1922
*Nov. 13.
*Nov. 27.

C. GROSS (PLAINTIFF) .....APPELLANT;

AND

H. D. WRIGHT (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Agreement—Breach—Party wall—Narrowing of wall contrary to agreement—Proper remedy—Injunction—Specific performance.

A party wall agreement between appellant and respondent provided that respondent might build the wall two feet or more in thickness, half on each property, the middle line to coincide with the boundary line. The respondent built a wall the foundation, basement and first story of which were in accordance with the agreement, but he narrowed the second story by four inches on his own side of the wall, and the third story by a further four inches, keeping the wall on the outside (appellant's side) perpendicular. After it had been erected for some years and formed a wall of respondent's building, the appellant, alleging he had recently discovered the breach of agreement. sued for a mandatory injunction to compel the respondent to pull down that part of the wall not erected in compliance with the agreement and for specific performance of same.

Held, that these facts did not constitute merely a breach of contract for which recovery of damages would be a proper remedy, but a trespass, and that the appropriate remedy is to grant a mandatory injunction as prayed for by the appellant.

Per Idington J. The appellant has also the right to ask for specific performance of the agreement, and the respondent should be ordered to rebuild the wall of the same thickness of two feet.

Judgment of the Court of Appeal ([1922] 2 W.W.R. 1028) reversed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Clement J. at the trial and dismissing the plaintiff's action.

The material facts of the case are fully stated in the above head-note and in the judgments now reported.

---

*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) [1922] 2 W.W.R. 1028.

1922

GROSS v. WRIGHT.

Geo. F. Henderson K.C. for the appellant.

Eug. Lafleur K.C. for the respondent.

THE CHIEF JUSTICE.—For the reasons stated by my brother Anglin, with which I fully concur and to which I have nothing useful to add, I would allow this appeal with costs.

Idington J.

IDINGTON J.—The appellant owned lot 11, and respondent Wright lot 12, in a certain survey on Hastings street, one of the best business streets in Vancouver.

The appellant had built on his said lot a frame building which in the rear part thereof was found to have encroached upon said lot 12.

In 1908 the said respondent Wright desired to build upon his said lot 12.

The foregoing circumstances seem to have led to the said parties entering into an agreement dated 31st January, 1908, whereby appellant, by the first operative clause thereof, bound himself to remove from the eastern boundary of said lot 11 so much of his said building as should be necessary in order to enable said respondent Wright to build the party wall thereinafter provided for at his own expense as and when required by him for the purpose of constructing his said building and the proper building and construction of the said party wall.

The second operative clause reads as follows:—

2. The party of the first part may build a party wall of brick or other material two feet or more in thickness on any part or the whole of the boundary line between the said lots Nos. 11 and 12, and under the sidewalk on Hastings street from the northern boundaries of said lots, which the party of the second part shall have the right to use as herein provided, the middle line of which shall coincide with the said boundary line, and the said party of the first part shall have the right to enter in and upon said lot No. 11 and build and construct the said wall and when any portion of the wall so to be built by the party of the first part shall be used by the party of the second part his heirs or assigns, the party of the second part, his heirs or assigns, shall forthwith pay to the party of the first part, his heirs or assigns, one half of the cost price of the building and construction of the whole thickness of the portion of such wall so used by the party of the second part, his heirs or assigns, and in estimating the portion of such wall so used, the cost thereof shall be estimated on the cost of the whole height of the wall for the width used from the foundation to the top thereof, and the sum of money to

1922
GROSS
v.
WRIGHT.
Idington J.

be paid by the party of the second part, his heirs and assigns, to the party of the first part, his heirs and assigns, shall, until paid, remain a charge upon the said land of the party of the second part, and shall be an incumbrance and charge upon said land, being lot No. 11. The party wall to be constructed by the party of the first part to be approximately as shewn upon the sketched plan annexed to this agreement, subject to such alterations therein as the party of the first part may see fit from time to time to make. In case of total destruction of the said party wall by fire or otherwise this agreement and all covenants and agreements herein contained shall terminate. And it is agreed that the covenants herein contained shall run with the land, but no covenant herein contained shall be personally binding on any person except in respect of breaches during his or their seizin or title to the said lands.

The third operative clause provided that though one half of the said wall should be situated upon appellant's land, it should remain and be the property of respondent Wright until such time as appellant should use and pay respondent therefor as same would be so used and then the latter should own that portion of the wall so used and paid for

but the same shall remain intact and be for the mutual enjoyment and benefit of both of the parties.

thereto and until then the said respondent Wright in the meantime should have the use, benefit and enjoyment of the whole of said wall.

