is possible to announce a theory of the chancellor's court as a court of equity in contradistinction to the strict law of the common-law courts.

6. Thomas Wolsey, at the beginning of the 16th century, was almost the last of the clerical chancellors. Virtually, all of them were laymen after this, and most of them were common lawyers. Despite the Coke-Ellesmere debate in 1616, the chancery as a court was sufficiently well established that it alone of the royal courts not of common law survived into the Commonwealth. England had come to the point where she couldn't run her legal system without it.

7. The 17th century does, however, see important developments in the equity jurisdiction. Equity, so much a matter of discretion even in the 16th century, becomes a matter of rule. Reports of equity cases become regular in 17th c. Francis Bacon when he was chancellor from 1618–1621 played a key role in establishing the procedural rules. Heanage Finch, lord Nottingham, 1675–1682, played an equally important role in establishing the substantive rules.

8. The end result is that around the year 1700, we can conveniently divide the jurisdiction of the chancellor into a (1) a body of substantive jurisdiction of which by the most important are those concerning trusts, equitable interests in land, mortgages, supervising of fiduciary accounts (guardians, trustees) and equitable relief against fraud, mistake, accident, and undue influence. (2) There are also a series of equitable remedies that can be used in conjunction with what would otherwise be ordinary actions at common law: injunctions, declaratory judgments, rescission, accounting, receivership. The declaratory judgment is particularly complicated because it arises out multiple suits in ejectment at common law. This leads to *quia timet*; then the action to quiet title; and finally the declaratory judgment. In all the other cases the successful plaintiff at law will take the action into equity to get it enforced. (3) There are thirdly a series of equitable defenses to ordinary actions at common law: set-off, release, laches, estoppel. In these cases the defendant will go into equity to get the action enjoined in order to raise the defense, but a jury may well be used to try the legal issues. (4) All of this is governed by a series of equitable concepts of which, I suggest, there are really only three, though they have substantial ramifications: (a) relief from an obligation on the basis of fraud, mistake, accident; (b) relief from penalties and forfeitures in both contracts and deeds; and (c) conversion of an obligation into property, particularly, but not exclusively, with regard to land. The equitable servitude of the early 19th century, with which we deal later in the course, is a familiar example. (5) Finally, and somewhat curiously, equity even more than common law is characterized by maxim jurisprudence: he who seeks equity must do equity, equity does not aid a volunteer, equity regards as done what ought to have been done, equity delights to justice and that not by halves, equity follows the law, equity suffers not a right without a remedy—all of which were summarized by the cruder generation of law students of my day in one overarching maxim: equity takes no shit.

9. The decline of Chancery was already happening in Queen Anne's reign. The problem was that there was only one judge. As business grew, more and more had to be prepared so that the one judge could handle the matter in the time available, and that was frequently not full time, since the chancellor was a great officer of state. In addition, the masters, the six clerks, and the sixty clerks owned their jobs and made their money on fees for piece work. The more work, the larger the fees. Matters came to a head under Lord Eldon, Chancellor in the early 19th century, who was said to preside over a court of "oyer sans terminer." In 1824, the court had £39 million in its coffers, deposits into the court of funds at issue in litigation, moldering in the court without interest, the remains of undecided cases and wrecked fortunes. In the same year, a royal commission was told of a case that had begun in 1808 that was still in its interlocutory stages; no trial had been scheduled; costs of £3719 had already been paid. It was out of such material that Charles Dickens wrote *Bleak House*. Reform did not come until the middle of the 19th century with expansion of the judges and abolition of the sinecures. Ultimately, Chancery was merged

into the High Court. Similar things happened in the United States, though much of our law today and that of England is still troubled by the uncertain law/equity line.

PETERS V. ARCHAMBAULT

Supreme Judicial Court of Massachusetts.
361 Mass. 91, 278 N.E.2d 729 (1972).

CUTTER, J. The plaintiffs by this bill seek to compel the defendants (the Archambaults) to remove a portion of the Archambault house which encroaches on the plaintiffs' land in Marshfield. The plaintiffs and the Archambaults own adjoining ocean-front lots. Both lots are registered (G.L. c. 185). Neither certificate of title shows the Archambault lot to have any rights in the plaintiffs' lot.

The Archambaults' predecessor in title obtained a building permit in 1946 and built a house partly on their own lot and partly on the plaintiffs' lot, of which the total area is about 4,900 square feet. Each lot had a frontage of only fifty feet on the adjacent way. The encroachment contains 465 square feet, and the building extends fifteen feet, three inches, onto the plaintiffs' lot, to a depth of thirty-one feet, four inches. The trial judge found that it will be expensive to remove the encroaching portion of the Archambaults' building. He ruled (correctly, so far as appears from his subsidiary findings and from the small portion of the evidence which has been reported) that there had been established no estoppel of, or laches on the part of, the plaintiffs in seeking to have the encroachment removed. It appears from the evidence that the Archambaults bought their lot from one vendor and the plaintiffs on June 14, 1966, bought their lot from another vendor. The judge found no evidence of any permission by the owners of the plaintiffs' lot for the encroachment. The encroachment was discovered on July 14, 1966, when the plaintiffs had a survey of their land made.[1] [p*216]

A final decree ordered the removal of the encroachment. The Archambaults appealed. . . .

