ENCROACHING BUILDINGS AND POSSESSION BY EASEMENT

When A. erects a building that encroaches on B.'s land, so much of the building as stands on B.'s land becomes the property of B.; and A. is then concerned to acquire some right from B. that will preserve the building and entitle him to the use of the encroaching portion. Of course, if B. is willing to sell the land on which the encroachment has occurred, no difficulty arises, so long as the transfer of the portion in question is not prevented by any law affecting the subdivision of land. On the other hand B. may be unwilling or unable to transfer the fee simple to A. In this case, if he is unwilling to make any arrangement, he may himself remove the encroaching part (c.f. *Burling v. Read*), [1] or he may sue for trespass, and bring a series of actions if the trespass continues (*Holmes v. Wilson*), [2] or he might perhaps obtain a mandatory injunction for the removal of the encroaching part.

If, however, B. is willing to make reasonable terms with A., but without giving up for ever his right to the land encroached on, the question arises what is the most appropriate method of protecting their respective interests. The assumption is that B. is willing to let A.'s building stand, but wants to resume possession of all of his land when the encroaching building is pulled down.

Two cases need to be distinguished—

(a) where nothing more than the outer wall of A.'s building encroaches on B.'s land;

(b) where some of the inner space of the building is over B.'s land.

In the first case the matter would at first sight seem to be easily settled. The encroaching part of the wall is B.'s property, since it is annexed to his land; but so long as B. will leave it there A. can make full use of his building. All that A. needs is that B. should grant him an easement of lateral support for his building, to continue so long as the building in question stands. The easement should therefore be granted in fee simple so long as the building (describing it) shall stand. [3] See *Re W. H. Marsh*, [4] where the Court made an order under the New South Wales Encroachment of Buildings Act, 1922, for the grant of an easement of support.

There is however a further possibility to be met. If bad feeling should arise between A. and B., it might happen, when A. wanted

[1] (1850) 11 Q.B. 904.
[2] (1839) 10 Ad. & E. 503.
[3] Cf. Plowd. 557.
[4] 59 W.N.. (N.S.W.) 17.

to pull his building down, that B. would forbid him to touch the portion of the wall that is B.'s. As between A. and B., it might be a sufficient protection to A. for B. to give him (for valuable consideration) a licence to remove B.'s portion of the wall. But if B. transferred his land the agreement would not be binding as such on B.'s successor in title; and an attempt to create a servitude, attaching to the land and binding on all holders of it, would be a risky device, and would probably fail. Therefore for complete safety it might be as well to deal with this case in the same manner as will be suggested for the second case now to be considered.

In the second case a question of law arises that is not settled beyond doubt. What A. wants here is a right that will enable him to make use of the portion of the building which stands above B.'s soil. If the boundary line runs through a room he will be committing a trespass if he passes from his side of the room to B.'s side. In other words, he should be granted some interest that gives him possession of the part of the building on B.'s side of the boundary.

It seems to be a commonly accepted idea that this case also can be covered by the granting of an easement, but the correctness of this view may be doubted. It raises a question how far a right to possession may be granted by way of an easement. It is submitted that although a right of possession may accompany certain types of easement, the right to exclusive use and occupation appropriate to the case under consideration goes beyond the scope of an easement, and can be conferred only by granting an estate in the land in fee or for a term of years. The authorities bearing on this question will now be considered. For the most part they are not directly concerned with the extent to which an easement can confer possession, but the inference to be drawn from them seems clear.

Although there are only obiter dicta to support it, it seems to be sufficiently well settled that a grant of the exclusive use of land is a grant of the ownership of the land. This seems to have been assumed to be the law in *Capel v. Buszard.* [5] The more common type of case is a grant of exclusive use and occupation for a limited period, in which case a tenancy arises. [5a] In *Reilly v. Booth* [6] Lopes, L.J., carried the matter further and said: "The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land, and there is no easement known to the law which gives exclusive and unrestricted use of a piece of land." This passage was quoted with approval by Lord Ashbourne in *Metropolitan Railway Co. v. Fowler.* [7]