Then followed a clause relative to chimneys, which is not material for our consideration herein, and a further clause for reference to arbitration as to value of price mentioned above, not important herein.

The 6th clause is as follows:—

6. And it is further agreed that the wall built by virtue of this agreement shall be of good materials and workmanship, and when built shall be and remain a party wall.

Some few months after these parties had duly signed and sealed the said agreement the respondent had begun the building of a four-story brick building on his said lot 12, using in the foundation of the western wall thereof the agreed space assigned for such use as a party wall between him and appellant, the said owner of lot 11.

That foundation was a little over the two feet in thickness named in the agreement. Mr. Watson, the said respondent's architect (whose evidence I take as absolutely reliable) tells that before beginning the said foundation of

the said party wall the ground was surveyed by competent surveyors and the line drawn between the said lots 11 and 12, and a pin driven into the ground at the street line in front to mark and indicate said division line, and such line so determined was rigidly observed in laying the said foundation wall, so that one half of it was on the appellant's said land and the other half on the said respondent's lot.

That wall, in order to conform with the terms of said agreement, should have been carried up to the top of the four stories, intended to be and actually built by the said respondent, in such manner and form that each foot upwards should have rested equally on the respective properties of said parties to said agreement.

Whether it might have been contracted in thickness as to be less than two feet as it reached the upper stories I need not say.

The respondent Wright directed the contractor and architect when reaching the second story so to contract the thickness of the wall after reaching the top of the ground floor in height that instead of being two feet or more in thickness it should be, as it became under his directions, as testified by Watson the architect, as follows:—

Q. How was the wall on the right side?—A. It is set back.

Q. Set back on what stories?—A. On the first floor and second floor. The plans were prepared for a three-story building but we built four stories.

Q. Both walls in the basement are perpendicular?—A. The basement and ground floor is perpendicular, 2 feet 1 inch thick. The next floor is 1 foot 9 inches; the wall on the next floor 1 foot 4 inches; the next floor a brick and a half, 12 inches.

Q. With a little mortar would make it?—A. A brick and a half.

On the western side, being that next and upon appellant's lot 11, the wall is absolutely perpendicular and in the result in the fourth story rests entirely, or substantially so, upon appellant's said lot.

The space thus secured by respondent for use on his own side is said to be the equivalent of a room ten by twelve feet.

If that had been all that needed to be herein considered we might let the judgment below stand, but it is very far

1922
GROSS
v.
WRIGHT.
Idington J.

from being the gravest or chief cause of concern to the appellant herein. He never discovered the trick thus played upon him until ten or twelve years later when he had decided to build upon his lot 11 a brick building which for the first time would involve the use of the party wall, in the sense in which I read it. Then he certainly was confronted with a number of very serious problems. If he wished to use the wall to go beyond the second story he could not do it conformably with the city by-law in that regard.

The respondent suggests that the thickness of the wall to conform with the city by-law could be obtained by adding to that now existent by means of building up inside and on lot 12 the necessary additional thickness.

The inspector of buildings, called to give evidence on this suggestion, did not seem disposed to say so or at least properly refused to pass thereon until such a concrete case was presented for his consideration.

There is another class of expert evidence on the point which clearly demonstrates to my mind that the adding of a new wall to attain the desired thickness would not add to the strength of the wall because the old wall having been up so many years had settled, and the new supplemental wall would settle and not adhere to the old wall.

Hence it seems to me quite impracticable to rely and act upon the suggestion made and obtain any satisfactory results.

The learned trial judge acted upon the submission of trespass made by the pleadings and gave nominal damages, but at the same time granted an injunction restraining the respondents from continuing the said trespass, but allowed two years in which either to complete the wall in question so as to make it conform with the said agreement and the said order restraining the respondents.

He relied upon the case of *Stollmeyer* v. *Petroleum Development Co.* (1), which was a case of nuisance.

The Court of Appeal by a majority reversed the said judgment; held that substantial damages were the only

(1) [1918] 87 L.J.P.C. 83.

remedy and directed a new trial. Mr. Justice McPhillips would simply have dismissed the appeal.

I respectfully submit that specific performance of the agreement, which is prayed for by appellant's pleadings, and recognized in the judgment of the learned Chief Justice in appeal as a remedy, is the only appropriate remedy.

The remedy by way of damages, from any angle I can look at it, seems entirely inadequate.

