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LEGAL STATUS OF THE SPITE FENCE
IN OHIO

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It is generally assumed, on the authority of *Letts v. Kessler*,¹ that spite fences in this state are within the law. That case was decided in 1896 and has never been overruled. But the world moves on,² and so does the law;³ and no one doubts that courts are daily handing down decisions that would have been impossible in 1896. It may not be amiss, therefore, to consider whether the bar is justified in taking for granted that *Letts v. Kessler* would be followed.

HISTORICAL SUMMARY

The history of the law in this country on the question involved is outlined in a note in the Virginia Law Review,⁴ from which we quote:⁵

"It was early established in this country in regard to

¹54 Ohio St. 73, 42 N. E. 765 (1896). The syllabus is as follows: "L and K owned adjoining lots, and L erected on his lot a board fence reaching to the roof of K's house which stood on the line of the two lots, which fence shut off light and air from the windows of the house of K to its injury, which fence was so erected by L for no useful or ornamental purpose, but from motives of un-mixed malice toward K. In an action by K against L to compel the removal of the fence. *Held:* That L had a legal right to erect and maintain such fence, and that neither law nor equity could compel its removal."

²"...will anyone venture to say that there is any thing anywhere on this earth, which will afford a fulcrum for us, whereby to keep the earth from moving onwards." NEWMAN, APOLOGIA PRO VITA SUA, 270.

³"Harly a rule of today but may be matched by its opposite of yesterday." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS, 26.

⁴11 Va. L. Rev. 122 (1924).

⁵The cases in brackets are cited in the footnotes to the text quoted.
spite fences that, apart from statute, an action would not lie therefor. This was laid down as the law in every jurisdiction, with one exception [Michigan], in which the case arose during the past century. As in the case of spite wells it was held that 'Bad motives in doing an act which violates no legal right of another, cannot make that act a ground of action'.

"... In [Michigan] ... the court had in 1888 taken the bit in its teeth and decided that spite fences were actionable if malice be shown to be the sole motive for their erection. (Burke v. Smith, 69 Mich. 380, 37 N. W. 838.) ... And although this case was decided by an evenly divided court, it was subsequently affirmed and approved by three later decisions in the same jurisdiction. (Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381; Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Peck v. Roe, 110 Mich. 52, 67 N. W. 1080.)

"The Michigan rule stood alone and in direct conflict with the rule in all other jurisdictions where the case had arisen. In 1909, however, the Supreme Court of North Carolina in a powerful decision upheld and approved the reasoning adopted by the Michigan judges and reversed the holding of the lower court. [Barger v. Barringer, 151 N. C. 433, 66 S. E. 439.]

"This case appears to mark a turning point in the law.

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8In a number of jurisdictions the matter is governed by statute. The cases arising under these statutes are beyond the scope of this paper. We confine ourselves to a consideration of the question from the point of view of the common law.

9It may be observed in passing that, abstractly, this statement is a mere truism. In practice it either gets us nowhere or begs the question. The issue in any case is whether a legal right of the plaintiff has been violated. When that has been determined the case is ended. The second paragraph on page 81 of the opinion in Letts v. Kessler is open to this criticism.
In 1912, when the question next arose, the Alabama court [followed the Michigan and North Carolina cases. Norton v. Randolph, 176 Ala. 381, 52 So. 283].

"Since this case the question has arisen only twice apart from statute[^10] [Hibbard v. Halliday (1916), 58 Okla. 244, 158 P. 1158; Daniel v. Birmingham Dental Mfg. Company (1922), 207 Ala. 659, 93 So. 652]. In both cases the Michigan rule was followed and approved.

"In view of the fact that for more than twenty years a right of action has been held to lie in every case of spite fences arising under the common law, it is submitted that the weight of modern authority favors the Michigan view which appears clearly the sounder on principle and natural justice."

**Present State of the Law**

Since the publication, in 1924, of the article just quoted from, no case has been decided on the precise point in question. In two cases[^12] language has been used indicating an adherence to the obsolescent view that spite fences may be erected with impunity, but in neither case was the question before the court for decision, so that what was said must be classed as *dicta*.

