Supreme Judicial Court of Massachusetts, Worcester.
MICHALSON et al.
v.
NUTTING et al.
April 6, 1931

275 Mass. 232, 175 N.E. 490, 76 A.L.R. 1109

Appeal from Superior Court, Worcester County; Winfred H. Whiting, Judge.

Suit by Charles Michalson and others against Archer I. Nutting and others. From a final decree dismissing the bill, plaintiffs appeal.

Affirmed.

*232 **490 W. E. Mellquist, of Worcester, for appellants.
W. L. Macintosh, of Worcester, for appellees.
WAIT, J.
The plaintiffs brought this bill in equity alleging that roots from a poplar tree growing upon the land of the defendants had penetrated the plaintiffs' land and had filled up sewer and drain pipes there, causing expense in digging them up and clearing them, and also had grown under the cement cellar of the plaintiffs' house, causing the cement to crack and crumble and threatening seriously to injure the foundation of the dwelling. They sought a mandatory injunction compelling the removal of the roots, a permanent injunction restraining the defendants from allowing the roots to encroach on the plaintiffs' land, and damages. The trial judge found that, as alleged, roots had *233 extended from a poplar tree set out on the land of the defendants into the plaintiffs' land; had entered and clogged the sewer so that several times the plaintiffs had been compelled to dig up the pipes and remove the roots at an expense for the last cleaning of $42.28; had extended under ground to the cement foundation wall of their house and had caused it to move slightly but as yet without serious harm; that, at the time of the first clogging of the sewer, notice had been given defendants and request made that the roots be removed but that they had refused and refrained from so doing. He ruled that upon the facts admitted and found to be true there was no liability on the part of the defendants for the clogging of the sewer and the moving of the wall by the roots of the tree the trunk of which stood on the defendants' land, and he ordered a decree dismissing the bill with costs. The case is before us upon the plaintiffs' appeal from a final decree entered in accord with that order.

[1] There is no error. The law of Massachusetts was stated in Bliss v. Ball, 99 Mass. 597, 598, by Chapman C. J., to be ‘As against adjoining proprietors, the owner of a lot may plant shade trees upon it, or cover it with a thick forest, and the injury done to them by the mere shade of the trees is damnum absque injuria. It is no violation of their rights.’ We see no distinction in principle between damage done by shade, and damage caused by overhanging branches or invading roots. The principle involved is that an owner of land is at liberty to use his land, and all of it, to grow

trees. Their growth naturally and reasonably will be accompanied by the extension of boughs and the penetration of roots over and into adjoining property of others. As was said in Countryman v. Lighthill, 24 Hun (N. Y.) 405, 407: 'It would be intolerable to give an action in the case of an innoxious tree whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor's soil.' It would be equally intolerable where roots penetrate the neighbor's soil.

[2] The neighbor, through without right of appeal to the courts if harm results to him, is, nevertheless, not without *234 remedy. His right to cut off the intruding boughs and roots is well recognized. Bliss v. Ball, supra; Harndon v. Stultz, 124 Iowa, 440, 100 N. W. 329; Robinson v. Clapp, 65 Conn. 365, 32 A. 939, 29 L. R. A. 582; Countryman v. Lighthill, **491 supra; Hickey v. Michigan Central R. Co., 96 Mich. 498, 55 N. W. 989, 21 L. R. A. 729, 35 Am. St. Rep. 621; Tanner v. Wallbrunn, 77 Mo. App. 262; Lemmon v. Webb, [1895] A. C. 1. See Skinner v. Wilder, 38 Vt. 115, 88 Am. Dec. 645. His remedy is in his own hands. The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another's right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious.

The cases where resort to the courts has been attempted are few. The result we have reached is supported by the decisions in Harndon v. Stultz, supra; Grandona v. Lovdal, 70 Cal. 161, 11 P. 623; Id., 78 Cal. 611, 21 P. 366, 12 Am. St. Rep. 121, and the reasoning in Gulf, Colorado & Santa Fe Railway Co. v. Oakes, 94 Tex. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835; Crowhurst v. Burial Board of Amersham, 4 Ex. D. 5; Giles v. Walker, 24 Q. B. Div. 656. We are unable to agree with Ackerman v. Ellis, 81 N. J. Law, 1, 79 A. 883; Buckingham v. Elliott, 62 Miss. 296, 52 Am. Rep. 188; Brock v. Connecticut & Passumpsic Rivers Railroad Co., 35 Vt. 373. The majority opinion in Gostina v. Ryland, 116 Wash. 228, 199 P. 298, 18 A. L. R. 650, contra, is based, apparently, on a state statute. See 1 C. J. page 1233, for a collection of the cases. In this commonwealth, there was no actionable nuisance and no right of recourse to equity.

Decree affirmed.

Mass. 1931
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