1. In Massachusetts a landowner is ordinarily entitled to mandatory equitable relief to compel removal of a structure significantly encroaching on his land, even though the encroachment was unintentional or negligent and the cost of removal is substantial in comparison to any injury suffered by the owner of the lot upon which the encroachment has taken place. Geragosian v. Union Realty Co., 289 Mass. 104, 108–110, 193 N.E. 726. [Further citations omitted.] In rare cases, referred to in our decisions as "exceptional" [citations omitted], courts of equity have refused to grant a mandatory injunction and have left the plaintiff to his remedy of damages, "where the unlawful encroachment has been made innocently, and the cost of removal by the defendant would be greatly disproportionate to the injury to the plaintiff from its continuation, or where the substantial rights of the owner may be protected without recourse to an injunction, or where an injunction would be oppressive and inequitable. . . . Lynch v. Union Inst. for Sav., 159 Mass. 306, 34 N.E. 364. [Further citations omitted.] But these are the exceptions. What is just and equitable in cases of this sort depends very much upon the particular facts and circumstances disclosed."[2]

2. We here are considering the remedies to be applied with respect to registered land. Such land is protected to a greater extent than other land from unrecorded and unregistered liens, prescriptive rights, encumbrances, and other burdens. See G.L. c. 185, sec. 1(e), 46 (as amended through St. 1963, c. 242, sec. 2), 47, 53, 57, 58, 77, 112; Goldstein v. Beal, 317 Mass. 750, 758–

[1] The brief findings and the limited evidence designated for report to this court leave it wholly uncertain (a) what, if any, inspection the plaintiffs made before purchasing their present house and lot, and (b) how much, if at all, the location of the Archambaults' building affected the price paid by the plaintiffs.

[2] Such cases have been based upon estoppel [citations omitted]; or on laches [citations omitted]; or on the trivial nature of the encroachment or injury [citations omitted].

759, 59 N.E.2d 712; [further citations omitted]. Adverse possession (c. 185, 53) does not run against such land. To recognize the encumbrance created by the Archambaults' encroachment would tend to "defeat the purpose of the land registration act." See Goldstein v. Beal, *supra*, at 759, 59 N.E.2d at 717.

3. The present record discloses no circumstances which would justify denial of a mandatory injunction for removal of an encroachment taking away over nine per cent (465–4900) of the plaintiffs' lot. The exceptions (see fn. 1, *supra*, and related text) to the general Massachusetts rule, hitherto recognized as sufficient to justify denial of mandatory relief, have related to much less significant invasions of a plaintiff's land, or have involved circumstances not here present. The invasion of the plaintiffs' lot is substantial and not de minimis.[3] Photographs and maps in evidence, portraying the encroachment, show that the intrusion of the Archambaults' building on the plaintiffs' small lot greatly increases the congestion of that lot. The plaintiffs were entitled to receive whatever was shown by the land registration certificate as belonging to their grantor, unencumbered by any unregistered prescriptive easement or encroachment. [p*217]

4. The Massachusetts rule in cases like this is well established. There is no occasion for resort to cases from other jurisdictions.

Decree affirmed with costs of appeal.

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[3] Our position avoids constitutional doubts (See Opinion of the Justices, 341 Mass. 760, 785, 168 N.E.2d 858) which might arise were we to allow the Archambaults, at their option and as a result of the trespass of their predecessor in title, to expropriate part of the plaintiffs' land by essentially an informal exercise of private eminent domain. See Constitution of the Commonwealth, Declaration of Rights, art. 10 (as affected by art. 39 of the Amendments); Riverbank Improvement Co. v. Chadwick, 228 Mass. 242, 248, 117 N.E. 244. Cf. Machado v. Board of Pub. Works of Arlington, 321 Mass. 101, 103–104, 71 N.E.2d 886.

TAURO, C.J. (dissenting). The plaintiffs and defendants are owners of adjoining lots, with dwellings, both registered under G.L. c. 185. The defendants acquired title to their lot on June 18, 1954, and the plaintiffs acquired their title on June 14, 1966. The plaintiffs seek removal of a portion of the defendants' dwelling which encroaches on their land. This encroachment existed in full view from June, 1946, when the defendants' predecessor in title erected the dwelling, until July 14, 1966, when the plaintiffs had their property surveyed for the purpose of erecting a retaining wall. During this period, neither the plaintiffs' predecessor in title nor the plaintiffs raised any objection to the location of the defendants' dwelling. It is reasonable to infer that prior to taking title the plaintiffs viewed the property. Thus they had actual notice of the location of the defendants' dwelling and its relative position to their own dwelling.

The plaintiffs do not seek money damages but rather a decree for the removal of the encroachment on their land which, in effect, would result in the destruction of the defendants' dwelling.[1] The Superior Court made, and the majority today affirm, such a decree. I cannot agree with the opinion of the majority that, in the proper exercise of the court's discretion, "(t)he present record discloses no circumstances which would justify denial of a mandatory injunction" compelling the removal of the encroaching structure.[2] To the contrary, I believe that the record

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[1] Photographic exhibits of the locus, including the defendants' dwelling, indicate that the enforcement of the present order by this court will have the practical effect of requiring the defendants to remove one-third to one-half of their dwelling which encroaches upon the plaintiffs' lot.

[2] The rule governing treatment of suits in equity for removal of encroaching structures dates at least from Kershishian v. Johnson, 210 Mass. 135, 137, 96 N.E. 56, in Massachusetts. For the current formulation, see Geragosian v. Union Realty Co., 289 Mass. 104, 110, 193 N.E. 726, and Ferrone v. Rossi,

before us sets forth unusual circumstances which would justify this court in denying a mandatory injunction and leaving the plaintiffs to seek their remedy at law for damages. Moreover, the granting of injunctive relief in the circumstances of this case would be "oppressive and inequitable."

To conclude, as does the majority opinion, that this court must grant a mandatory injunction because the facts in the instant case do not precisely fit the factual pattern adjudged to be "exceptional" in prior Massachusetts cases is illogical and untenable. Courts, especially courts of equity, should not be restricted to so fossilized a concept of what the law is or should be. The cause of justice deserves a better fate. The overwhelming weight of authority in other jurisdictions recognizes and applies the doctrine I urge be adopted here. . . .

1. This court has recognized the existence of exceptional cases even as we laid down the general rule governing the treatment of suits in equity for the removal of encroaching structures. [Citations omitted.]