This, then is the situation: there is not a single decision in the last twenty-one years supporting the rule of Letts v. Kessler. Every case in point decided since 1906[^13] is authority for the proposition that a spite fence is

[^10]: In *Horan v. Byrnes*, 72 N. H. 93, 54 Atl. 945 (1903), the plaintiff relied upon a statute which provided that a fence erected or maintained to annoy the owners or occupants of adjoining property, should be considered a nuisance. The question at issue was the constitutionality of this enactment, which was upheld, so that the plaintiff prevailed. The case is nevertheless important for our purpose because the court clearly indicated that, in its view, the plaintiff would have had a right of action even without the statute.

[^11]: This holding was foreshadowed by the earlier case of *Smith v. Speed*, 11 Okla. 95, 66 Pac. 511 (1901).


[^13]: *Metz v. Tierney*, 13 N. Mex. 331 83 Pac. 788 (1906), is the last of the cases confirming the legality of the spite fence.
actionable. There is no doubt, therefore, that the weight of modern authority is against the spite fence.

**Reason For the Modern Rule**

The considerations which have led the courts to abandon the view that a man might build a fence for no other reason than to injure his neighbor and be protected by the law in so doing, are well stated by Dean Pound.

"To the nineteenth century way of thinking the question was simply one of the right of the owner and of the right of his neighbor. Within his physical boundaries the dominion of each was complete. So long as he kept within them and what he did within them was consistent with an equally absolute dominion of the neighbor within his boundaries, the law was to keep its hands off. For the end of law was taken to be a maximum of self-assertion by each, limited only by the possibility of a like self-assertion by all. If, therefore, he built a fence eight feet high cutting off light and air from his neighbor and painted the fence on the side toward his neighbor in stripes of hideous colors, this was consistent with his neighbor's doing the same; it was an exercise of his incidental *jus utendi*, and the mere circumstance that he did it out of unmixed malice was quite immaterial since it in no way infringed the liberty or invaded the property of the neighbor. But suppose we think of law not negatively as a system of hands off while individuals assert themselves freely, but positively as a social institution existing for social ends. Thinking thus, what claims or demands or wants of society are involved in such a controversy? There is an individual interest of substance on the part of each. Each asserts a claim to use, enjoy and get the benefit of the land of which the law recognizes him as the owner. Also the one asserts an individual interest of personality, a claim to exert his will

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14Pound, *Spirit of the Common Law*, beginning at page 196. See also the article by Dean Ames, *infra*, note 20, at page 415, and note 4 on same page.
and exercise his faculties freely and hence to employ them in such building operations upon his land as he thinks proper. What shall society say to these claims? If we think in terms of social interests and of giving effect to individual claims to the extent that they coincide with or may be identified with a social interest, we shall say that there is a social interest in the security of acquisitions, on which our economic order rests, and a social interest in the individual life. But that security of acquisitions is satisfied by use of property for the satisfaction of wants of the owner which are consistent with social life; or at least it is not seriously impaired by so limiting it in order to give effect to other wants which are consistent with social life. And the individual life, in which there is a social interest, is a moral and social life. Hence the social interest does not extend to exercise of individual faculties for anti-social purposes of gratifying malice. The moment we put the matter in terms of social life rather than of abstract individual will, we come to the result to which the law has been coming more and more of late throughout the world."

**Ohio Cases**

There are, in addition to *Letts v. Kessler*, two Ohio reported cases in point, namely, *Peck v. Bowman*\(^\text{15}\) and *Dawson v. Kemper*.\(^\text{16}\) The syllabus of the former, decided in 1889 by the Common Pleas Court of Cuyahoga County, is as follows:

"The erection of a high board fence near to the lot line of the defendant, though entirely on his premises near the windows of a neighboring house to shut out the view therefrom, not from necessity, but from malice alone, is a nuisance; it is an unjustifiable use of one's premises, and will be enjoined."

