116 Wash. 228 (Wash. 1921)

199 P. 298

GOSTINA et ux.

v.

RYLAND et ux.

No. 16334.

Supreme Court of Washington

July 1, 1921

Department 1.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Leo G. Gostina and wife against A. L. Ryland and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Mackintosh and Bridges, JJ., dissenting.

[199 P. 299]

Walter B. Allen, of Seattle, for appellants.

Warren Hardy, of Seattle, for respondents.

[116 Wash. 229] HOLCOMB, J.

These adversaries own and reside upon adjoining lots in the city of Seattle. Appellants have owned and resided upon their lot for many years. Respondents bought their lot in August, 1918. There are growing upon appellants' lot a Lombardy poplar tree, situated about 2 feet from the division line fence separating the properties; also a fir tree in the rear of appellants' premises, situated within 2 feet of the division fence. It is alleged that some branches of the trees overhang the premises of respondents. Appellants also maintain a creeping vine, growing in a rustic box on top of a large stump, a few feet from the division fence, which is trained downward from the stump, and it is alleged that parts of the creeping plant go through and under the division fence, and onto the lawn on respondents' premises. There are also some raspberry bushes and a rosebush at the rear of appellants' premises growing near the line, which the respondents allege are permitted to hang over the division fence.

On July 28, 1919, respondents caused their attorney to give notice in writing to the appellants that the branches of the fir tree (then mentioned as a pine tree) standing upon appellants' premises extended over the lot of respondents, and that the needles therefrom fell upon the lawn of respondents, injuring the same, and that the ivy planted in the yard of appellants ran under the fence and onto the lawn of respondents. Demand was made that appellants, within 10 days, cut off the branches of the fir tree at the point where they crossed the boundary line, and remove the ivy from respondents' property, and to keep the tree and ivy from further encroaching upon their property.

[116 Wash. 230] This demand not having been complied with, about 15 days thereafter respondents began their action under the statute (Rem. Code, §§ 943, 944, and 945) for the abatement of a nuisance, and for such other and further relief as might seem equitable and just. Issue was joined as to the overhanging branches and encroaching ivy constituting a nuisance. Findings of fact and conclusions of law, and judgment ordering abatement of the nuisances by appellants within 60 days, and, in case of failure by them, ordering the sheriff to do so, were entered in favor of respondents by the trial court, and this appeal resulted.

Appellants desired to defend on the theory that the action by respondents was merely for spite and vexation, and first complain because the court excluded evidence offered by them to the effect that, when respondents purchased their property adjoining that of appellants, they knew of the existence and condition of the trees and shrubs, and expressed their admiration therefor, and had no objection to their maintenance, as they were upon the property of appellants until after they had had some sort of personal disagreement, which caused their action in regard to the trees and shrubs. The court rejected all such evidence and offered proof, on the ground that it was immaterial, because, where branches of trees overlap adjoining property, the owner of the adjoining property has an absolute legal right to have the overhanging branches removed by a suit of this character.

Section 943, Rem. Code, provides:

'* * * Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property, is a nuisance, and the subject of an action for damages and other and further relief.'

[116 Wash. 231] Section 944, supra, provides:

'Such action may be brought by any person whose property

is injuriously affected or whose personal enjoyment is lessened by the nuisance. * * *'

It cannot be said that acquiescence in the existence of the alleged nuisance for the period of a few months is such as to constitute estoppel or equitable laches. Whatever may have been respondents' sentiments regarding the situation and character of the trees and shrubs at one time, when they entered upon the enjoyment of their own possessions, after occupancy for a few months they gave notice on July 28, 1919, that their permissive acquiescence in the existence of the alleged nuisances, at least as to the fir tree and the ivy, had ceased, and that they required the encroachment to be stopped.

