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**WHERE PRINCIPLES OF RESTITUTION ARE
INAPPLICABLE TO ENCROACHMENT BY
BUILDING ON ADJOINING LAND**

*Easter v. Dundalk Holding Co.*¹

This suit was entered in the Circuit Court of Baltimore City by the complainant, the Dundalk Holding Co., to restrain the defendant, Andrew J. Easter, an adjoining property owner, from enforcing a judgment obtained in an ejectment suit, to assess the value of the strip of land occupied by the complainant, and to order defendant to convey the strip to the complainant. In 1945 the defendant, who was then the owner of a large undeveloped tract of land on Belair Road, sold a frontage of 250 feet to the complainant. The latter erected a moving picture theater, the southwest wall of which, by innocent mistake, encroached on the defendant's land from .36 to .95 of a foot. This theater wall was 13 inches thick, made of bricks and cinder blocks; the roof was constructed of steel beams and gypsum steel planks; and the ceiling of metal lathe and plaster. The defendant apparently was not made aware of the encroachment until after the progress of the work had caused some of the top soil on his own land to be cut away. In 1947 the defendant had filed suit in ejectment in the Superior Court of Baltimore City, and in 1949 the Court had rendered judgment in his favor. This judgment had been affirmed by the Court of Appeals in 1950.² Thereupon the complainant filed the bill in equity cited above, alleging that the value of the strip occupied was only \$150, whereas

¹ 86 A. 2d 404 (1952).

² *Dundalk Holding Co. v. Easter*, 73 A. 2d 877 (1950).

the cost of removing the wall would be more than \$60,000, due to the necessity of replacing the footings, building a new wall, and of changing all the seats in the theater. The Circuit Court of Baltimore City, France, J., entered a decree declaring the exact value of the land occupied to be \$500, but refused to grant an injunction or any other relief prayed. The defendant, the owner of the land encroached upon, appealed and this decree was reversed by the Court of Appeals on the ground that, though it was a nullity and could not affect the judgment in the ejectment suit, it still might create a cloud on defendant's title and therefore should be expunged.³

The complainant had relied upon the decision of the Maryland Court of Appeals delivered in 1874 by Chief Judge Bartol in *Union Hall Association v. Morrison*.⁴ In that case the appellant erected a building wholly upon a vacant lot. The appellee, an adjoining owner, discovered from a survey a number of years later that the land on which the building was erected was included within his tract, and he recovered a judgment in ejectment against the appellant. Thereupon the latter filed a bill in equity, and, though he was not entitled to relief under the doctrine of equitable estoppel since appellee had not knowingly allowed him to erect the building on his land, the Court decided that the appellant was entitled to relief as a bona fide possessor under the doctrine of the civil law. The Court held that the appellee had the option either: (1) to accept payment for the lot estimated at its fair value without the improvements, or (2) to hold the lot and to pay for the improvements to the extent of additional value which they had conferred upon the lot, and in default of such payment the same should be a lien on the property.

The radical distinction between that case and the instant case was pointed out by the Court of Appeals. The *Union Hall* case was held not to be precedent for the case under discussion, since the complainant here made no improvements which enhanced the value of defendant's lot. The Court declared that no court of law or equity has authority to compel a landowner to surrender his property to another person in exchange for a sum of money; to do so would be a deprivation of property without due process of law in violation of Article 23 of the Maryland Declaration of Rights and the Fourteenth Amendment to the Constitution

³ *Supra*, n. 1, 407.

⁴ *Union Hall Association v. Morrison*, 39 Md. 281 (1874).

of the United States. It should be stated parenthetically that the Court of Appeals presumably regarded the doctrines of estoppel or mutual mistake as inapplicable to this case. As far as can be found from the record, the parties were dealing at arm's length, with an innocent mistake on the builder's side only.

The Court of Appeals in the *Union Hall* case based its opinion squarely upon a decision of Judge Story in the Circuit Court for Maine in *Bright v. Boyd*,⁵ where the facts were analogous. Judge Story's decree (that the improvements innocently made were a lien on the hand, which, if not paid, would cause the land to be sold) was apparently the model for the Court of Appeals in the *Union Hall* case. Judge Story stated that his decision was the clear result of the Roman law, and the Maryland Court of Appeals remarked: "This careful and well considered decision meets with our entire approval, and rests upon such plain principles of equity, that we have no hesitation in adopting it, as applicable to the case before us."⁶ Both of these cases entitled the bona fide possessor to affirmative relief in equity by way of compensation or lien on the other party's land because the structures erected were permanent improvements that enhanced the value of the land. Where the expenditures of the occupant, no matter how great, have not made the premises more valuable to the owner, the latter is never under equitable obligation to make compensation.⁷ To be an improvement or betterment, the expenditure must be both permanent and beneficial, and in the instant case it can be seen that the erection of the theater wall certainly did not meet the latter qualification. If anything, it impaired the value of the property.

