THE RIGHT TO A PRIVATE LIFE AND THE FORMS OF PROPERTY VIOLATION IN COMMON LAW

Smărăndiţa-Elena CIUDIN-COLŢA
Faculty of Law, "Alexandru Ioan Cuza" University of Iaşi
Iaşi, Romania
smarandaro@yahoo.com

Acknowledgement*:* *This work was supported by the strategic grant POSDRU/159/1.5/S/141699, Project ID 141699, co-financed by the European Social Fund within the Sectorial Operational Program Human Resourses Development 2007-2013*

Abstract: *A major part of the legal provisions regarding servitudes is originated in the contractual approaches, established by the middle of XIX-th century in England and in the United States of America, when people attempted to avoid the onerous rules concerning the transfer of property rights. This document approaches the tight connection between servitudes, as limitations of property rights` exertion, the right to a private life and the forms of trespassing and nuisance. Although the latter ones, as forms of interfering with property rights, appear to be similar, they are characterised by several elements that distinguish one from the other. The fact that, in certain cases, the matter of public interest is being raised in order to justify a private activity, that interferes with a private property, represents a challenge for the courts, as they are in a less comfortable position when to decide the person who will have to bear the losses.*
Keywords: *servitude, real covenants, equitable servitudes.*

1. PRELIMINARY CONSIDERATIONS ON THE NOTIONS OF "REAL COVENANTS" AND "EQUITABLE SERVITUDES"

Denominations such as "easements", "real covenants" or "equitable servitudes" are used so as to design the category of interests specific to the "servitudes", which offer to the holder "the right of using or averting the use of a property, property that he does not manage and he does not possess" (e.g.: the right to cross the neighbor's field).

Some theoreticians assess servitudes as representing non-possessory interests related to the property, explaining this argument by reference to the situation of the railway companies or those whose object is pipe fitting, and which succeed to establish their itineraries through the acquirement of such servitudes.

The distinction between possessory and non-possessory interests is based on the general or special nature of the interest manifested by the holder. Therefore, the rented properties constitute an example of possessory interests regarding the property, as the rent involves a general right of user, while servitudes, as non-possessory interests, involve a particular right of user, specially determined or limited [1].

Most of the servitudes recognized by the common law system were rather affirmative than negative.

In the English law, the negative servitudes were limited to five types: light, air, lateral support, subjacent support servitudes and servitudes regarding the discharge of an artificial watercourse. Affirmative servitudes are those who let visible signs on the property while negative servitudes do not let such marks, situation which can determine displeasing surprises regarding the legal situation of the field to the subsequent purchasers.

It is assessed that the limitation of the category of negative servitudes is due to absence of a recording system of such servitudes in England.

The denomination of "real covenants", in Romanian "promisiuni reale", has its roots in the promises regarding the "land is real property", promises inserted in the contracts signed between the parties.

"Equitable servitudes", in Romanian "servituţi în echitate", denomination used by the English High Court of Chancery, known as "the Court judging in equity", originates from the civil law tradition and to a smaller extent from the common law system, designating certain rights offered to a person, of using the field that he does not manage and he does not possess.

The term of "servitude" is used nowadays so as to designate both "real covenants" and "equitable servitudes", the term deriving from the civil law and not from the common law.

Nowadays, there are a lot of common points between the two notions, their merger into one concept only, that of "servitude" being preferred.

2. THE RIGHT TO A PRIVATE LIFE

"The right to confidentiality" or "the right to intimacy" are notions hard to define.

The common law system hardly acted with regard to the definition of the notion of "private life", so that the instances were inevitably influenced by the provisions of art 8 of the European Convention on Human Rights, "the right to respect for his private and family life", according to which "1. Any person has the right to respect for his private and family life, for his home and correspondence. 2. The involvement of a public authority in the exercise of this right is only admitted if stipulated by the law and it constitutes, in a democratic society, a necessary measure for the national security, the public safety, the economic welfare of the country, the defense of the order and the prevention of the criminal acts, the protection of the health, ethics, rights and freedoms of the other" [2].