In *Lonsdale v. Nelson, 2 B. & C.* 311, it is held by the English court, that:

'Nuisances by an act of commission are committed in defiance of those whom such nuisances **[199 P. 300]** injure, and the injured party may abate them without notice to the party who committed them; but nuisances from omission may not be thus abated, except it be to cut the branches of trees which overhang the public road, or the private property of the person who cuts them. The permitting of the branches of those trees to extend so far beyond the soil of the owners of the trees is an unequivocal act of negligence. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it; in such cases a person would be justified in abating the nuisance from omission without notice. In all other cases of such nuisance, persons should not take the law into their own hands,

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but follow the advice of Lord Hale, and apply to a court of justice.'

'Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are technical nuisances, and the person over whose land they extend may cut them off, or have his action for damages, if any have been sustained therefrom, and an abatement of the nuisance against the owner or occupant of the land on which they grow; but he may not cut down the tree, neither can he cut the branches thereof beyond the extent to which they overhang his soil.' Wood on Nuisances (3d Ed.) § 108.

'It may be understood that any erection upon one man's land, that projects over the land of another, as well as any tree whose branches thus project, doing actual damage, or anything that interferes with the rights of an adjoining owner, is an actionable nuisance.' Wood on Nuisances, § 106.

From ancient times it has been a principle of law that the landowner has the exclusive right to the space above the surface of his property. To whomsoever the soil belongs, he also owns to the sky and to the depths. The owner of a piece of land owns everything above it and below it to an indefinite extent. Coke, Litt. 4.

'On the same principle it is held that the branches of trees extending over adjoining land constitute a nuisance--at least in the sense that the owner of the land encroached upon may himself cut off the offending growth.' 20 R. C. L. 433, 434, 435, § 49, and cases cited.

'But whether a suit for injunction and damages may be maintained without proof of actual damage is a point upon which the authorities are not very clear or satisfactory. According to some of the decisions, sensible, appreciable damage must be shown in order to give the overhanging branches the character of nuisance; in other words, the fact that the branches extend over another's land does not constitute them a nuisance per se.' 20 R. C. L. pp. 433, 434, 435,§ 49.

[116 Wash. 233] Thus in *Countryman v. Lighthill (N. Y.)* 24 Hun, 405 (not an ancient case, as respondents state, but decided in 1881), it was held that:

'The overhanging branches of a tree, not poisonous or noxious in nature, are not a nuisance per se, in such a sense as to sustain an action for damages. Some real, sensible damage must be shown to result therefrom, and the complaint which does not describe the damages caused will not state a cause of action.'

That is our view. It is generally the rule that----

'One adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature. His remedy in such cases is to clip or lop off the branches or cut the roots at the line.' 1 C.J. 1233, § 94; Countryman v. Lighthill, supra; Crowhurst v. Amershaw Parish Burial Board, 4 Ex. D. 5; *Hoffman v. Armstrong*, 48 N.Y. 201, 8 Am. Rep. 537; *Lyman v. Hale*, 11 Conn. 177, 27 Am. Dec. 728; *Skinner v. Wilder*, 38 Vt. 115, 88 Am. Dec. 645; *Harndon v. Stultz*, 124 Iowa, 440, 100 N.W. 329; *Tanner v. Wallbrunn*, 77 Mo.App. 262.

It is therefore well settled that the powerful aid of a court of equity by injunction 'can be successfully invoked only in a strong and mischievous case of pressing necessity,' and 'there must be satisfactory proof of real substantial damage.' Tanner v. Wallbrunn, supra. Hence, were it not for our statute of nuisances, the respondents herein would not be accorded any judicial relief. But our statutes accord a

remedy to one 'whose personal enjoyment is lessened,' or for a very slight nuisance:

'Whatever is an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property.'

[116 Wash. 234] But in this case the respondent did describe some annoyance and damage--insignificant, it is true; so insignificant that respondents did not even claim them or prove any amount in damages--but simply proved that the leaves falling from the overhanging branches of the poplar tree caused them some additional work in caring for their lawn; and that the needles from the overhanging branches of the fir tree caused them some additional work in keeping their premises neat and clean, and fell upon their roof and caused some stoppage of gutters; and that sometimes, when the wind blew in the right directions, the needles blew into the house and annoyed the occupants. We cannot avoid holding, therefore, that these are actual, sensible damages, and not merely nominal, and, although insignificant, 'the insignificance of the injury goes to the extent of recovery, and not to the right of action.' *Henry v. Shepherd*, 52 Miss. 125.

