

The Law Is What It Is, but Is It Equitable? The Law of Encroachments Where the Innocent, Negligent, and Willful Are Treated the Same

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A landowner builds a house that encroaches two feet on his neighbor's property. The encroachment involves very little land, but it creates many issues for the respective landowners. In today's society, where subdivisions are developed daily, there is an increasing potential for encroachments due to innocent mistakes, negligence, or willfulness. When an encroachment occurs, it would be terrific if the parties could negotiate a fair solution, but this rarely happens. This is because the law automatically places an encroaching landowner in an inferior bargaining position. In North Carolina, courts will order the encroaching landowner to remove the encroachment regardless of his intent. Therefore, the encroaching landowner must meet the neighbor's demands for waiving a mandatory injunction to compel removal or prepare to move the encroaching portion of the structure.

This Article addresses the public policy and equitable issues sparked by the encroachment of a permanent structure on an adjoining landowner's property. It focuses on the equitable hardship doctrine, which is commonly invoked by many jurisdictions in encroachment cases and applied when the circumstances of a given case justify superseding the landowner's ordinary remedy to an injunction—a doctrine which North Carolina has paid lip service to but does not apply. The analysis in this Article leads to the conclusion that in determining whether to grant an injunction, a court must balance the equities by assessing the relative hardship of each party. Application of the equitable hardship doctrine in encroachment cases will prevent economic waste, the potential for extortion, and unnecessary litigation, and create a just result for both parties.

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INTRODUCTION

North Carolina courts are unforgiving in decisions where permanent structures have encroached on an adjoining landowner’s property. The law is simple: If the adjoining landowner requests a mandatory injunction to compel removal, a court will grant it.¹ Everyone likes simple rules, but should a simple rule continue to apply when its application creates greater problems than it resolves? Knowing that courts will grant a mandatory injunction to compel removal when permanent encroachments are at issue promotes unnecessary litigation. It places plaintiffs in a strong bargaining position and creates the potential for extortion. It results in waste if a defendant must remove a portion of the encroaching structure. And, it rarely deters the willful encroacher but severely punishes the innocent one.

Although these cases involve “mighty little”² in terms of the land involved, they create a great deal of trouble for the parties and the courts. This is because of two competing ideals. First, the law should not permit a party “to take [the] land of another merely because he is willing to pay a market price for it.”³ Second, courts should not sanction extortion and economic waste by ordering destruction of a structure innocently built on

1. See, e.g., *Young v. Lica*, 576 S.E.2d 421, 425 (N.C. Ct. App. 2003) (reversing and remanding to determine if defendants encroached onto plaintiffs’ easement and to render a judgment based on law and precedent); *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986) (holding a mandatory injunction for removal was the proper remedy for an apartment building encroaching one square foot onto adjoining landowner’s property); *Bishop v. Reinhold*, 311 S.E.2d 298, 304–05 (N.C. Ct. App. 1984) (granting a mandatory injunction to compel removal of a house built partially on adjoining landowners’ property).

2. See Olivia L. Weeks, Comment, *Much Ado About Mighty Little—North Carolina and the Application of the Relative Hardship Doctrine to Encroachments of Permanent Structures on the Property of Another*, 12 CAMPBELL L. REV. 71, 72 & 72 n.14 (1989) (quoting *North v. Bunn*, 38 S.E. 814, 814 (N.C. 1901) (involving an encroachment of the corner of a house onto an adjoining landowner’s property)). I originally wrote on this same topic as a student in 1989. The “Much Ado About Mighty Little” Comment addresses the relative hardship doctrine and its application to cases of permanent encroachment in North Carolina prior to 1990. This Article addresses the same issue but through the lens of cases after 1990.

3. 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES § 5.10(4), at 816 (2d ed. 1993) [hereinafter DOBBS, LAW OF REMEDIES].

the land of another.⁴ Because these principles are inconsistent with each other, courts should seek resolution through a balancing of the hardships and equities.

Encroachments are characterized by the courts as renewing, continuing, or permanent trespasses.⁵ As a general rule, North Carolina courts apply the law of continuing trespass to encroachments of permanent structures.⁶ This allows plaintiff to seek a mandatory injunction to compel removal, which will be issued if plaintiff can show there is no adequate remedy at law and there is a real need for the injunction.⁷ This is not to be confused with the election of remedies for unjust enrichment, which allows the true landowner to elect to keep the structure and pay the builder the amount by which the structure increased the value of his property or demand the builder remove the structure and recover only actual damages to the land.⁸

Equity is the body of principles that represents what is fair and right;⁹ therefore, in any equity action, the relative hardships to the parties and the equities between them are to be considered.¹⁰ Upon balancing the equities in encroachment cases, courts commonly deny relief to the aggrieved party in favor of money damages if the encroachment was made innocently and is slight compared to the injury to defendant if he has to remove it.¹¹ An injunction is not granted simply because of the advantage to plaintiff or denied because of the convenience to defendant.¹² The problem is one of relative hardships, which requires balancing all of the equities involved,

4. *Id.* at 816–17.