In *Reilly v. Booth* [6] there was a conveyance of land at the rear of a house, "together with the exclusive use" of a gateway in the form of a passage through the ground floor of the house, which

[5] (1829) 6 Bing. 150.
[5a] See Halsbury, Vol. xx, pp. 6 et seq.
[6] (1890) 44 Ch. D. 12.
[7] (1893) A.C. 416.

gave access to the land at the back. The Court of Appeal inclined to the view, which was not absolutely necessary to its decision, that the effect was to convey the ownership of the space within the passage. Frequently, however, the circumstances show that something less than full possession is intended, as in the case of lodgers, or grants of a right to stack materials, or to erect hoardings, or to post bills on a wall, even though an exclusive right is given which deprives the grantor himself of an effective use of at least the surface of the part of the land affected. In these cases the grant is ordinarily treated as a licence. [8]

The question arises whether a right which prevents the grantor from using a defined area of land can take effect in one of two ways only, either as a grant of an estate in so much of the land, or the grant of a mere licence; or whether if the proper formalities are observed the right may operate as an easement. Now most easements restrict to some extent the servient tenant's use of his land. In the case of a right of way, for example, he is not excluded from the area of the way, but he cannot use it freely, as by building on it. Other easements exclude him completely from the area affected. Thus an easement to carry water in pipes through or over another's land excludes the servient tenant from the space occupied by the pipes. In the case of this sort of easement the dominant tenant may even have possession of the area affected. Thus in *Holywell Union v. Halkyn Drainage Co.* [9] the servient tenant granted to the Company an easement giving a right of drainage through a tunnel and an open cut, with power to enlarge and to alter the line of the drain, etc., and with exclusive rights of using it, reserving to himself only certain rights in respect of minerals and the use of the drain for access to and removal of minerals. The question was whether the Company was rateable as an occupier. In the Court of Appeal the question was considered on the basis of two possible alternatives only, on the one hand that the Company owned the tunnel and watercourse and on the other that it had a mere easement giving only an incorporeal interest. The House of Lords, however, while agreeing with the Court of Appeal that the Company did not own the tunnel and watercourse, held nevertheless that the rights of the servient tenant were subordinate to those of the Company, and that the Company was in occupation of the land occupied by the works.

Then again, the holder of an easement may be in possession of land by virtue of the fact that works erected by him in connection with his easement remain his property. In *Cory v. Bristow* [10] the Thames Conservators, in whom the bed of the river was vested, gave to the plaintiffs a right to lay in the bed of the river very substantial permanent moorings to which two floating coal derricks were attached. The House of Lords treated the moor-

[8] See the cases cited in Halsbury, Vol. xx, p. 9.
[9] (1895) A.C. 117.
[10] (1875) 1 C.P.D. 54; 2 App. Cas. 262.

ings as being land which was the property of the plaintiffs (they having laid them), and held the plaintiffs liable to pay rates as being occupiers of land. This was a case of a licence rather than an easement, since the right had been created by mere agreement; but *a fortiori* the plaintiffs would have been owners and occupiers if their right had been created as an easement. In the Court of Appeal reference was made to the analogous case of a company installing water or gas pipes or telegraph posts, in which case the company is rateable as an occupier. Where on the other hand the works are installed by the servient owner they are his property and the easement or licence does not carry occupation with it: See *Watkins v. Overseers of Milton-next-Gravesend,* [11] which was distinguished on this ground in *Cory v. Bristow.* [10]

In this connection it should be noted, as appears from *Cory v. Bristow,* [10] that the maxim *quicquid plantatur solo solo cedit* does not apply to structures affixed to land in the exercise of an easement or a licence in the nature of an easement. [12] But this exception does not apply to the case of the encroaching building, for, even if an easement to build could be granted, the annexation to the land occurs before any question of an easement arises.

Thus although a right to possession of land may accompany an easement, so far as the authorities go this is only in special cases and for restricted purposes. There may be an exclusive use of a piece of land for the purposes of an easement, either because installations which become part of the land are the property of the holder of the easement or because the servient tenant grants exclusive use to the holder of the easement. But in these cases the mode of use is restricted. In *Holywell Union v. Halkyn Drainage Co.* [13] the Company were not entitled to use the tunnel and drain for any purpose they liked, but only for drainage purposes; or if there were an easement to stack coals on a piece of land, although the servient tenant might be excluded, the dominant tenant would nevertheless be restricted to stacking coals. Where pipes or posts are installed for the purpose of an easement, the nature of the property itself provides a restriction, and even if they were adaptable to other purposes, there would be no right to use them for such purposes.