In the latter the Common Pleas Court of Hamilton

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\(^\text{16}\) 32 Wk. L. Bull. 15 (1894).
County refused to follow *Peck v. Bowman*, which had been approved by the Circuit Court in the *Letts* case. The trial court was affirmed by the Circuit Court, but that court expressly found that the defendant had not acted maliciously.

A careful reading of the opinion in *Letts v. Kessler* will show that the court rested its decision on three propositions, substantially as follows: 16a

1. A malicious motive cannot render actionable an act otherwise not actionable.
2. By the weight of authority a spite fence is not actionable.
3. The case of *Burke v. Smith*, having been decided by a split court, is not an authority.

We shall consider these propositions in order.

1. *A malicious motive can not render actionable an act otherwise not actionable.* 17 Such statements have no virtue in their own right, but only insofar as they summarize what the courts have held in concrete cases. The proposition in question is nothing if not a generalization of the decisions in the various classes of cases in which it has been sought to ground a cause of action upon malice. 18 If it represents the holding in these cases, or in a substantial majority of them, it is to that

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16 a. Counsel for the injured party urged the maxim, "Enjoy your own property in such a manner as not to injure that of another person." The court answered by saying "that the maxim should be limited to causing injury to the *rights* of another, rather than the *property* of another . . .". There is no basis for any distinction between "property" and "rights". Property in land is simply the sum total of the legal rights, privileges, powers and immunities of the owner pertaining to the land. See HOFFFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923), 28 and 29.

17 The court did not use this phraseology. We think, however, that it fairly and conveniently expresses what the court said.

18 What follows clearly excludes the possibility that the generalization reflects one of those basis postulates which ultimately govern the course of decision.
extent helpful as eliminating the necessity of recourse to the cases, which, nevertheless, are themselves the real authority. If it does not, then it has no place in legal consideration.

The proposition may, however, be a correct generalization of the decisions in the several classes of cases in which the effect of malice has been considered, taken as a whole, and at the same time be utterly untrue as regards one or more of the classes of cases making up the entire group. In a case belonging to any such class it is obvious that the generalization can not stand against the authority of the decisions in analogous causes.

Now the modern cases hold that if a plaintiff can show a fence of which he complains was erected from motives of unmixed malice, he has a cause of action. It is certainly no answer to these cases to repeat the generalization we are discussing, in whatever form it may be expressed. If the authority of these cases is to be met, it must be by recourse to the earlier cases in which the legality of the spite fence was affirmed.

It is clear then that when the question arises the contest will be between the modern precedents on the one hand and the older precedents on the other. The generalization in question will have no bearing upon the decision, unless it is believed to state the "general rule", in which event it might determine the issue against an acceptance of the modern view.

Is there any basis for the generalization? Dean Ames considered this question in an article published in 1905.20

19 Reliance upon the generalization, under the circumstances, would suggest a story that is told of an indigent colored prisoner. The lawyer appointed to defend him proved sympathetic and, at the conclusion of the darky's account of what had happened, exclaimed, "Why, they can't put you in jail for that!" His client readily assented, but pointed out that he was there.

20 Ames, How Far an Act May be a Tort because of The Wrongful Motive of the Actor, 18 Harv. L. Rev. 411 (1905).
More particularly his inquiry concerned certain statements of the judges in *Allen v. Flood*,¹¹ of which the following remark of Lord Watson is representative:

"Although the rule may be otherwise with regard to crimes, the law of England does not, according to my apprehension, take into account motive as constituting an element of civil wrong."

This statement Dean Ames "tested by cases in which the actor in wilfully causing damage to another was dominated by a wrongful motive". His investigation of these cases led him to the following conclusion:

"If this essay has accomplished its purpose, it is made clear that the *dictum* that our law never regards motive as an element in a civil wrong is as far from the truth as would be the statement that malevolently to damage another is always a tort."