The most significant incursion with regard to the definition of the right to a private life, in the United Kingdom of Great Britain, is represented by "Calcutt Report" of 1990 [3], which, even if it concerned first of all the right to self-determination of the media, a key role was occupied by the question regarding the violation of the right to a private life. This right was defined as representing the antithesis of what is "public", respectively the aspects regarding the individual dwelling, family, religion, health, sexuality, "legal and financial business" of the individual. The French laws adopt, in general, this approach.

Calcutt Report defined the right to a private life as representing individual's right of being protected against any intrusion in his life or in his own business, or in his family's business, intrusion which can be performed through direct fixed means or through the publication of information.

On the historical axe of transformation of the legal rule, the English laws do not stipulate special protections for the right to a private life. Such protection was accidentally granted by means of the actions sanctioning trespass, nuisance, denigration or passing off.

3. "TRESPASS TO LAND"

"Trespass to land" represents an insubstantial interference in the possession exercised by a person on a field.

We must notice that, for historical reasons, the prejudice is attached to the possession and not to the property right on the field, the intrusion having to be direct.
For instance, if a person throws stones on a field belonging to another person, the former commits "trespass", but if the same person allows the growth of the branches of his trees on the neighbor's field, this situation is called "nuisance" and the prejudice has to be proved.

"Trespass to land" was one of the first actions appearing in the common law system. Several cases reaching before the Courts and regarding trespass to land presented disputes between neighbors. Such cases which regarded mostly property bordering, could involve several legal complications, especially in the existence of older assignments, situations classified as being extremely time consuming.

It is deemed that, in case of trespass to land, the prejudice produces *per se*, so as the claimer is not obliged to prove the prejudice to the field, being essential the fact that such violations are deemed to be intentionally produced by the defendant.

There are several forms of trespass to land: through the entrance to the field belonging to another person, through remaining on the field and through placing objects on such field.

In all this cases, there is no legal ground for the manner of acting.

3.1. Trespass to land, exercised through the entry without having the right

The smallest violation of the border between the properties shall be deemed sufficient so as to retain a trespass, such as, for instance, placing one hand on a window or supporting a ladder from the wall belonging to another person (*Westripp v Baldock* [1938] 2 All ER 799) [4].

This form of trespass can also be committed through the abusive exercise of the right of entering on another property. Therefore, a person who used the road for other purposes than passage is deemed to have committed a violation of the property right, exercised by his holders, on the subsoil.

The entry on another property can be performed above or through the subsoil of the concerned field, but also through the above-ground space concerning the field.

The notion of "land" is defined, according to the Law of Property Act 1925, as being the "Land of any tenure, mines and minerals, corporeal and incorporeal hereditaments").

It includes any building or elements attached to the field, the above-ground space concerning the field and the subsoil.

With regard to the above-ground space, it was deemed, in the case *Kelsen v Imperial Tobacco Co Ltd* [1957] 2 QB 334, that the defendant committed trespass as he allowed the display of a high dimension advertisement interfering with claimant's property, at soil level and immediately above soil level.

3.2. Trespass through remaining on the field occurs when the right of entry in that location ceases.

Within these conditions, the refusal or the omission of leaving the field constitutes "trespass".

If the person entering on someone else's property is empowered by an authority, according to the law, and if he abuses from the granted capacity, he shall be treated as a "trespasser" from the moment in which he entered to that particular property (*The Six Carpenters Case* (1610) 8 Co Rep 146).

This type of violation is deemed "trespass *ab initio*" and it does not apply if the defendant entered with the permission of the occupant, even if he did not have the authority conferred by the law.

3.3. The third form of "trespass" concerns placing different objects on someone else's field.

In the case *Holmes v Wilson* (1839) 10 A & E 503, the defendants built a bridging so as to prevent the submergence of a road.

For its performance, it was necessary to use claimant's field, the latter suing them and recovering his prejudice. Nevertheless, the defendants did not eliminate the bridging, so they were sued again. Even if they stated that the action is prescribed, their defense was not taken into consideration, as it was deemed that it was a continuous violation, which persisted over the entire duration of the work on claimant's field.