While it is true that this court in the past has denoted various classes of exceptions, I cannot agree with the view which the plaintiffs urge, and which the majority find persuasive, that these cases bar this court from considering the particular facts of each case independently of recognized categories of exceptions. I believe that equity and justice require different standards. [p*218] Long ago in Starkie v. Richmond, 155 Mass. 188, 195–196, 29 N.E. 770, we stated the principle that should guide us in reviewing cases of this sort where a plaintiff seeks to invoke our equitable powers: "Each case depends on its own circumstances. It is for the court, in the exercise of a sound discretion, to determine in such instances whether a mandatory injunction shall issue. It will not be issued when it appears that it will operate inequitably and oppressively, nor when it appears that there has been unreasonable delay by the party seeking it, in the enforcements of his rights, nor when the injury complained of is not serious or substantial, and may be readily compensated in damages, while to restore things as they were before the acts complained of would subject the other party to great inconvenience and loss" (emphasis supplied). . . .

2. While I agree that the pattern of facts in the instant case does not conform to the pattern in any of the decided Massachusetts cases, this factor is not decisive. I have examined the cases where this court has made an exception and I have found no stronger case on the facts than the instant case for the denial of injunctive relief on the basis of established principles of equity and justice. If we are to give any continuing validity to the long established rule that, in exceptional cases, where equity and justice do not require the removal of an encroachment, injunctive relief will not be granted, it would be difficult to envision a set of facts and circumstances which would present a more meritorious case in which to refuse a mandatory injunction.

Since there is essentially no dispute about the basic facts, this court may draw its own rational inferences from the trial judge's express findings of fact and arrive at its own conclusions. [Citations omitted.] I proceed on this basis.

As stated above, the defendants occupied their dwelling for over twelve years peacefully and without complaint prior to the present lawsuit. They bought their property in June, 1954, apparently without knowledge that, in 1946, their predecessor in title had mistakenly built partially upon an adjoining lot. The defendants' house was in plain view when the plaintiffs acquired title to the adjoining lot in June, 1966. It seems likely that, before the plaintiffs took title, they viewed the property and were aware of the location of the defendants' house and its proximity (by approximately six feet) to the house they might purchase. It is reasonable to infer, either that they inquired and were told that the space between the dwellings marked the property

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311 Mass. 591, 593, 42 N.E.2d 564. [Further citations omitted.] Other jurisdictions also follow this rule. See generally annotation, 28 A.L.R.2d 679–751.

line, or that they made this assumption. The plaintiffs have disclosed that they discovered the encroachment one month after taking title as the result of a survey undertaken by them for the purpose of constructing a retaining wall. Apparently there was nothing about the defendants' dwelling which was offensive to the plaintiffs or even aroused their suspicions at the time of purchase. It appears therefore that the plaintiffs were satisfied with their purchase and the proximity of the defendants' dwelling to their own until the survey and that, but for the fortuity of the survey, the encroachment might have continued undiscovered indefinitely as it had during the entire period 1946 to 1966.

The discovery of the encroachment in these circumstances is best characterized as an unexpected windfall rather than an intentional injury. The defendants are innocent of any wrongdoing and are at most guilty of unknowingly continuing a longstanding encroachment. Nor can it be said that the defendants have deprived the plaintiffs of something which they believed they were entitled to at the time of their purchase. On the contrary, the plaintiffs could only have believed that they were acquiring [p*219] exactly what they contemplated when they inspected the property. Subsequently, by virtue of the survey which they had made, the plaintiffs discovered they had purchased more than they had bargained for. At the same time, the defendants learned that what they had purchased in 1954 was less than they had bargained for. These circumstances should not pass unnoticed.

Moreover, removal would be a severe burden upon the defendant. As the trial judge indicated, it would "cost a lot of money, and (involve) a lot of inconvenience, and . . . reduce . . . (the defendants') property value to a great extent." The judge does not appear to have considered whether removal might require the razing of a substantial portion of the defendants' house, but from the exhibits, we should not be unaware of this possibility. The judge made no finding of irreparable injury to the plaintiffs. Under the other facts which he did find, however, I conclude to the contrary that the injury to the plaintiffs, if any, is not of great significance compared with the defendants' loss and that money damages should be sufficient remedy.

In the totality of circumstances, I conclude that equity does not, in the exercise of our sound discretion, require us to grant injunctive relief. Removal imposes upon the defendants substantial cost and inconvenience which are entirely disproportionate to the injury to the plaintiffs. Where, as here, it appears that the plaintiffs were content with the status quo until fortuitous discovery of the encroachment, it would be oppressive and inequitable for this court to grant a mandatory injunction against the defendants who have acted in good faith, albeit their predecessor in title made a mistake which remained undiscovered for some twenty years. . . . Here, it appears not only that the defendants have always acted in good faith but that the initial trespass was committed many years before they acquired title to their lot. . . .

3. The majority lay much stress on the fact that we are here dealing with registered land. The majority opinion states: "To recognize the encumbrance created by the Archambaults' encroachment would tend to "defeat the purpose of the land registration act.' "I cannot agree. It is erroneous to suppose that, if we denied injunctive relief, the effect upon the plaintiffs would be to make their lot subservient to rights in the defendants' lot. By virtue of the land registration act (G.L. c. 185), no court has such a power to alter registered titles. See Goldstein v. Beal, 317 Mass. 750, 59 N.E.2d 712.[3] I do not see, however, that an injunction in any way affects the plaintiffs' certificate of title or tends to defeat any recognized purpose of the land registration act. It does not follow that a decision denying injunctive relief and leaving the plaintiffs to their remedy at law would be the same as enlarging the defendants' title at the plaintiffs' expense by

[3] In Goldstein v. Beal, this court held (at pp. 758–759, 59 N.E.2d 712) that, because the plaintiff's lot was registered, the trial judge could not oblige the plaintiff to execute a conveyance to the defendants. . . .

means of prescription or adverse possession. See G.L. c. 185, 53.[4] It would seem that after an award of damages the plaintiffs and the defendants would be free voluntarily to reform the titles and establish corrected boundaries. . . .