The respondents in this case certainly had one remedy in their own hands, and under all the authorities could--without notice, if they had not encouraged the maintenance **[199 P. 301]** thereof; after notice, if they had (which they gave)--have clipped the branches that overhung their premises at the line.

'And although the right to trim encroaching branches must be conceded, it may be said that the watching to see when trimming of noxious branches would be necessary and the operation of trimming are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner. * * * But, if the trees are innocuous, it might well be held that the occupier of the land projected over would have no right of action from grounds of general convenience, but should be left to protect himself by clipping.' Crowhurst v. Burial Board of Amershaw, supra.

Since they had the statutory right to bring an action for abatement, and have shown some actual and

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sensible damages, although insignificant, we consider that we have no option but to sustain it. The remainder of the trees will doubtless shed their leaves and needles upon the respondents' premises; but this they must endure positively without remedy.

The appellants' contention that 'one who has slept upon his rights for a considerable time by acquiescing in the alleged nuisance will be denied equitable relief and left to his remedy at law' (29 Cyc. 1231) cannot apply here. The cases cited by appellants under this head show delays, not of months, but of years. That principle is applied where one has encouraged the nuisance, and allowed the party to go on and make a heavy expenditure, under the reasonable belief that no objection would be made, or where the damages were small, and the injury not of a continuous and permanent nature. 2 Wood, Nuisances (3d Ed.) § 785. The courts look beyond the injury to the consequence of their action, and if fair redress can be had at law they will not tie up important industries or operations by injunction, unless the equities of the case demand. *Varney v. Pope*, 60 Me. 192; *Sparhawk v. Union Pass. R. R. Co.*, 54 Pa. 401.

Here respondents did not encourage an active nuisance, or nuisance by commission, but for a short time permitted an omission, when they gave notice of the cessation of their permission. No expenditure had been encouraged, and incurred on the part of appellants. It cannot be considered that respondents slept upon their rights for such a considerable time, by acquiescing in the alleged nuisance, so that they would be denied equitable relief; nor is this equitable relief, but legal and statutory relief. *Carl v. West Aberdeen Land Co.*, 13 Wash. 618, 43 P. 890. While it has some appearance of being merely a vexatious suit,

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appellants admit that the tree boughs do overhang respondent's lot to some extent. There is sufficient foundation in fact to sustain a case, and the authorities are clearly with respondents.

The judgment of the lower court is affirmed.

PARKER, C.J., and FULLERTON, J., concur.

MACKINTOSH, J. (dissenting).

To have the acts complained of in this case constitute a nuisance under section 943, Rem. Code, they must be acts (1) injurious to health; or (2) indecent; or (3) offensive to the senses; or (4) an obstruction to the free use of the property, so as to essentially interfere with the comfortable enjoyment of the life and property. It is conceded that the acts do not come within classifications 1, 2, or 3; but it is held that such acts amount to an obstruction of the free use of the property, so as to essentially interfere with its comfortable enjoyment. I cannot agree with such a result; for the trivial encroachment of the branches of a tree and the growth of a few vines under a fence do not appear to me to amount to such an obstruction as to essentially interfere with the respondents' comfortable enjoyment of their property, and are not such circumstances as will entitle respondents, under section 944, Rem. Code, to institute an action, it being provided in that section that the action may

be brought by a person whose property is injuriously affected or whose personal enjoyment is lessened.

I agree with the writer of the opinion in his characterization of this action as vexatious, and I think that the statutes on nuisances are hardly susceptible of the interpretation given them, which has rendered the action, not only vexatious, but successful.

I therefore dissent.

BRIDGES, J. I concur in the dissent of Judge MACKINTOSH.