The tendency since that article was written may be summarized in the words of Professor Burdick:²²

"There is, however, increasing recognition of the principle that intentional damage is *prima facie* tortious and requires a justification.²³ . . . . . Intentional damage having been inflicted, the justification is the benefit intended. Such intended benefit will justify the intended harm. But, where there is no intended benefit, the harm will be actionable."²⁴

¹¹ (1898) A. C. 1.
²³ "It is a "commonplace that the intentional infliction of temporal damage... . . . is actionable if done without just cause." HOLMES, op. cit., supra, note 9, at p. 119. See also 7 Minn. L. Rev. 600 (1923), note.
²⁴ "The gratification of ill-will, being a pleasure, may be called a gain, but the pain on the other side is a loss more important. Otherwise, why allow a recovery for a battery." HOLMES, op. cit., supra, note 9, at p. 124.
A conspicuous illustration of this fact is found in *Tuttle v. Buck*25 and *Dunshee v. Standard Oil Company*,26 both of which are authority for the following,27 which we quote from the opinion in the former case:

"To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort."

Another striking case is *American Bank & Trust Co. v. Federal Reserve Bank*.28 The plaintiffs complained that the defendant had determined to accumulate checks drawn upon them and present the checks for payment all at one time, which would seriously embarrass the plaintiffs, if not drive them out of business. The bill, which sought an injunction, contained allegations to the effect that the defendant's proposed course of action was in the nature of a reprisal against the plaintiffs for not becoming members of the federal reserve system. The defendant contended that the holder of a check has a right to present it to the drawee bank for payment over the counter and that however many checks he may hold he has the same right as to all and may present them all at once, whatever his motive or intent. The court held that the bill stated a cause for an injunction and reversed the decree dismissing it for want of equity.

We do not know of any attempt to tabulate the various

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25107 Minn. 145, 119 N. W. 946 (1909).
26152 Iowa 618, 132 N. W. 371 (1911).
27Compare AMES, op. cit., supra, note 20, at p. 420.
28256 U. S. 350 (1921).
types of cases in which the legal significance of a malicious motive has been passed upon, and, by separating those in which the plaintiff was allowed a recovery on that ground from those in which judgment was for the defendant, to strike a mathematical balance. Nor do we propose to enter upon any such undertaking, which, as we see it, would serve no useful purpose, for the reasons mentioned in the next paragraph. This much, however, is certain, namely, that there are many classes of cases in which a recovery is allowed on the sole ground that the defendant acted maliciously. That is enough to establish the invalidity and misleading character of the generalization under discussion.

It is objectionable for another reason. A generalization, if it serves any purpose, does no more than obviate the necessity of going back to the cases. Obviously, if cases are not analogous one to another, nothing but confusion can result from generalizing them. Now the various classes of cases involving the legal effect of malice differ widely from each other, not only as regards the facts but also as regards the interests affected and the considerations involved, and, therefore, do not admit of measurement by the same yardstick. To illustrate: A creditor pursues his debtor with all the rigor of the law in order to ruin him, knowing that, with some indulgence, he would realize more himself and enable his debtor to avoid bankruptcy. The malicious motive of the creditor is legally of no significance. The debtor is legally bound

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29aIn many of the cases containing language which supports the generalization, the act complained of was not motivated solely by malice. The decisions in these cases, therefore, are not pertinent to our inquiry.
to pay and can not claim damages for being brought into court on account of his breach of duty.\textsuperscript{30} Now take this case: a passenger on a street car, having been subjected to outrageous treatment by the conductor, reports the latter's misconduct. The fact that, in so doing, he gratifies a desire for revenge, born of his humiliation, does not make him a tort-feasor.\textsuperscript{31} Obviously these cases have nothing in common and the holding in the first could not with any show of reason be cited as an authority for the second. Both decisions rest on grounds of policy,\textsuperscript{32} but the grounds are not the same. There is, accordingly, no room for a generalization of the cases in which the legal significance of malice has been passed upon.

It follows that there is no "general rule" that could logically be relied upon to give aid and comfort to the older spite fence cases.

Our Supreme Court has already indicated that it would not be fettered by the generalization we have been considering. In Jaeger v. Topper,\textsuperscript{33} the court said:

"It is familiar law that every man is permitted to do what he will with his own property \textit{if} he uses it without purpose to injure his neighbor, \ldots\ldots."

(Italics ours).