They could only be adequate if the appellant should receive damages equal to the value of the part of lot 11 which respondent Wright has used, and the abandonment by appellant of his title thereto, and he or his assigns so driven to build a wall of his, or their, own; and the further cost of breaking up his building already built two stories high and using, pursuant to the agreement, the present wall as a party wall. In short a new agreement being made damages might suffice.

There is a peculiarity in the agreement which seems, I respectfully submit, to have been overlooked by the courts below. It is this: That it is in a sense absolutely unilateral for it gives no rights to the appellant unless and until the respondent has exercised the option given by the second clause of the same which provides that the said respondent Wright may build a party wall, but nowhere binds him to do so.

Having done so the agreement has been so far part performed by him that the occupation of the appellant's land by him, pursuant thereto, enables us to act upon the principles relative to specific performance in a way that absolute justice can be done between the parties which cannot be effectively obtained in any other way.

The theory of trespass does not fit the actual case as presented.

The appellant, much less his assignees, cannot, as is usual in party wall agreements, enter, by virtue of this peculiar agreement, upon the said land and do anything to protect his rights in his own property. The agreement, in effect, forbids that, or any effective remedy except specific performance.

1922
GROSS
v.
WRIGHT.
Idington J.

It was suggested that the appellant having used one part of the wall and refusing to pay therefor had disentitled himself to relief.

The respondent never having built even that so far used, as his agreement bound him to, is not in a position to set up such contention, and cannot claim active relief in that regard, unless and until he has performed his obligations under the agreement.

It has been suggested also, that as the appellant has no present intention of building further, he is not injured and hence has no claim for damages.

Surely that is a most effective answer to the pretention that damages would be an effective remedy.

It is just by such a mode of reasoning that respondent would hope to escape paying adequate damages or a court be disabled from giving what would be adequate relief. So much would be dependent upon speculative estimates that appellant is entitled to have the contract specifically performed in a way which would add something tangible and appreciable to the market value of the remainder of appellant's property.

It is no unusual thing for a man possessed of vacant property, adjoining other vacant property on which the owner desires to build, to enter into an agreement of this kind. If the party wall that is to be erected on such terms is completed and the parties have agreed then there is created an inducement for others seeking for a site to build on to buy the vacant lot with the right to use said party wall and build thereon, but exactly what such an asset is worth is most speculative in its character. When such an agreement is not in fact carried out but the property left by a trick of respondent in the situation this is, the remedy by specific performance being applied, adequate compensation either way may incidentally thereto be given in a way to do approximate justice between the parties.

The respondent Wright claimed in his evidence the right to build two storys additional to the four he had built, and evidenced an intention to do so, but later admitted as fol lows:—

Q. Is the interior structure of the first and second stories such that you could erect two additional stories on your building?—A. What do you mean by first and second?

Q. The ground floor and the next floor?—A. It may have to be reinforced from the first story.

Q. It may have to be reinforced right from the basement?—A. No, I think not.

I assume that under the agreement he may have the right to add two stories provided the foundation, and upward, of the party wall is carried up the two feet or more in thickness.

But his idea of reinforcement by a new wall is entirely contrary to what the evidence already referred to establishes, and is impossible unless the wall is demolished entirely down to the point where the two feet in thickness was departed from.

Unless respondents distinctly abandon such right and intention, and appellant agrees to his doing so, I conclude that the wall must be demolished down to the part where the two feet thickness of wall was departed from and the respondents be ordered to rebuild same of the said thickness of two feet as specified in the agreement and that on or before the 21st October, 1923, according to the specification in the agreement.

And in such event the appellant should pay the respondents then or so soon as determined the half of the cost price of the construction of the said party wall so far as used by the appellant up to said date.

If, however, the appellant is content to refrain from insisting upon the terms named in the agreement and satisfied with a wall twenty-one inches in width from the point where the wall was reduced as originally built from two feet to twenty-one inches in thickness, that then the existent wall shall be demolished down to that point to the top of the four existent stories and in accordance with the terms otherwise specified in said agreement.

In such event as that the wall so carried up will not be in conformity with the original agreement and the same will rest upon the land conceded by the appellant in a greater proportion than upon the respondent's land, due compensation should be made by them for the difference to be

1922
GROSS
v.
WRIGHT.
Idington J.

determined by the local registrar of the court or other party those concerned may select in settling the minutes of judgment herein.

Such wall of reduced thickness shall be available for the use of the appellant or his successors in title according to the terms specified in the agreement as if of the agreed thickness therein contemplated but subject to the foregoing reduction as provided for above.