4. I do not intend that the long established rule in Massachusetts in reference to unlawful encroachments should be extended or varied. On the contrary, I feel that it is incumbent upon this court in the circumstances of the instant case to weigh the relative equities of the parties and determine whether this is an exceptional case under our Massachusetts rule. . . . [p*220]

If we were to refuse injunctive relief, common sense suggests that, in all probability, this dispute would be settled eventually without the need for the destruction of the defendants' dwelling. This could be accomplished through an agreement by the plaintiffs to voluntarily relocate their boundary line in return for payment by the defendants of an amount negotiated between them. The parties would then have their certificates of title reformed to reflect the agreement. In the alternative, the plaintiffs could bring an action at law and the court would make an impartial assessment of damages. The placing of the potent weapon of injunctive relief in the hands of the plaintiffs is hardly conducive to a fair and just settlement. In circumstances such as those in the instant case, the court in Christensen v. Tucker, 114 Cal. App. 2d 554, 563, 250 P.2d 660, 665, said: "(T)he injunction should be denied, otherwise, the court would lend itself to what practically amounts to extortion." See Golden Press, Inc. v. Rylands, 124 Colo. 122, 126, 235 P.2d 592. I would dismiss the bill and relegate the plaintiffs to their remedy at law.

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[4] Nor can it be seriously argued that such a result would be, in effect, an exercise of the State's eminent domain power for the benefit of a private interest. Restatement: Torts, sec. 941, comment d. See Gray v. Howell, 292 Mass. 400, 198 N.E. 516.

Notes and Questions

1. What is going to happen next in the *Peters* case? What does Judge Tauro believe would have happened had his view prevailed?

2. The Harvard Law School Library (and a number of other law libraries in Massachusetts) has a complete set of the records and briefs in cases heard before Massachusetts Supreme Judicial Court in microfiche. The record and briefs in this case fully justify Justice Cutter's complaint (above) about the skimpiness of the record transmitted, and, we might add, of the briefs. (The exhibits to which the court refers are not included in the microfiche version of the record and briefs.) It does, however, tell us that the street address of the property in question was 11 Abbey Street, Marshfield, MA, which may be viewed in 'Google Maps' here or by real esate listings here. It seems clear the Peters did build their fence, but it is not at all clear (you can make up your own mind) that the Archambault's house has suffered having 30% cut off it.

3. Geragosian v. Union Realty Co., 289 Mass. 104, 193 N.E. 726 (1935), *supra*, p. S112, featured even more prominently in record and briefs in *Peters* than it did in the court's opinion. It is the only case that the superior court judge cited in his opinion granting the injunction and the brief of the appellee (Peters) is devoted almost entirely to an exposition of it. The brief of the appellant is so short as to border on malpractice.

4. Why was this case not brought as an ejectment action?

5. How does the fact that the site of the dispute in *Peters* had been registered bear on the case? If it had not been registered what other doctrine would have figured prominently in the dispute? Why do you suppose that the law has been so reluctant to establish a procedure by which title to land can be adjudicated against all the world? For the proposition, but not an answer to the question, see the note below. [p*228]

Note on the Real Actions—Twenty-first Century Style

The remedies available to protect a given interest are critical. It does one little good to have a "right" in a resource if the law will not protect that right, and how the law will protect that right (specific relief and-or damages, and if damages how measured) largely determines what the right is worth.

What follows is a summary introduction to the problems connected with enforcing an interest in land against third parties. Like all such summaries it requires substantial qualification both in the light of individual state law and in the light of specific fact situations. The emphasis is on remedies against "strangers" to the plaintiff's title. A complete summary of the real actions would include actions between parties claiming concurrent or consecutive interests in a piece of land from a common source of title, e.g., vendor and purchaser under a land sale contract, cotenants, landlord-tenant, and life tenants and remaindermen. Later, we will have occasion to treat these topics in greater detail. Suffice it to say here that the same sanctity accorded land in *Peters* governs these actions as well. Thus, although specific performance will not ordinarily be allowed as a remedy for a breach of contract, when the subject of the contract is a transfer of land or an interest therein, specific performance is normally granted, because of the "uniqueness" of land. A. CORBIN, CONTRACTS § 1143 (1964).

We have attempted to organize this summary along these lines: (1) actions to establish good title in the abstract, (2) actions to recover possession, and (3) actions to protect the right of possession or the privilege of use of land. It will become apparent to you that this set of categories sits uneasily on the existing law. Thus, an action of trespass, technically one to recover damages for an interference with possession may in fact be one to establish good title. In fact, the basic statutory action to establish title in one jurisdiction is known as "trespass to try title." TEX. PROP. CODE §§ 22.001–22.045 (Vernon 1984).[1] Despite [p*221] our attempts, then, to organize this summary along functional lines, you will probably note that the discussion is more along these lines: (1) equitable bills of peace (quiet title actions); (2) ejectment; (3)(a) trespass, case and nuisance at law, (b) trespass, case and nuisance in equity.

1. *Actions to Establish Good Title*. Mr. Justice Stone once said, "There is no course of legal procedure by which title to land can be adjudicated as good against all the world." United States v. Oregon, 295 U.S. 1, 25 (1935). The statement, unfortunately, is only slightly less true today than it was in 1935.

The principal action to establish title, the quiet title action, has its origins in equity. At common law, it was axiomatic that a plaintiff could not sue in ejectment if he was in possession of his land. Yet even if a person were in full possession of a parcel of land, his enjoyment of it and its sale value could be threatened if another claimed better title to it, particularly if the other party brought numerous actions of ejectment. Furthermore, even where the owner had been ousted from possession, if a number of claimants were involved it was inconvenient and expensive for him to maintain ejectment against each and every one. In these circumstances equity could take jurisdiction, try the validity of the defendants' title, and grant relief by cancelling the losers' claims and enjoining them from ever asserting those claims at law. See Finnegan, *Problems and Procedure in Quiet Title Actions*, 26 NEB. L. REV. 485–88 (1947); J.