A more important case is \textit{American Mortgage Company v. Rosenbaum}.\textsuperscript{34} Rosenbaum, a stockholder in the mortgage company, had demanded that he be permitted to make an examination of the books and papers of the corporation. Meeting with refusal, he sought a mandatory injunction

\begin{footnotes}
\item[31] \textit{Lancaster v. Hamburger}, 70 Ohio St. 156 (1904).
\item[32] \ldots in all such cases the ground of decision is policy; and the advantages to the community, on the one side and the other, are the only matters really entitled to be weighed." \textit{Holmes, op. cit., supra}, note 9, at p. 130; Ames, \textit{op. cit., supra}, note 20, p. 414.
\item[33] 103 Ohio St. 350, 359, 133 N. E. 82 (1921).
\item[34] 114 Ohio St. 231, 151 N. E. 122 (1926).
\end{footnotes}
against the company, relying upon section 8673 of the General Code, which then provided in part:

The books and records of such corporation at all reasonable times shall be open to the inspection of every stockholder.

The company took the position that Rosenbaum sought the information which the books and papers would disclose, in bad faith and in order to make a personal profit at the expense of the corporation, and that, therefore, he was not entitled to it. Rosenbaum contended that the statute gave him an absolute legal right and that his motive in exercising that right was immaterial, citing Cincinnati Volksblatt Company v. Hoffmeister, in which the court said:

"Ordinarily the motive, or purpose, of the party who is in the exercise of, or is about to exercise, a clear legal right, is unimportant. Letts v. Kessler, 54 Ohio St., 73, and authorities cited; ......... A like rule prevails as to one's pursuit of an equitable remedy."

The court, in effect, overruled the statements just quoted, which it classed as dicta, and held that Rosenbaum was not entitled to the relief sought, on the ground that he was actuated by improper motives.

It will be noted that the language of the statute is absolute and unconditional. There would seem to be no way, however, in which a stockholder can compel compliance therewith, except through the processes of equity. But the court held that equity will not intervene if the stockholder is actuated by improper motives. An un-

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62 Ohio St. 189, 56 N. E. 1033 (1900).

The case was decided on demurrer to the answer. Hence the actual state of mind of Mr. Rosenbaum was not passed upon.
enforceable legal right is a contradiction in terms.\textsuperscript{37} The very existence of the right to inspect is, therefore, made to depend upon the motive of the stockholder. This is a clear repudiation of the generalization we have been discussing.

2. \textit{By the weight of authority spite fences are not actionable}. That this is no longer true is clearly shown by the authorities we have already cited.

3. \textit{The case of Burke v. Smith, having been decided by a split court, is not an authority}. As to this it need be said only that the question has three times been raised in the Supreme Court of Michigan since \textit{Burke v. Smith}, and that each time the court has unanimously followed its decision in that case.\textsuperscript{38}

The decision in \textit{Letts v. Kessler} is, therefore, left without a base. But \textit{cessante ratione legis cessat ipsa lex}. The

\textsuperscript{37}See \textit{Holmes, op. cit., supra}, note 9 (p. 168), "One of the many evil effects of the confusion between legal and moral ideas, \ldots \ldots is that theory is apt to get the cart before the horse, and to consider the right or the duty as something existing apart from and independent of the consequences of its breach, to which certain sanctions are added afterward. But \ldots a legal duty, so called, is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; and so of a legal right. \ldots \ldots (p. 170). I do not say that there is not a wider point of view from which the distinction between law and morals becomes of secondary or no importance, as all mathematical distinctions vanish in the presence of the infinite. \ldots \ldots \ldots (p. 171). If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience. \ldots \ldots \ldots for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it—just as we talk of the force of gravitation accounting for the conduct of bodies in space. \ldots \ldots \ldots (p. 173). The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."

court is accordingly free to consider the question at issue upon its merits and to adopt the modern rule, which is the rule that originally prevailed in this state. We submit that it should do so—"There is no general policy in favor of allowing a man to do harm to his neighbor for the sole pleasure of doing harm."39

39Holmes, op. cit., supra, note 9, at p. 124.