Of course this suggestion adopting with compensation to appellant for the use of a greater part of his land than would be contributed by respondents can only be acted upon if a twenty-one-inch wall for such a four-story building as existent, or a six-story building as contemplated by respondent, can be made conformable with the city by-law relative to party walls.

Little authority has been cited us by either side but the only case cited by respondents, *Weston* v. *Arnold* (1), seems so far from touching anything involving the principles applicable to this case that one is surprised to find such a citation supposed to be useful herein.

On the other hand the only case cited by appellant, *Shelfer* v. *City of London Electric Lighting Co.* (2), is in point as to the question of preferring the application of the recognized principles of equity jurisprudence relative to specific performance in lieu of damages.

The paucity of citations of authorities is no doubt owing to the extraordinary methods the respondent Wright adopted and pretended to be founded upon a very plain agreement which he chose to violate, though pretending such violation was in pursuance of the terms of the agreement, which gave him contrary to the usual terms of a party wall agreement, a free hand, except in one plainly specified option which he chose to exercise in a most unjustifiable way.

The right to specific performance, so far as the contract in question is concerned once the respondent actually accepted and acted upon the contract so as to render it operative, seems to me elementary law unless so far as met by the contention that damages are an adequate remedy

(1) [1873] 8 Ch. App. 1084.

(2) [1895] 1 Ch. 287.

if this case can be brought within any such case as the courts have so held as a reason for refusal thereof.

The cases on which I rely for the application I am making of the law relative to specific performance being granted when damages are an inadequate remedy, are to be found in Fry on Specific Performance, at p. 26 and following pages, and Dart on Vendors and Purchasers, chapter on Specific Performance and especially at pp. 989 *et seq.* of 5th ed. and cases cited therein.

And as to the application of compensation see Fry on Specific Performance, Part V, c. 3 (6th ed.).

But one case, *Powell* v. *The South Wales Ry. Co.* (1) (to which I am indebted to Dart in Vendors and Purchasers, cited at p. 990 of the 5th ed. thereof) decided by V. C. Wood, seems in principle to cover the whole ground herein both as to the execution of a work, in that case a drain, and the question of compensation.

I regret that we have not had on this branch of the case as I have dealt with it, any argument.

I would therefore suggest, if my views are agreed upon by the majority of the court, that if the parties concerned cannot agree, the minutes may be spoken to.

I would allow the appeal and decree specific performance on the foregoing terms, with costs to the appellant throughout.

DUFF J.—The appellant and the respondent are owners of adjoining building lots in Vancouver and in 1908 they entered into an agreement by which, among other things, the respondent was given the privilege of erecting a wall, described as a party wall, not less than two feet in thickness upon any part of the whole of the boundary line between the two lots, the middle line of the wall to coincide with the boundary line, and the respondent was to have certain rights in relation to this wall when so constructed. The respondent proceeded in due time to build a wall properly placed in conformity with the terms of the agreement, one half on each side of the boundary line and he proceeded in this way to the height of 12 feet. The wall was raised to a further height of 36 feet but with

(1) [1855] I Jur. N.S. part 1, 773.

1922
GROSS
v.
WRIGHT.
Duff J.

the thickness reduced progressively at different stages to 12½ inches at the top. The whole of this reduction of thickness was made on the respondent's side, the wall on the appellant's side presenting an even surface from top to bottom. The appellant having, years afterwards, discovered what had taken place, the action out of which this appeal arises was brought. The learned trial judge granted an injunction directing the demolition of the wall down to the point at which the dimensions of it ceased to conform to the specification of the agreement but stayed the operation of the injunction for two years to enable the parties to arrange matters. The Court of Appeal reversed this judgment substituting an inquiry as to damages. The question on the present appeal is whether or not the judgment of the trial judge should be restored.

I am unable to agree with the view of the case taken by the Court of Appeal. That view was that the plaintiff's sole ground of complaint was that there had been a breach of contract and that as it was not a case in which the court would, according to its practice, order the contract to be specifically executed, the plaintiff's only right was to recover damages. I am unable to agree with this because it seems to me quite clear that the conduct of the respondent was tortious. His authority to enter upon the appellant's land was an authority strictly limited. It was for the purpose of constructing a wall which should be placed half on his side of the line and half on his neighbour's side. This term of the agreement as to the situation of the wall is not a mere incident, it is of the very essence of the licence granted to the respondent. The moment he began to reduce the thickness of the wall on his own side of the line while maintaining unreduced its thickness on the other side he became a trespasser. He became a trespasser because having authority to enter upon his neighbour's property for a certain purpose he was using it for another purpose for which he was not authorized to enter. The principle is well illustrated in the cases touching abuse of rights of way. *Dovaston* v. *Payne* (1). I may add that treating the reciprocal rights and duties of the parties to this agree-

(1) 2 H.Bl. 527.

ment as within the domain of contract alone it is quite clear that the respondent came under an implied undertaking not to make that part of the wall resting on the appellant's land thicker than the part resting on his own.