[1] Texas is typical of the confused state of the law in this area. The statutory action in Texas is the lineal descendant of the common law action of ejectment. Unlike common law ejectment both legal and equitable title may be tried in such an action, but as in ejectment the plaintiff as a general rule must be out of possession and must show a present right to possession in order to prevail. There is no statutory quiet title action in Texas, and a plaintiff in possession or asserting a non-possessory interest (such as an easement) must rely on the ancient equitable bill to quiet title, which in Texas has most of the infirmities which it had in England in 1789. *See generally* 61 TEX. JUR. 3D *Quieting Title and Determining Adverse Claims* (1988).

POMEROY, EQUITY JURISPRUDENCE § 248, at 1393–99 (5th ed. 1941).

The early equity actions to quiet title were fraught with technicalities, and today most states have adopted statutory forms of the action which, in general, extend the scope of the remedy. See, e.g., N.Y. REAL PROP. ACTS. LAW §§ 1501–51 (McKinney 1979). While such statutory actions differ greatly among themselves, they all are influenced to some extent by the rules of the equity action. The limitations of the equity action are also felt whenever the court must decide some apparent conflict in the statute. The situation is not improved by the fact that many statutes are poorly drafted and give courts ample opportunity to decide cases on the principles of the old equity actions. See Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245, 1267–76 (1959).

First, old principles interfere in the establishment of a right to maintain the action. Very often courts have looked at the distinction between possession and non-possession which existed in equity. There was some question whether a plaintiff out of possession and asserting legal (as opposed to equitable) title could bring the action at all. Further, a plaintiff in possession had to establish certain facts before he could recover in equity; e.g., he must have been disturbed in his possession by repeated actions at law, and his legal title must have been established by at least one judgment in his favor at law. The plaintiff has also been required to show a certain adverseness to the claim against him. That is, the defendant's title must, at least, be valid on its face in order for the plaintiff to bring the action, even though an invalid claim is potentially harmful to his full enjoyment of the land. Some courts have also followed the equitable principle that "he who seeks equity must do equity," and have thus required, for example, that one seeking to remove a mortgage as a cloud on title pay the underlying debt even though it may have been canceled by the statute of limitations. [p*222]

Even if a plaintiff gets into court and is successful in obtaining a judgment in his favor, the remedy may be of limited usefulness. Courts feel bound by the notion that equity can only act in personam, that is, by personal service on all defendants. This principle means the judgment is binding only on those served and not against claims unknown at the time of suit. Even if the statute purports to provide for service of unknown persons, such as by newspaper publication, the courts have often created limitations. The plaintiff frequently must show that he has been reasonably diligent in finding all the interested parties he could to serve personally. If he has not, persons not found who might have been found with more diligence may attack the judgment.

The reasonably diligent inquiry may be a requirement of due process, but the rule has often been pushed beyond constitutional necessity and practicability.

The remedy's effectiveness is also hampered by the large amount of time usually available for direct attack of the judgment. Under prevailing doctrine, any person who was served only constructively, who had no actual notice of a hearing, and who can present a good defense to the action may have a judgment vacated within a period ranging from six months to five years. Direct attack provisions are also accorded to infants, incompetents, and occasionally to holders of future interests. These provisions virtually destroy any conclusiveness and thereby greatly limit the effectiveness of a judgment. See Comment, *Suit to Quiet Title*, *supra*, at 1273–75; P. BASYE, CLEARING LAND TITLES § 6, at 41 (2d ed. 1970).

One other action to establish good title, limited to a few states, is the action which is part of the Torrens Title Registration System. (Note its presence in *Peters*.) Under the Torrens system all interests to realty are embodied in a certificate of registration. To register, a party claiming a fee interest in land, whether he is in possession or not, files an application naming all known adverse claimants and joining all other potential but unknown claimants. After a favorable examination of the title, the court proceeds to hear all claims. If a judgment in favor of the plaintiff is rendered, it is incorporated in a certificate of registration. This certificate is then conclusive evidence of good

title and is binding upon all the defendants, known and unknown. Despite these advantages, the Torrens system has not proved popular. At its peak it existed in a minority of states, in which its use was optional. Even in states still maintaining the registration system, land registration is not widely used. The problems are the high cost in time and money of initial registration, a consequence of the compulsory law suit; vested interests in the present system of land recordation; and court-made exceptions and technicalities. See Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 IND. L.J. 55 (1987); Comment, *Suit to Quiet Title*, *supra*, at 1251–55; P. BASYE, *supra*, § 1, at 3–4.

2. *Actions to Regain Possession*. Under the common law, one could sue in ejectment only if one had legal title or possession. J. KOFFLER & A. REPPY, COMMON LAW PLEADING § 106, at 234 (1969). A person with only equitable title, such as a vendee of land who was not yet in possession, was obliged to recover in an action for specific performance of the contract. Professor (later Judge) Clark argues that with the merger of law and equity it should make no difference whether the plaintiff initially brings the action in ejectment or specific performance and that no complaint should be dismissed if it alleges facts on which some sort of relief can be granted. The substantive rights of the parties can be determined at trial and the proper remedy given. *See* C. CLARK, CODE PLEADING § 26, at 182 nn. 108, [p*223] 109 (2d ed. 1947). Some courts seem to have accepted this view. *See* Whitehead v. Callahan, 44 Colo. 396, 99 P. 57 (1908). Others have refused to follow this reasoning and continue to distinguish between equitable and legal title at the pleading stage. See Hutchins, *Equitable Ejectment*, 26 COLUM. L. REV. 436 (1926); C. CLARK, *supra*. Many states have changed the law by statute to allow a person with equitable title to sue in ejectment. *See* C. CLARK, *supra*, at 182 n. 111; OKLA. STAT. tit. 12, § 1141 (1988).