Even where the expenditures undeniably enhance the value of the true owner's land, however, the *Bright v. Boyd* — *Union Hall* line of cases, which govern the law in Maryland, are in the minority. Outside of Maryland this

⁵ *Bright v. Boyd*, 4 Fed. Cas. 134 (1843). This case involved a bona fide purchaser without notice of defect in his title who made valuable improvements on the true owner's land. As in the *Union Hall* case he was given affirmative relief in equity, after a judgment at law had been obtained against him.

⁶ *Supra*, n. 4, 296.

⁷ 27 Am. Jur. 273, Improvements, Sec. 19. See also Annotation, 81 Am. St. Rep. 164. Anything that enhances the value of the property is an "improvement"; *Parker v. Wulstein*, 48 N. J. Eq. 94, 21 A. 623 (1891). But ordinary repairs cannot be classed as permanent improvements; *McKenzie v. Bacon*, 41 La. Ann. 6, 5 So. 640 (1889). A wall out of the true course is not an improvement to property, but an injury to it; *Leavison v. Harris*, 12 Ky. Law Rep. 488, 14 S. W. 343 (1890).

minority view has been fully adopted only in a few jurisdictions.⁸ Elsewhere, if not modified by statute, the common law rule prevails to the effect that whoever puts improvements upon the real property of another does so at his peril, regardless of the good faith factor. This rule was supposed to be founded in good policy, inasmuch as it induces diligence in the examinations of titles and prevents intrusions upon and appropriations of property of others.⁹

The harshness of the common law rule has been modified by equity only to a limited extent. In the majority of jurisdictions, where no statute governs, equity courts will not grant positive relief of the type granted in *Bright v. Boyd* and the *Union Hall* case; relief is granted only in an ancillary, auxiliary manner, where the other party has invoked equity jurisdiction and the bona fide possessor is the defendant, unless there is fraud or estoppel involved.¹⁰ Thus where the landowner invokes the aid of equity to obtain injunctive relief for the removal of an encroaching structure, he will only be granted relief upon condition that he compensate the other party to the extent that the value of his property was enhanced by the improvements.¹¹ This was based on the familiar maxim that he who seeks equity must do equity. Similarly where the landowner brings an action for rents or mesne profits against his encroaching neighbor, the latter is entitled to a set-off against the damages to the extent of the value of his improvement.¹² Thus, though the courts of equity introduced an innovation to the common law rule, the relief afforded was of a limited, negative character.

Writing in 1839, Judge Story observed: "The Civil Law seems to have proceeded upon a far broader principle of natural justice. For by that law any bona fide possessor . . . was allowed a privilege or lien for such meliorations."¹³ It was this civil or Roman law rule that Story seized upon four years later as a basis for his decision in *Bright v.*

⁸ Notes to RESTATEMENT OF RESTITUTION, Sec. 42; *Hardy v. Burroughs*, 251 Mich. 578, 232 N. W. 200 (1930); *Hatcher v. Briggs*, 6 Ore. 31 (1876); *Herring v. Pollard's Ex'rs.*, 4 Humph. 362 (Tenn. 1843); *Murphy v. Benson*, 245 S. W. 249 (Tex. 1922).

⁹ 81 Am. St. Rep. 166-167.

¹⁰ Annotation 174 A. L. R. 10, 137.

¹¹ *Warwick v. Harvey*, 158 Md. 457, 148 A. 592 (1930). One purchasing land in ignorance of a mortgage thereon is entitled to compensation for improvements in foreclosure proceedings.

¹² Notes to RESTATEMENT OF RESTITUTION, p. 31 and 27 Am. Jur., Improvements, *supra*, n. 7.

¹³ 2 STORY, EQUITY JURISPRUDENCE (2nd Ed., 1839), Sec. 1239.