In these circumstances what is the appropriate remedy? Lord Justice Scrutton has recently pointed out in a case in which the subject of mandatory injunction was a good deal discussed how difficult it is to discover in the decided cases any definition enabling one to draw a line exactly between the conditions in which a mandatory injunction will be granted and the circumstances in which it will not be granted. *Kennard* v. *Cory* (1). In that case the Court of Appeal sustained an order made by Mr. Justice Sargant requiring the defendant to execute certain works in the nature of repairs. The order was made upon an application under leave to apply reserved in the judgment given at the trial and the case largely turned upon the scope of the inquiry as to damages which had been granted and that of the original injunction and leave. The original injunction as interpreted by the Court of Appeal was an exercise of jurisdiction of a somewhat unusual character and affords a more than ample precedent for the order of the trial judge in the present litigation.

The circumstances of this case indeed seem to bring it within the analogy of more than one well marked class of cases in which the Court of Chancery exercised its jurisdiction by granting specific relief without hesitation. I must premise before particularizing that it seems quite clear that the trial judge proceeded on the view that the appellant remained in ignorance down to the time the proceedings were taken of the fact that the agreement had been violated by the respondent. My own conclusion is that the fact was concealed. The suggestion made by the respondent himself that although he knew what was being done he had no design of infringing the appellant's rights is one that postulates a degree of indifference to the rights of others which a court of equity could not treat as innocent. In such matters standards must be objective standards.

(1) [1922] 2 Ch. 1 at p. 21.

1922
GROSS
v.
WRIGHT.
Duff J.

The case therefore falls within the class dealing with the responsibilities of persons who, having obtained an advantage on faith of an undertaking to do something for the benefit of another, seek to retain the advantage while escaping the obligation through some technical loophole. Equity has always in such cases insisted upon the performance of the duty where the advantage could not be surrendered or on the surrender of the advantage where it would not compel the performance of the duty; and an excellent illustration is to be found in those cases in which a railway company having taken lands from a landowner on terms of performing certain works, the court in departure of its general practice to refuse orders for the construction of works has required the railway company to carry out its undertaking. *Wolverhampton and Walsall Ry Co.* v. *London and North-Western Ry. Co.* (1). The case is within that principle in its general features for the respondent has taken advantage of an authority conferred upon him for a strictly defined purpose clandestinely to use it in violation of the good faith of the agreement. Again the work complained of was constructed in breach as we have seen of the explicit terms of the agreement and it is within the analogy of those cases in which it has been held that the court will grant a mandatory injunction to restrain the violation of such an agreement. *Morris* v. *Grant* (2); *McManus* v. *Cooke* (3); *Manners* v. *Johnson* (4).

The case moreover is within the principle of *Goodson* v. *Richardson* (5). The defendant in that case had without the consent of the owner of the soil laid certain water pipes under a highway and Lord Selborne at p. 224 said:—

> I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.

There can be no distinction in principle between getting possession clandestinely and getting possession by agreement for a given purpose and then surreptitiously using

(1) [1873] L.R. 16 Eq. 433.
(2) [1875] 24 W.R. 55.
(3) [1887] 35 Ch. D. 681.
(4) [1875] 1 Ch. D. 673.
(5) [1874] 9 Ch. App. 221.

the possession so acquired for another purpose. There is no doubt, as laid down by the Lords Justices in *Kennard* v. *Cory* (1), that the primary point for consideration in every case where the question is injunction or no injunction is whether or not the wrong complained of is a wrong "for which damages are the proper remedy," to use the phrase of Lindley L.J. in *London & Blackwall Ry. Co.* v. *Cross* (2), that is to say a complete and adequate remedy; and I have no doubt that it would have been competent to the court to direct an inquiry as to damages wide enough to include damages suffered by reason of diminution of the value of the appellant's land. See judgment of the Master of the Rolls in *Kennard* v. *Cory* (1) at p. 13, and of Warrington L.J. at p. 18. But on the other hand as Lord Selborne and the Lords Justices point out in *Goodson* v. *Richardson* (3), a very important element in the value of land may be the right to exclude a particular trespasser or the right of the owner to have specific works erected as in the *Wolverhampton Case* (4). It is quite clear that the trial judge did not think that damages ascertained according to any principle upon which it would be feasible to assess them would afford an adequate remedy. I am unable to say that the Court of Appeal disagreed with this because the Court of Appeal proceeded upon a basis which, with great respect, as already mentioned, was not, I think, the right basis. I am unable to say what view the Court of Appeal would have taken if they had agreed with the trial judge that the conduct of the respondent amounted to an actionable wrong. Being myself far from satisfied that damages would afford adequate reparation, I think the appeal should be allowed and the judgment of the trial judge restored.