There are also problems caused by the persistence of the distinctions between the various common law forms of action. Generally, ejectment requires an "ouster from possession" while mere invasions of rights call for the action of trespass or case. Hence, ejectment lies only for the recovery of real property upon which an entry might be made, and of which the sheriff is able to delivery actual possession. *See* Versailles Tp. Authority v. McKeesport, 171 Pa.Super. 377, 90 A.2d 581 (1952); J. KOFFLER & A. REPPY, *supra*, § 106, at 231–32.[2]

The old forms of action also prevent the granting of the remedy of ejectment in situations where an easement is the subject of interference. It has been held that in this case ejectment does not lie and that the proper remedy is an action on the case. See 3 H. TIFFANY, REAL PROPERTY § 814 (3d ed. 1939).

3. *Remedies for Protecting the Right of Possession and the Privilege of Use and Enjoyment of Property*.

(a) *Damages*. Here confusion is caused by the old distinction between the common law forms of action of trespass and case. As you will recall, trespass was the correct action for all direct, forcible injuries to the person or his property; trespass on the case was the great residual action, and was the proper form if the injury was indirectly or consequentially caused, if the plaintiff's

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[2] It should be noted, however, that the ouster does not have to be complete, and courts are sometimes quite liberal in finding that an action of ejectment will lie. For example, a court has allowed an action of ejectment where the sum total of the dispossession was a single telephone wire 30 feet above the plaintiff's land:

> Where there is a visible and tangible structure by which possession is withheld to the extent of the space occupied thereby ejectment will lie, because there is a disseisin measured by the size of the obstruction, and the sheriff can physically remove the structure and thereby restore the owner to possession.

Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716, 718 (1906).

interest was intangible (such as his reputation), or if the injury was to a nonpossessory property interest (such as an easement or remainder). J. KOFFLER & A. REPPY, COMMON LAW PLEADING §§ 84–85 (1969); W. PROSSER & W.P. KEETON, TORTS § 13 (5th ed. 1984); Prichard, *Trespass, Case, and the Rule in Williams v. Holland*, 1964 CAMBRIDGE L.J. 234.

These distinctions no longer are observed at the pleading stage of the lawsuit but still cause problems at the stage of proof. When the courts hold that the proper action is case—where the injury is consequentially caused, where there was no invasion by a visible, substantial object, etc.—the plaintiff must prove actual harm to his property, a legal duty on the defendant's part, and a wrongful act breaching that duty. J. KOFFLER & A. REPPY, *supra*, §§ 89–92. Perhaps the classic example of this has been the "blasting" cases. Injuries from vibrations caused by an explosion may be classified as indirect injuries, and require proof of negligence on the defendant's part; on the other hand, injuries due to rocks thrown by the explosion may be considered direct, and require no proof of negligence. *See* Booth v. Rome, W. & O.T.R. Co., 140 N.Y. 267, 35 N.E. 592 (1893). This distinction has more recently [p*224] been rejected by many courts, which, because blasting is classified as an ultrahazardous activity, hold the defendant strictly liable both for damages from objects thrown from the blast and for damages from the concussion. W. PROSSER & W.P. KEETON, *supra*, § 78.

The requirement that one have possession to bring a trespass action still causes difficulties, too. An owner out of possession, such as a landlord, cannot sue in trespass, but must sue in case for injury to the reversion. It follows from this that the owner must prove permanent harm, such that the value of the reversion is lessened. If there are no such damages caused by the trespasser, the landlord has no remedy against him. W. PROSSER & W.P. KEETON, *supra*, § 13, at 77–8; J. KOFFLER & A. REPPY, *supra*, § 85, at 176.

Formerly, the requirement of possession to bring a trespass action also caused trouble for an owner who had been in possession but was forcibly dispossessed. At common law, an owner forcibly dispossessed could sue solely for the ouster (in ejectment) but could not, in the same suit, recover for lost profits or damages to the property. Only after recovering possession, by means of a lawful re-entry or a judgment in ejectment, was the owner deemed (by a legal fiction) to have been in possession throughout the period of disseisin and, thus, entitled to bring an action of trespass for mesne profits. J. KOFFLER & A. REPPY, *supra*, at 238–39. This has been changed by statute in many states, so that it is now possible in these states for the owner to recover for damages to his property as well as possession in a single action. See, e.g., CAL. CIV. PRO. CODE § 740 (West 1980); N.J. STAT. ANN. § 2A:35–2 (West 1987).

The modern action of nuisance has gradually evolved out of the action of case. Nuisance is the proper action for interference with use or enjoyment of property, while trespass protects possession. Nuisance, being the offspring of case, has inherited some of its characteristics. At common law liability for trespass was imposed on the defendant if the invasion of the plaintiff's land was the direct result of any volitional act of the defendant's, even if not intentional or negligent, while liability for nuisance required some kind of wrongful conduct. W. PROSSER, *supra*, at 69. Many courts now hold that liability for trespass requires intentional or negligent conduct, or an invasion due to some kind of abnormally dangerous activity. *See* National Coal Bd. v. J.C. Evans Co., [1951] 2 K.B. 861; RESTATEMENT (SECOND) OF TORTS § 166 (1965); W. PROSSER, *supra*, at 65; *cf*. Phillips v. Sun Oil Co., 307 N.Y. 328, 121 N.E.2d 249 (1954). Others do not. See Smith v. Board of County Road Com'rs, 5 Mich. App. 370, 146 N.W.2d 702 (1966), aff'd, 381 Mich. 363, 161 N.W.2d 561 (1968); Herro v. Chippewa County Road Com'rs, 368 Mich. 263, 118 N.W.2d 271 (1962). Other distinctions, too, between trespass and nuisance still have some life left: one is that an actionable trespass occurs when the plaintiff's land is invaded without regard to whether there is harm, while nuisance and case require substantial harm to be actionable; a second is that trespass requires an immediate, direct injury, while injuries giving rise

to an action on the case or nuisance are indirectly caused. W. PROSSER, *supra*, at 63–69; *see also* Note on Legal Instruments of Land-Use Control, *infra*, p. S363.

