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COMMENTS

BAD MOTIVE PLUS HARM EQUALS A TORT

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“. . . An adjacent proprietor has no right to light and air coming . . . across the land of his neighbor.”

On the strength of this statement the Rhode Island court¹ recently held, as the most important reason for refusing an injunction, that a landowner may rightfully build a fence for the sole purpose of depriving his neighbor of light and air. The court argues that if one has no right to such light and air there can be no duty on the part of the defendant not to obstruct them; that the maxim “sic utere tuo” should not be applied so as to confer gratuitously upon an adjacent property holder incorporeal rights; that this differs from the situations in which the defendant sends smoke, smells or noise over plaintiff’s land; that “[v]iolations of ethics or morals which do not harm the public weal, it [the municipal law] wisely leaves to the sanctions of the moral law. At that bar only can the motives of men be fully appraised and fairly judged.”²

As to the first statement, it would appear that the court misconceives the nature of the rights of a landowner. The fact that the Rhode Island legislature had enacted a spite fence statute, although this was not applicable in the present case, indicated the legislative belief that landowners are subject to some duties to their neighbors. The fallacies of the last statement of the court and its companion, that “an otherwise lawful act does not become unlawful because performed with a bad motive,” I had supposed were so thoroughly exposed by Dean Ames two generations ago³ that no court would now venture to make either of them.

In fact, there are few “absolute rights,” certainly none to harm others, although policy sometimes gives an immunity from civil liability. It would be improper to state that the civil immunity of a judge or senator in defaming others creates a “right” in him to do so. It is still true in many states that one may cause another to be very unhappy by means of insults without being subjected to an action of tort, but where such a rule prevails it is only on the ground that

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¹ *Musumeci v. Leonardo*, 75 A. 2d 175 (R. I. 1950).

² *Id.* at 178.

³ Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 HARV. L. REV. 411 (1905).

there is no substantial harm, or not the kind of harm for which it is expedient to give redress.⁴ Again it is true that one has a right not to aid another or to deal with another. However, one cannot properly refuse a gift or to deal with another if refusal is intended to cause the other to commit a breach of contract or unlawful act.⁵ Under modern labor legislation one cannot refuse to employ if the denial is based upon racial grounds⁶ or because of membership or nonmembership in a labor union.⁷ It has frequently been said that one can enforce a lawful claim against another although the enforcement is from a bad motive;⁸ in this case, however, the defendant is committing a wrong in not making payment and even in this situation the right may not be without limitation.⁹ One probably has a right to eject trespassers irrespective of motive,¹⁰ but again this represents the righting of a wrong committed by the trespasser.

On the other hand, the right to compete for business is today generally recognized to be dependent upon the existence of a proper motive.¹¹ The common right to use public roads may become unlawful if for an improper purpose¹² and even the exercise of the right of free speech may be limited although the words used are proper, if the motive is to induce rioting.¹³ In some states it is an actionable tort to make a true but defamatory statement with a bad motive;¹⁴ in all states, the exercise of a "privilege" is dependent upon its being used for the purpose for which it is given.¹⁵

⁴ Contrast the language of *Emden v. Vitz*, 88 Cal. App. 2d 313, 198 P. 2d 696 (1948), with that in *Wallace v. Shoreham Hotel Corp.*, 49 A. 2d 81 (Mun. Ct. App. D. C. 1946).

⁵ RESTATEMENT, TORTS § 766, comment g (1939); Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 13 (1894).

⁶ MASS. ANN. LAWS, c. 151B, § 4 (Supp. 1950). "It shall be an unlawful employment practice:

1. For an employer, by himself or his agent, because of the race, color, religious creed, national origin, age, or ancestry of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." See also N. Y. CIV. RIGHTS LAW § 42.

⁷ 49 STAT. 452 (1935), as amended, 29 U. S. C. A. § 158(a)(3) (Supp. 1951).

⁸ *South Royalton Bank v. Suffolk Bank*, 27 Vt. 505 (1854).

⁹ *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, Georgia*, 256 U. S. 350 (1921).

¹⁰ *Kiff v. Youmans*, 86 N. Y. 324 (1881); *Brothers v. Morris*, 49 Vt. 460 (1877); *Oakes v. Wood*, 2 M. & W. 791, 150 Eng. Rep. 977 (1837).

¹¹ *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946 (1909).

¹² *Beatty v. Gilbanks*, 9 Q. B. D. 308 (1882).