ANGLIN J.—By an agreement made between the parties in 1908 the defendant obtained the right to enter upon and utilize 12 inches of the plaintiff's land for the erection of a party wall of not less than 24 inches in thickness of which the centre line should coincide with the boundary line between their respective properties. The defendant built the

(1) [1922] 2 Ch. 1.
(2) [1886] 31 Ch. D. 354 at p. 369.
(3) 9 Ch. App. 221.
(4) L.R. 16 Eq. 433.

1922
GROSS
v.
WRIGHT.
Anglin J.

wall. It was in substantial compliance with the agreement as to the basement and the first or ground floor story. For the second story the wall was only 21 inches in thickness—12 inches on the plaintiff's land and 9 inches on the defendant's land. For the third story the total thickness was 16½ inches of which only 4½ inches was on the defendant's land. For the fourth story the wall had a thickness of 12½ inches of which only one-half an inch was on the defendant's land. A fire parapet carried above the roof and 9 inches thick was wholly on the plaintiff's land.

The wall was perpendicular on the outside, or the plaintiff's side, and he remained unaware that from the second story up it did not conform to the contract until shortly before he brought this action. Nothing amounting to acquiescence, or even to laches such as might disentitle him to relief by injunction has been shewn.

Upon the evidence it is reasonably clear that the existing wall cannot be added to by further construction on the defendant's property so as materially to strengthen it or make it at all equivalent to a wall originally built according to the requirements of the contract. While it seems probable that the wall as constructed would have sufficient strength to serve as a party wall for a four-story building of comparatively light construction, such as an office building, to be erected on the plaintiff's land, it has not been shewn that under the existing by-laws of Vancouver the plaintiff would be allowed to utilize it as a party wall for such a structure. Moreover, it is quite clear that it would not suffice as a party wall for a warehouse or for any other building intended to carry a heavy weight, and probably not for a building of lighter construction of more than four stories in height. Even if in a position to make some use of the wall as a party wall the plaintiff would therefore find himself restricted in the use to be made of his land to an extent materially greater than would have been the case had the party wall been built as agreed upon.

The evidence of the architect, Watson, shews that the departure from the terms of the agreement was decided upon by the defendant when the plans for his building were in course of preparation and before work on the party wall had begun.

Upon these facts the learned trial judge held that a trespass had been committed on the plaintiff's land by the erection of the narrowed wall above the top of the first story, and enjoined the continuance of such trespass, but suspended the operation of the injunction for two years to enable the defendant to make the wall conform to the agreement.

The Court of Appeal (Macdonald, C.J.A., Galliher and Eberts JJ.A., McPhillips, J.A. diss.) being of the opinion that there had been no trespass but merely a breach of agreement, and that the wall as erected

is a good and sufficient wall for the purpose for which it was built,

set aside the judgment of the trial court and substituted for it a judgment awarding the plaintiff such damages (if any) as he had sustained by the defendant's breach of contract,

the amount of such damages, if any, to be arrived at by ascertaining the value to the respondent (plaintiff) of the space the use of which he has been deprived of by the appellant, Wright, building the said wall

as he did, and a new trial to assess such damages was directed.

The plaintiff appeals and asks the restoration of the judgment of the learned trial judge. There is no cross-appeal by the defendant, who, on the contrary concedes that the wall is not built according to the terms of the agreement and, with a view to escaping an immediate injunction, offers either to strengthen it by additional construction on his side, or, if that he not feasible, to rebuild from the second story up such portion of it as the plaintiff may desire to use as a party wall whenever he shall be prepared to carry on his building.

With great respect, if damages should be the appropriate remedy, the measure of them should not be restricted to the value of the space lost to the plaintiff by the wall being narrowed wholly on the defendant's side instead of equally on both sides. In the first place the perpendicularity of the wall on the plaintiff's side was in strict conformity with the contract. That caused no loss of space to which he was entitled under its terms. What should be allowed as damages would be such sum as would, as nearly as money compensation could do so, place the plaintiff in

1922
GROSS
v.
WRIGHT.
Anglin J.

the same position as he would have held had the wall been erected according to the terms of the contract.