5. See DAN B. DOBBS, *THE LAW OF TORTS* § 57 (2000) [hereinafter DOBBS, *LAW OF TORTS*].

6. See, e.g., *O'Neal v. Rollinson*, 192 S.E. 688 (N.C. 1937); *Kinsland v. Kinsland*, 125 S.E. 625 (N.C. 1924); *Graham v. Deutsche Bank Nat'l Tr. Co.*, 768 S.E.2d 614 (N.C. Ct. App. 2015); *Adams Creek Assocs. v. Davis*, 746 S.E.2d 1 (N.C. Ct. App. 2013); *Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006); *Young*, 576 S.E.2d 421; *Williams*, 346 S.E.2d 665; *Bishop*, 311 S.E.2d 298; *Terry v. Jim Walter Corp.*, 175 S.E.2d 354 (N.C. Ct. App. 1970).

7. See Dan B. Dobbs, *Trespass to Land in North Carolina Part II. Remedies for Trespass*, 47 N.C. L. REV. 334, 352–58 (1969) [hereinafter Dobbs, *Remedies for Trespass*].

8. See *Beacon Homes, Inc. v. Holt*, 146 S.E.2d 434, 439 (N.C. 1966). In *Beacon*, defendant elected to keep a house mistakenly constructed on her property by plaintiff; however, she refused to pay for the house or allow plaintiff to remove it. *Id.* at 435. The court stated she could either allow plaintiff to remove the house or she could keep the house and pay the amount by which the house increased the value of the property. *Id.* at 439.

9. *Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014).

10. See DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 816.

11. RESTATEMENT (SECOND) OF TORTS § 941 cmt. a (AM. LAW INST. 1979).

12. *Id.*

including the relative hardships to the parties, the interests of third parties, and the interest of the general public.¹³ North Carolina courts discuss the relative hardship doctrine but refuse to apply it in cases where a permanent structure encroaches onto an adjoining landowner's property.¹⁴

Since 1984, North Carolina courts have relied on *Bishop v. Reinhold*¹⁵ as precedent for all cases involving permanent encroachments. *Bishop* involved a home that was built partially on the plaintiffs' property.¹⁶ The original tract of land was owned by defendants, who conveyed a portion of the land to plaintiffs.¹⁷ While plaintiffs, a colonel in the Air Force and his wife, were stationed in various locations, defendants built a new home partially on plaintiffs' property.¹⁸ Plaintiffs sued for removal of the house.¹⁹ At trial, the jury awarded damages, finding that defendants had wrongfully trespassed on plaintiffs' property and the trespass was continuing.²⁰ Defendants appealed, and the appellate court stated—in order to avoid multiple actions—the trial judge can order “equitable relief in the form of a permanent injunction” which would allow a single recovery for all damages.²¹ The court remanded the case to the trial court and ordered the court to grant a mandatory injunction for the removal of the parts of defendants' home encroaching onto plaintiffs' property.²² In this case, the court did not discuss or even mention the relative hardship doctrine. Although cases prior and subsequent to *Bishop* discuss the doctrine, courts consistently follow the holding and rationale in *Bishop* whether the encroachment was innocent, negligent, or willful.²³

This Article argues that the holding in *Bishop* should no longer be the guiding star of the North Carolina courts. Instead, courts should apply the equitable hardship doctrine in encroachment cases to determine whether a mandatory injunction for removal is inequitable under the circumstances of a given case. Part I discusses the characteristics of continuing and permanent trespasses, how the characterization of each determines the

13. *Id.*

14. *See* Clark v. Asheville Contracting Co., 342 S.E.2d 832 (N.C. 1986); Young v. Lica, 576 S.E.2d 421 (N.C. Ct. App. 2003); Williams v. S. & S. Rentals, Inc., 346 S.E.2d 665 (N.C. Ct. App. 1986).

15. *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984).

16. *Id.* at 299.

17. *Id.* at 300.

18. *Id.* at 299.

19. *Id.*

20. *Id.*

21. *Id.* at 300 (quoting Conrad v. Jones, 228 S.E.2d 618, 619 (N.C. Ct. App. 1976)).

22. *Id.* at 305.

23. *See* discussion *infra* Section IV.C.

remedies available to the parties, and the statute of limitation that applies to each. Part II discusses the equitable remedy for encroachments of permanent structures, a mandatory injunction to compel removal. It will show that courts should balance the equities of the parties before issuing an injunction. Part III gives an overview of the relative hardship doctrine, how the doctrine is distinguishable from the betterments doctrine, and how and why courts apply the relative hardship doctrine in other jurisdictions. Part IV examines the rationale given by North Carolina courts for granting mandatory injunctions without applying the relative hardship doctrine and how subsequent cases apply that rationale. Finally, Part V discusses why North Carolina courts should apply the equitable hardship doctrine and how its application can prevent economic waste, potential extortion, unnecessary litigation, and result in a just remedy for all parties involved.