Hence there is no conflict between the cases considered and the dictum of Lopes, L.J., that "there is no easement known to the law which gives exclusive and unrestricted use of a piece of land." They show that exclusive use may be given, but do not extend to unrestricted use. If an easement could give both exclusive and unrestricted use it would be equivalent to an estate in land, and this is contrary to the whole scheme of classification of interests in

[11] (1867) L.R. 3 Q.B. 350.
[12] See also *Lancaster v. Eve,* (1859) 5 C.B. (N.S.) 717, *Wood v. Hewett,* (1846) 8 Q.B. 913, and, for a case of a customary mining right, *Wake v. Hall,* (1883) 8 App. Cas. 195.
[13] See note 9.

land. Therefore although the dictum of Lopes, L.J., is only *obiter* there seems to be no ground for questioning it. In his statement the important word is "unrestricted."

We may now return to the subject of the encroaching building. The encroaching portion built by A. is the property of B., and, if no more than an easement is to be granted, will remain the property of B. The right conferred by the easement, then, must be a right to the use and possession of B.'s portion of the building. If A. is to get what he wants it will have to be a right to unrestricted use. This is not a case of the soil encroached on being put to a restricted use (viz. being built upon); it is a case of unrestricted use of a portion of B.'s land, that is, his portion of the building. The land (i.e. the building) is not to be used for some special purpose akin to those of the recognised easement: it is to be used for all the purposes, without limitation, of which this sort of land is capable. A. wants all that he would get by being granted an estate in the land. On the basis of the principle laid down by Lopes, L.J., such rights cannot exist as an easement.

It follows, therefore, that if A. is to enjoy full rights of possession and use in regard to the encroaching portion of the building he must be given an estate in it. To meet the situation the estate should be one that determines when the building ceases to exist. Thus A. should be given either a determinable fee or a long lease similarly determinable. The grant could be confined to the building, including the foundations, leaving the soil below it in the possession of B. In addition, whatever right of support might be implied from the grant of the estate, it would be as well for A. to take an easement for the support of the building by the subjacent land of B.

If a determinable fee were granted certain difficulties would arise. B. would then retain no reversion in the land encroached on, but a mere possibility of reverter. Care would have to be taken that this possibility of reverter passed to anyone who acquired the rest of B.'s land, so that the two portions would be ultimately reunited. Under the old law this sort of possibility (sometimes called a bare possibility) [14] was descendible but not devisable. Whether it is devisable under the Wills Act is a matter of some doubt. [15] As to conveyance inter vivos, at common law it could not be granted, but might be dealt with by a conveyance operating by way of estoppel, e.g. a fine. The mode in which at the present day the possibility could be assigned together with B.'s remaining land would depend on the local conveyancing legislation.

A more satisfactory method would be to give A. a determinable lease for a long term of years: e.g. to A. for 1,000 years if the building (describing it) should so long stand. This would

[14] See Challis, Real Property (3rd ed.) p. 76.
[15] See Challis, p. 228.

leave a reversion in B. which could be readily passed with the rest of his land. There would appear to be no objection to such a lease, as being in effect merely a lease at the will of the tenant (who at any time may remove the building): cf. *Doe d. Lockwood v. Clarke,* (1807) 8 East. 185. In addition, in order to give A. a right to remove B.'s portion of the building when A. desired to rebuild, the lease should contain a term providing that he might do this. There would seem to be no doubt that such a covenant would run with the land and with the reversion, and be binding on B. or his successors in title, for the benefit of A. or his successors in title. In the case of a small encroachment, where B. might desire to use A.'s external wall as a party wall for a building of his own to be erected subsequently, A.'s right to removal would need to be restricted to such parts of the building as did not at the time of removal constitute a party wall between A.'s building and the one belonging to B.

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