But is his remedy properly restricted to the recovery of damages? Is he not entitled to the mandatory injunction which the learned trial judge granted him?

Whatever might have been the case had the original entry been lawful—i.e., had the defendant when he began to build the wall intended to construct it according to the terms of the agreement and determined to narrow it, as he did, only while it was in course of construction,—whether or not upon that state of facts the view taken by the Court of Appeal, that the cause of action is not for trespass but only for breach of agreement, or, perhaps more accurately, for an abuse of licence, would have been correct, (The *Six Carpenters' Case* (1); Smith's Leading Cases, (12 ed. 146, 156) the defendant, having obtained a licence to enter upon the plaintiff's land only for a defined purpose, his entry for a different purpose was in my opinion clearly a trespass, which he continued by erecting the wall as he did and still continues by maintaining it. The determination to build the wall otherwise than as agreed upon having been arrived at before the work was begun, the original entry itself was not authorized by the licence given by the agreement.

Again, the evidence satisfies me that the departure from the agreement was intentional and deliberate and was made for the purpose of securing to the defendant such additional space as he would thus obtain and probably also in order to save him a portion of the cost of constructing a party wall of 24 inches in thickness from top to bottom. The positive testimony on this point given by the architect, Watson, should, I think, be accepted rather than the plaintiff's denial. This case seems to present an instance of wanton disregard of a plaintiff's rights, and perhaps also of an attempt to steal a march on him. *Colls* v. *Home & Colonial Stores, Ltd.* (2); *Jones* v. *Tankerville* (3). To quote the language of Lord Selborne L.C. in *Goodson* v. *Richardson* (4):

(1) [1826] 8 Co. 146a.
(2) [1904] A.C. 179, at p. 193.
(3) [1909] 2 Ch. 440 at p. 446.
(4) 9 Ch. App. 221, at pp. 224-5.

I cannot look upon this case otherwise than as a deliberate and unlawful invasion by one man of another man's land for the purpose of a continuing trespass, which is in law a series of trespasses from time to time, to the gain and profit of the trespasser, without the consent of the owner of the land; and it appears to me, as such, to be a proper subject for an injunction.

The plaintiff has therefore established an invasion of his legal right not trivial either in its character or in its consequences—if indeed the latter need be considered in a case of trespass such as this, *Goodson* v. *Richardson* (1). No doubt, unless under circumstances of peculiar aggravation, (Kerr on Injunctions, 5th ed., pp. 43-4) the jurisdiction to grant a mandatory injunction, especially where it involves subjecting the defendant to such serious loss as the tearing down of the party wall must in this instance entail, should be exercised with great caution and only if the remedy by damages is inadequate. *Colls v. Home & Colonial Stores* (2). But the jurisdiction itself is undoubted even when the injury has been completed before action is brought, *Durell* v. *Pritchard* (3); *City of London Brewery Co.* v. *Tennant* (4), and such an order has more than once been made. *Baxter* v. *Bower* (5); *Attorney General* v. *Parish* (6). It seems to be the remedy to which a plaintiff is entitled where the defendant has deliberately placed an unauthorized erection on his land. *Holmes* v. *Upton* (7).

Here we have a case of wilful trespass involving substantial injury, adequate compensation for which it is almost impossible to estimate—so much so that the removal of the wall so far as it is not in compliance with the agreement appears to be the only remedy by which justice can be done to the plaintiff. *Shelfer* v. *City of London Electric Lighting Co.* (8). The court has not the right to compel the plaintiff to part with his exclusive legal right over his own land for something different from that for which he bargained as the consideration for foregoing

(1) 9 Ch. App. 221, at p. 224.
(2) [1904] A.C. 179, at pp. 193, 212.
(3) [1866] 1 Ch. App. 244.
(4) [1873] 9 Ch. App. 212, at p. 219.
(5) [1875] 23 W.R. 805; 44 L.J. Ch. 625.
(6) [1913] 57 Sol. J. 625.
(7) 9 Ch. App. 214n.
(8) [1895] 1 Ch. 287, at pp. 310-11, 322.

1922
GROSS
v.
WRIGHT.
Anglin J.

it. *Cowper* v. *Laidler* (1). That in effect will be done if the mandatory injunction sought be refused. Any damages which the plaintiff could reasonably expect to recover would not give him full compensation for the injury done him should the wall be allowed to remain as it now stands.