One line of cases in which the problems caused by these distinctions are apparent is where smoke, odors, gases, or microscopic particles enter a person's property. Many courts have held that the only proper remedy is one for nuisance, stating, with somewhat unclear logic, that since trespass is an action protecting possession, there must be an actual invasion of visible objects to maintain it. Thus, only nuisance will be allowed to lie. See Riblet v. Ideal Cement Co., 54 Wash. 2d 779, 345 P.2d 173 (1959); Waschak v. Moffat, 379 Pa. [p*225] 441, 109 A.2d 310 (1954). It has also been argued that trespass is not the proper action in such cases because these are only indirect invasions; the fumes or gases were not directed to the plaintiff's land, but were carried there by the wind. See Arvidson v. Reynolds Metals Co., 125 F. Supp. 481 (W.D. Wash. 1954), aff'd, 236 F.2d 224 (9th Cir. 1956), cert. denied, 352 U.S. 968 (1957). But see Sheppard Envelope Co. v. Arcade Malleable Iron Co., 335 Mass. 180, 138 N.E.2d 777 (1956); *see also* Note on Legal Instruments of Land-Use Control, *infra* p. S363.

Some courts have blurred these distinctions. For example, several courts reject the distinction which allowed a trespass action for visible objects and denied it for microscopic particles. They now hold that any physical invasion of any mass gives rise to a trespass action if physical harm to the property results. Martin v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959). For invasions of energy or light, however, nuisance is still the proper remedy. Amphitheatres, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948).

Often these distinctions lead to results which seem to make little sense. Encroachments by tree limbs and roots are generally classified as a nuisance, their natural growth being regarded as an indirect invasion. If, however, the tree's owner were to cut down such overhanging limbs and use the wood to build a sign which encroached on the plaintiff's airspace or a fence which leaned over his property, this would be a direct invasion and the proper action would be trespass. Annot., 65 A.L.R.4th 603 (1988); Note, 20 Mod. L. Rev. 499, 501 (1957); *see* Kelsen v. Imperial Tobacco Co., [1957] 2 W.L.R. 1007, [1957] 2 All. E.R. 343 (Q.B. Div.); *cf.* Mann v. Saulnier, 19 D.L.R.2d 130, 132–33) (N. Bruns. Sup. Ct. App. Div. 1959). These distinctions can mean the difference between success or failure in a suit; should the court decide the proper action was nuisance, the plaintiff may lose for one of two reasons: first, the statute of limitations is sometimes longer for trespass actions than for nuisance actions (see, e.g., Zimmer v. Stephenson, 66 Wash. 2d 477, 403 P.2d 343 (1965)); second, the plaintiff may have to prove the invasion was unreasonable and that there was actual, substantial harm. Mann v. Saulnier, *supra*; 5 R. POWELL, REAL PROPERTY § 705 (P. Rohan ed. 1981).

To add to the confusion, nuisance may be confused with negligence as well as with trespass. The actions are so indistinctly separated that it is common practice for lawyers to plead all three causes of action in one complaint. See Newark, *Trespass or Nuisance or Negligence*, 17 MOD. L. REV. 579 (1954).

Finally, not only does nuisance get confused with trespass and negligence, but it is itself anything but a clean concept. In fact, it is so confused that it led the RESTATEMENT OF TORTS to suggest an abandonment of the term (Scope and Introductory Note to Chapter 40) and caused Dean Prosser to remark:

> There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word "nuisance." It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie. There is general agreement that it is incapable of any exact or comprehensive definition.

W. PROSSER & W.P. KEETON, TORTS § 86, at 616 (5th ed. 1984).

For the measure of damages in trespass, case, and nuisance actions, *see generally* C.

MCCORMICK, DAMAGES §§ 126–28 (1935); Graves, *Proof of Damages to Property in Tort Actions*, 33 MISS. L.J. 151 (1962); Note, 51 KY. L.J. 366 (1962).

(b) *Injunction*. The difficulties of obtaining relief in a real property action are compounded when the relief sought is equitable in nature. Prior to the enactment of the codes and the merger of law and equity, the plaintiff first had [p*226] to establish a legal cause of action. For example, if a plaintiff were trying to enjoin a continuing trespass and the defendant claimed title, there would have to be an adjudication of title at law, resolved in favor of the plaintiff before he could sue for an injunction. J. POMEROY, EQUITY JURISPRUDENCE § 252, at 496–98 (5th ed. 1941). Similarly, if a person wanted equitable relief from a nuisance, he had first to establish, at law, the existence of that nuisance. Parks v. Parks, 121 Me. 580, 119 A. 533 (1922). In general, this is no longer the case, except in the few states where law and equity cases are still tried in separate courts. Lewis, *Injunction Against Nuisances and the Rule Requiring the Plaintiff to Establish His Right at Law*, 56 U. PA. L. REV. 289 (1908); de Funiak, *Equitable Relief Against Nuisances*, 38 KY. L.J. 223, 230–31 (1950). Some problems still exist, however, due to the constitutional requirements of trial by jury. Unless both parties are willing to waive this right, legal actions will have to be tried to a jury. Note, 55 W.VA. L. REV. 260, 262 (1953); *see* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).

Although an historical anachronism, a second prerequisite to equitable relief is that there must be no adequate remedy at law. C. CLARK, CODE PLEADING § 15, at 86–90 (1947); W. PROSSER & W.P. KEETON, TORTS § 89, at 640 (5th ed. 1984). For example, the availability of equitable relief in a nuisance action may depend on the nature of the nuisance. If it is temporary in nature, there is an adequate remedy at law; only if the nuisance is continuous or repeated and threatens permanent or irreparable injury will it warrant equitable relief. De Funiak, *supra*, at 230.