Boyd.¹⁴ And it was this case that established the minority line of cases in this country. How far the minority view would have made its way unaided by the legislative arm is difficult to say, but the Restatement of Restitution states that Story's view permitting restitution would probably have prevailed in the end but for the prevalence of the so-called Betterment Statutes.¹⁵ These statutes, in varying degrees, codified the minority rule and give one who has color of title, or who, in good faith, enters upon and places permanent improvements on another's land, the right to recover for such improvements in a direct affirmative proceeding against the owner. The Betterment Acts have become the predominant statutory system of the country, though there is no such statute in Maryland.¹⁶ The addition of the jurisdictions relying on Story's "minority view" and those under the Betterment Acts probably produces an actual majority, leaving the common law rule with its negative equitable modification in the minority as far as the practical aspects of relief are concerned.

There are certain further limitations to both the "minority view" of Story and the Betterment Acts which should be observed. It has been held that an injunction (sought by the landowner) will not be barred, regardless of hardship, where one locates such portion of his building without any survey, although he has been warned not to encroach on the neighboring property.¹⁷ Good faith and lack of knowledge is, of course, a minimum essential to relief, and it has been held in this State as recently as 1946 that one who expends money on another's property, with knowledge or notice of the true state of the title has no claim to be reimbursed and has no lien.¹⁸ Yet in spite of these limitations the rule in Maryland is more liberal than that obtaining in most jurisdictions.¹⁹ In this State a defendant in an ejectment suit is not necessarily precluded

¹⁴ *Supra*, n. 5, 135.

¹⁵ *Supra*, n. 12, 29.

¹⁶ 81 Am. St. Rep. 168. For cases construing these statutes, see *ibid* and Notes to Restatement, *supra*, n. 12, 30.

¹⁷ *Kershishian v. Johnson*, 210 Mass. 135, 96 N. E. 56 (1911).

¹⁸ *Goldberg v. Ford*, 188 Md. 658, 53 A. 2d 665 (1947). This case involved a contractor engaged in strip-mining under a contract with a lessee of some coal land. He sought a lien for work done in laying bare certain veins of coal, but relief was denied because he had knowledge as to the actual ownership of the land. The court cited two earlier cases of *Bryan v. Councilman*, 106 Md. 380, 87 A. 279 (1907) and *Warwick v. Harvey*, *supra*, n. 11, for the rule that there must be three concurrent essentials: 1. He must have held possession under color of title; 2. His possession must have been adverse to the title of the true owner; 3. He must have acted in good faith.

¹⁹ *Supra*, n. 18, 664.

from going into equity after judgment, because he did not interpose a plea by way of equitable defense in the original action. The Court of Appeals has recognized that sometimes it is almost impossible to properly set up a claim by plea on equitable grounds in an action at law so as to do justice between the parties.²⁰

The foregoing review of authorities should reveal the weakness of the complainant's case in *Easter v. Dundalk Holding Co.* Under neither the minority view, followed in Maryland, nor under the Betterment Statutes did he have the slightest ground for relief, though the hardship involved was great. He failed because, in the eyes of the Court of Appeals, the wall that he had erected was a mere injurious encroachment and not an improvement or melioration upon the adjoining land. He would have been entitled to relief had his innocent mistake been much greater in degree — that is if he had located the theater entirely on the defendant's land. But the possibility of this occurring, with the good faith factor present, is extremely slim in urbanized, well-developed areas. The relief of the kind discussed would seem to be confined, by the force of circumstances, to controversies arising over large, undeveloped tracts of real estate. The constitutional issue was likewise a fatal stumbling block to the complainant. It will be observed that even the liberal or minority view does not provide for a forced sale of the adjoining landowners tract when such a mistake is made. The relief provided is alternative or optional: the landowner can either compensate the bona fide occupier to the extent that the value of his land is enhanced or he will have the value of such improvement impressed as a lien upon his land. By granting this option there is no deprivation of property without due process of law. Because of the very nature of his case, the complainant in the instant case could not ask for this optional type of relief because the theater wall was obviously of no value to the other party.

²⁰ *Stump v. Warfield*, 104 Md. 530, 553, 65 A. 348 (1906). This case cites *Union Hall v. Morrison*, *supra*, n. 4, as "another illustration of a case where the defendant, in an action of ejectment, should not be prohibited from afterwards going into equity . . . He should be permitted to first have the title determined at law."

See Md. Code, Art. 75, for the rules of pleading generally.