Under these circumstances, although the expense to which the defendant will be put may be considerably greater than any actual benefit the plaintiff may derive, the plaintiff insisting on the relief of a mandatory injunction to restrain continuation of the trespass is in my opinion entitled to it. *Woodhouse* v. *Newry Navigation Co.* (2).

The defendant at the trial and again in this court offered, if allowed for the present to retain the wall as it stands, an undertaking to rebuild it so as to conform to the contract from the top of the first story upwards whenever the plaintiff should determine to carry up the one-story building now erected on his land. But such an undertaking would not be satisfactory; nor, if put in the form of a judgment, would it afford the plaintiff adequate relief. The agreement is registered against his land. He may at any time desire to sell it and an outstanding question as to the party wall would probably have an adverse effect, if not on the prospect of sale itself, at least on the price obtainable.

The defendant has not so conducted himself as to be an object of sympathy. If the mandatory injunction to be granted will entail serious loss to him he has only himself to thank for the situation in which he is placed. I accept the view of the late Mr. Justice Clement that a stay of the operation of the injunction for a period of two years is reasonable in view of the fact that the plaintiff appears to have no present intention either of proceeding with his building or of selling his land.

The appeal should be allowed with costs here and in the Court of Appeal and the judgment of the trial judge restored, modified, if necessary, so that demolition above the

(1) [1903] 2 Ch. 337 at p. 341.

(2) [1898] 1 Ir. R. 161, at pp. 173, 174.

point at which the wall ceases to be not less than 24 inches in thickness will be directed, as the learned judge no doubt intended.

BRODEUR J.—The parties in this case, who are owners of adjoining lots, agreed in 1908 that a party wall of at least two feet in thickness should be built by Wright one-half on each lot. The first story was built according to the agreement; but in the upper stories Wright narrowed the wall on his side and kept it perpendicular on Gross' side. In that way, Wright gained some space for his own property.

Gross, having recently discovered that Wright had not properly fulfilled the agreement, took the present action for trespass, for demolition and for specific performance.

The trial judge maintained the action, but the Court of Appeal decided there was no trespass but simply a breach of agreement which entitled Gross to damages for the loss of space occasioned by the wrongful building. Gross appeals from this judgment.

It is in evidence and it was so found by the trial judge that the wall as it now exists is of sufficient strength to carry any structure Gross is ever likely to put on his lot; and if I could satisfy myself that Wright was in good faith in constructing the wall as he did and in giving to himself more roomy space, I would be inclined to leave the wall as it is upon payment of reasonable indemnity (*Delorme* v. *Cusson* (1)). But the evidence of Wright's architect shows that he was instructed to construct the wall as he did in order that he (Wright) would have more room on the inside. Damages could be substituted for a mandatory injunction; but where, as Kerr on Injunctions, 5th ed. p. 44 says,

> the defendant has been guilty of sharp practice or unfair conduct or has shewn a desire to steal a march upon the plaintiff,

then the remedy should be by injunction. The courts are not instituted for legalizing wilful wrongful acts; and, as it is stated in *Shelfer* v. *City of London* (2),

(1) [1897] 28 Can. S.C.R. 66. (2) [1895] 1 Ch. 287.

1922
GROSS
v.
WRIGHT.
Brodeur J.

the court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is willing and able to pay for the injury he may inflict.

Wright, in virtue of his contract with Gross had a licence or authority to enter on his neighbour's property for a certain purpose; but this did not justify an entry for another purpose and the doing of acts not authorized by the license. (Cyc, vol. 38, p. 1061.)

The law is to the effect that if a land is subject to a certain right, a person who unlawfully uses such land for any purpose other than that of exercising the right to which it is subject is a trespasser. (Halsbury, vol. 27, p. 847.)

Applying these principles to the present case, it seems to me that the action instituted by Gross should be maintained, that the defendant should be considered as a trespasser and that all the wall which is not in conformity with the contract should be demolished.

The appeal should be allowed with costs of this court and of the Court of Appeal and the judgment of the trial judge should be restored, with a modification which would make the formal judgment clearly carry out the decision of the judge as expressed in his notes.

MIGNAULT J.—In my opinion, in building his wall as he did, the respondent committed a trespass on the appellant's land for which the only adequate remedy is an injunction to the effect indicated in the reasons for judgment of the learned trial judge. I would allow the appeal with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *McInnes & Arnold.*

Solicitors for the respondent: *Gwillim, Crisp & McKay.*