A final obstacle to equitable relief is that the court has a great deal of discretion in granting or denying it, even if the existence of the nuisance has been established. Many courts support the doctrine of weighing the equities, and if the scale tips in favor of the defendant, the plaintiff will not get injunctive relief. As the *Peters* case illustrates, injunctions against trespasses are the rule rather than the exception. See Annot., 28 A.L.R.2d 679 (1953). But see Arnold v. Melani, 75 Wash. 2d 143, 449 P.2d 800 (1968) (4–3). In nuisance litigation, on the other hand, many factors are considered in a balancing process that often results in no injunction. One such factor is a general predilection of the courts for remedies other than injunctions, and a reluctance to bar the operation of a lawful business. *See, e.g.*, Storey v. Central Hide & Rendering Co., 148 Tex. 509, 226 S.W.2d 615 (1950), *noted in* 28 TEX. L. REV. 723 (1950). A second consideration is the type of neighborhood in which the plaintiff resides; if it is industrial, a suit for injunctive relief from an industrial polluter is not likely to be successful. Bove v. Donner-Hanna Coke Corp., 236 App. Div. 37, 258 N.Y.S. 229 (1932); see Note, 22 CASE W. RES. L. REV. 356, 357 (1971). A third factor considered is the benefit to the public of the defendant's activities. Thus an employer of a thousand people, though the source of a nuisance, may well not be enjoined because of the benefit to the community of this employment. Koseris v. J.R. Simplot Co., 82 Idaho 263, 352 P.2d 235 (1960); W. PROSSER & W.P. KEETON, *supra*, § 89, at 641. The most important consideration, however, is the weighing of the relative damages to the plaintiff and the defendant-the comparative injury doctrine. If the damages to the plaintiff by the nuisance are relatively slight in comparison to the damages to the defendant if the nuisance were enjoined, the court will generally not grant an injunction. W. PROSSER & W.P. KEETON, *supra*, § 89, at 641; 39 FORD. L. REV. 338 (1970). It may, however, grant some other relief, such as permanent damages. Boomer v. Atlantic Cement Co., 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870 (1970), *infra*, p. S368. For a discussion of how the doctrine of comparative injury has affected the movement to curb [p*227] industrial pollution, see Note, 21 SYRACUSE L. REV. 1243 (1970).

(c) *Self-Help*. While not a favored form of redress under the law, self-help is permissible under

certain circumstances and within certain limits. For example, self-help is a permissible remedy in the expulsion of trespassers, chiefly because it may well be the only feasible remedy available. If someone breaks into your home and is walking out with your silverware or has left a car in your lot, time does not allow filing a law suit. In the expulsion of trespassers, however, the property owner may use only such force as is absolutely necessary, under the circumstances, to attain that end. The force applied must be appropriate to the defense of the property, and there is no privilege to use any force calculated to cause death or serious bodily injury, unless there is also such a threat to the owner's personal safety as to justify self-defense. Further, what cannot be done directly cannot be done indirectly. There is no privilege to use a deadly mechanical device, such as a spring-gun, unless the owner would have been privileged to use it himself had he been there. Katko v. Briney, 183 N.W.2d 657 (Iowa 1971); W. PROSSER & W.P. KEETON, *supra*, § 21.

Self-help may also be a permissible remedy for the abatement of nuisance. Generally, resort to self-help must be warranted by immediate necessity, and it must be exercised with caution to avoid a breach of the peace. De Funiak, *supra*, at 229–30. Under certain circumstances, however, self-help may be the only remedy available. For example, it has been held to be the only remedy for abating the nuisance of overhanging tree limbs or roots encroaching on the plaintiff's property. See Sterling v. Weinstein, 75 A.2d 144 (D.C. Mun. App. 1950); Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931).

EDWARDS V. SIMS

Court of Appeals of Kentucky.
232 Ky. 791, 24 S.W.2d 619 (1929).

STANLEY, Commissioner. This case presents a novel question. . . . [The statement of facts from *Edwards v. Lee's Admr*, *infra*, p. S134, follows:

[About [thirteen] years ago L.P. Edwards discovered a cave under land belonging to him and his wife, Sally Edwards. The entrance to the cave is on the Edwards land. Edwards named it the "Great Onyx Cave," no doubt because of the rock crystal formations within it which are known as onyx. This cave is located in the cavernous area of Kentucky, and is only about three miles distant from the world-famous Mammoth Cave. Its proximity to Mammoth Cave, which for many years has had an international reputation as an underground wonder, as well as its beautiful formations, led Edwards to embark upon a program of advertising and exploitation for the purpose of bringing visitors to his cave. Circulars were printed and distributed, signs were erected along the roads, persons were employed and stationed along the highways to solicit the patronage of passing travelers, and thus the fame of the Great Onyx Cave spread from year to year, until eventually, and before the beginning of the present litigation, it was a well-known and well-patronized cave. Edwards built a hotel near the mouth of the cave to care for travelers. He improved and widened the footpaths and avenues in the cave, and ultimately secured a stream of tourists who paid entrance fees sufficient not only to cover the cost of operation, but also to yield a substantial revenue in addition thereto. The authorities in charge of the development of the Mammoth Cave area as a national park undertook to secure the Great Onyx Cave through condemnation proceedings, and in that suit the value of the cave was fixed by a jury at $396,000. In April, 1928, F.P. Lee, an adjoining landowner, filed this suit against Edwards and the heirs of Sally Edwards, claiming that a portion of the cave was under his land, and praying for damages, for an accounting of the profits which resulted from the operation of the cave, and for an injunction prohibiting Edwards and his associates from further trespassing upon or exhibiting any part of the cave under Lee's land. At the inception of this litigation, Lee undertook to procure a survey of the cave in order that it might be determined what portion of it was on his land. The chancellor ordered that a survey be made, and Edwards prosecuted an appeal from that order to this court. The appeal was dismissed because it was not from a final judgment. Edwards v. Lee,