This action – "trespass to land" belongs only to the person possessing the field.

The granted concession right, e.g. for building a construction shall not be a sufficient proof of the possession, which justifies action promotion. The holder of the field shall not bring the action of trespass while the possession belongs to the tenant.

4. "NUISANCE"

Defined as a property violation too, the notion of "nuisance" is used for the situations in which this property violation is indirectly performed. There are three types of such actions: statutory nuisance, public nuisance and private nuisance.

With regard to the first category, statutory nuisance, a number of actions based on such violations was created through different statutes, mostly *ad hoc*, and they generally

appeared as a pressing social need. Several actions of this type were created through the Public Health Acts of 1845 and 1875, or through Clean Air Act of 1956, Control of Pollution Act of 1974, respectively Clean Neighborhoods and Environment Act of 2005, the latest containing provisions regarding environment quality improvement.

Such actions are made available to the local authorities, who intervene when the injured persons formulate a complaint with regard to the prejudices suffered and which can be the result of the noises or noxae.

The public nuisance has the nature of a crime.

The Court defined the public nuisance as representing that violation affecting the reasonable comfort and life quality of a category of the subjects of His Majesty, the activities of the defendant being therefore classified.

The common feature between the public nuisance and the private nuisance is deemed to be the requirement for the observance of the comfort and life quality degree.

The private nuisance designates those situations of illegal interference with the right of a person of using and enjoying of his field or any right in relation to the previously mentioned person. We talk about a continuous, illegal and indirect interference with another person's right of enjoying of his field, the proof of the prejudice being necessary.

The temporary construction works can lead to nuisance, but the constructors shall not be responsible if they prove that they have taken all the measures so as to avoid causing prejudices to the neighbors.

We must notice that, if the prejudice is mostly the consequence of a high degree of "sensitivity", characteristic to the property of the claimant and to a smaller extent the consequence of defendant's attitude, we assess that no nuisance is committed.
Nevertheless, if the normal use of the field was affected by the activities developed by the defendant, the action shall be admitted.

In the case *McKinnon Industries v Walker* (1951) 3 DLR 577, a culture of orchids was affected by the smoke resulted on the neighbor's field, and, even though the plants were unusually delicate, the claimant won motivating that inclusively the common plants, in those circumstances, would have had the same destiny.

So as to establish the existence of a prejudice, the claimant must prove a substantial interference in his right of using and of enjoying of the field, case in which the Court shall enforce the equity criterion, taking into account at the same time a range of elements, such as: interference duration, sensitivity degree of claimant's property, public utility nature of the activity developed by the defendant or the dishonesty of the defendant.

5. CONCLUSIONS

With regard to the invocation, by the defendant, of the public interest reason, which would justify the development of his activity, besides the prejudice caused to the claimant, the traditional opinion is that the public interest is irrelevant in the private rights matter and, as a consequence, it shall be ignored.

On the other hand, the modern opinion launched in this matter is more nuanced, so that the Court will have to decide the existence or absence of a nuisance, taking into account the public utility. In such cases, it is essential to establish the person who shall bear the losses.

Consequently, in order to establish the existence of a prejudice, the claimant must prove a substantial interference in his right of using and of enjoying the field, case in which the Court shall enforce the equity criterion, taking into account, at the same time, a range of elements, such as: interference duration, sensitivity degree of claimant's property, the public utility nature of the activity developed by the defendant or the dishonesty of the defendant.

References

[1] Siegel Stephen (2012), *A Student's Guide to Easements, Real Covenants and Equitable Servitudes. Third Edition* LexisNexis, retrieved from https://books.google.ro/books?id=T_loAxRR0XUC&printsec=frontcover&hl=ro&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

[2] European Convention of Human Rights, retrieved from http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[3] Cooke John (2009), *Law of Tort. Ninth Edition*, Pearson Education Limitated, England.

[4] Harpwood Vivienne (2009), *Modern Tort Law- Seventh Edition*, Routledge- Cavendish, Taylor& Francis Group, London and New York.