¹³ Compare *Feiner v. New York*, 340 U. S. 315 (1951), with *Terminiello v. Chicago*, 337 U. S. 1 (1949). For an able discussion of the limitations which may be imposed on the exercise of free speech to prevent breach of the peace, see Note, 25 ST. JOHN'S L. REV. 295 (1951).

¹⁴ *Wertz v. Sprecher*, 82 Neb. 834, 118 N. W. 1071 (1908). At common law, the defense of truth was not available in criminal proceedings for libel.

¹⁵ RESTATEMENT, TORTS § 890, comment c (1939).

Perhaps the clearest cases for recognizing that rights are relative to the purpose for which they are exercised are those involving adjacent landowners or possessors. In a crowded world, one holds one's property subject to the interests of others. To a greater or less extent, we all create sound waves and infiltrate the atmosphere with floating and alien particles. We exchange sounds, smells and dust with our neighbors. If we cause an excess of the disagreeable elements to our neighbor or to his premises than is permissible for the place or the kind of business we are operating, we commit a nuisance. Whether or not there is a nuisance depends upon whether there has been abuse of these common interests. To determine whether stores which create traffic congestion, or factories which pollute the atmosphere with smoke are nuisances, the benefit to the landowner and to the public from the activity is taken into consideration.¹⁶ Clearly if there is no benefit to the public and if the defendant acts to satisfy only his interests in hatred there is no reason to protect him.

The court distinguishes the sending of something upon another's land from the interception of light rays, a specious but spurious distinction. An undertaking establishment which transmits no more than gloomy thoughts can be justified, if at all, in a residential neighborhood only because of public necessity.¹⁷ There would seem to be no essential difference between sending over another's land artificial light rays or magnifying the sun's rays and depriving another of the rays from the sun. In one case there is a deprivation of darkness; in the other a deprivation of light. It should be noted that the defendant's conduct was not "non-feasance," a shibboleth used by some courts to deny recovery, but consisted of activity.

It is true that the right to erect useful structures is not diminished by the fact that the builder desired to harm his neighbor. Furthermore, aside from zoning statutes, there was no common law limitation upon the height of such structures, so that to this extent the exercise of the right to cut off light is different from the right to make noises, smells or dust. This, however, does not mean that the right should not be limited to its exercise for a proper purpose, a limitation common to the exercise of all rights or privileges to harm others. The fact that in the United States one does not acquire the right to receive light by lapse of time does not mean that he has no rights. It means only that he acquires no additional rights from the inactivity of his neighbors.

To revert to the "no right" of the plaintiff: it is of course obvious that whether the plaintiff has a right depends upon whether his neighbor has a duty not to interfere with the plaintiff's interest. This

¹⁶ *Robinson v. Westman*, 224 Minn. 105, 29 N. W. 2d 1 (1947) (riding academy); *Essick v. Shillam*, 347 Pa. 373, 32 A. 2d 416 (1943) (supermarket).

¹⁷ Compare *Gunderson v. Anderson*, 190 Minn. 245, 251 N. W. 515 (1933) ("constant reminder of death"), with *Devereux v. Grand-Americas Junior Corp.*, 85 N. Y. S. 2d 783 (Sup. Ct. 1949).

in turn should depend upon the motive in acting. There is no reason why the law should protect the interests of a person in harming another and this it does where it creates a right to harm another for a purely spiteful motive. A hundred years ago the decision of the Rhode Island court would have been a commonplace, but the principles of torts have been discovered since then. One of the most important developments has been in the recognition of the extent to which motive plays a part in the creation of liability for harm. This is particularly noticeable in the case of landowners. Since 1900 the tendency of the courts and legislatures has been to deny protection to one who is actuated solely by ill will, as may be seen by the cases involving spite fences,¹⁸ percolating waters¹⁹ and noises.²⁰ It is unfortunate that in a case in which the erection of a fence appears to have been justified, the court found it desirable to announce a rule outmoded because inconsistent with modern ideas of justice.

¹⁸ Cases collected in Note, 133 A. L. R. 691 (1941).

¹⁹ *Gagnon v. French Lick Springs Hotel Co.*, 163 Ind. 687, 72 N. E. 849 (1904); RESTATEMENT, TORTS §§ 860-863 (1939).

²⁰ *Collier v. Ernst*, 46 D. & C. 1, 31 Del. Co. R. 49 (Pa. C. P. 1942).