An encroachment is an interference with or invasion of another person's property.²⁴ This Article limits encroachment to an intrusion by a landowner onto the property of his neighbor by a permanent structure such as a house, a shed, or a fence. This Article also presumes that the neighbor entitled to a remedy holds superior title to the property in dispute.

I. CHARACTERIZATION OF TRESPASSES

Encroachment cases deal with “an ancient and simple tort—[an] unauthorized intrusion . . . upon land owned or possessed by another.”²⁵ Without an agreement or easement, an individual does not have the right to build structures on his land that will extend beyond his boundaries and encroach onto his neighbor's property.²⁶ At common law, the encroachment is a trespass,²⁷ and failure to remove the encroachment constitutes a continuing trespass.²⁸

A. *Permanent or Continuing?*

A continuing trespass is a permanent invasion of the rights of another.²⁹ However, the determining factor in characterizing an encroachment is not the physical permanence of a structure, but whether

24. See *Encroachment*, BLACK'S LAW DICTIONARY (10th ed. 2014).

25. Dan B. Dobbs, *Trespass to Land in North Carolina Part I. The Substantive Law*, 47 N.C. L. REV. 31, 31 (1968) [hereinafter Dobbs, *Substantive Law*].

26. 1 AM. JUR. 2D *Adjoining Landowners* § 112, at 1039 (2016).

27. *Id.*

28. RESTATEMENT (SECOND) OF TORTS § 161 cmt. b (AM. LAW INST. 1965).

29. See DOBBS, *LAW OF TORTS*, *supra* note 5, § 57, at 116–17.

the court will abate the invasion of property rights.³⁰ Courts characterize encroachments as either continuing or permanent trespasses based partly upon policy considerations.³¹ To make the determination, courts consider the physical permanence of the intrusion, the value of the encroachment to the community, the relationship between the parties, and the status of each party.³² After careful evaluation of these factors, a court will determine whether the defendant should be allowed to continue the encroachment on a single payment of damages or whether the plaintiff is entitled to a mandatory injunction to compel removal.³³ If the court will not abate the trespass for reasons of judicial policy or cannot abate the trespass because it is likely to continue in fact, the trespass will be characterized as permanent.³⁴ If, however, the court can and will abate the trespass because of an election of remedies available to the injured party, the trespass will be characterized as continuing.³⁵

For example, a house encroaching on the land of another is a permanent invasion of the landowner's property because the structure is expected to stand indefinitely.³⁶ The court, however, would likely abate the trespass at the request of the landowner on the theory that allowing the defendant to take the plaintiff's property is comparable to private eminent domain.³⁷ The trespass can continue only until the landowner exercises his option to request a mandatory injunction to compel removal.³⁸ Suppose, however, that defendant built an electrical substation instead of a private dwelling on plaintiff's land. In this scenario, the court would weigh the industry's benefit to the community against the hardship plaintiff would suffer if the structure is allowed to remain. If the court finds defendant's benefit to the community outweighs plaintiff's hardship, it would allow the structure to remain on plaintiff's land upon a single payment of damages.³⁹ The trespass then becomes legally and physically permanent and thus characterized as a permanent trespass.⁴⁰

30. See DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 5.4, at 335–37 (1973) [hereinafter DOBBS, HANDBOOK ON REMEDIES].

31. DOBBS, LAW OF TORTS, *supra* note 5, § 57, at 117.

32. DOBBS, HANDBOOK ON REMEDIES, *supra* note 30, § 5.4, at 337–38.

33. *Id.* at 337.

34. *Id.* at 340–41.

35. *Id.* at 342.

36. *Id.* at 339.

37. *Id.* at 340.

38. *Id.* at 336.

39. *See id.* at 340.

40. *Id.* at 341.

A legally permanent trespass is one that is “likely to continue in fact and guaranteed” to continue in law.⁴¹ The defendant either has statutory powers of eminent domain or the public benefit generated by defendant’s enterprise outweighs the hardship to plaintiff.⁴² On the other hand, a house or other type of private structure that encroaches upon another’s land, although “physically ‘permanent,’ is not legally permanent.”⁴³ The injured party can request damages and a mandatory injunction to compel removal of the structure.⁴⁴ As long as the injured landowner has the option of seeking a mandatory injunction, courts can abate the trespass and will characterize the trespass as continuing.⁴⁵

B. Characterization Determines the Statute of Limitations

One reason encroachment cases are so complex and often difficult to understand is because an encroachment is a trespass the entire time it is wrongfully on another’s land.⁴⁶ Each day the encroaching structure remains, a new cause of action arises.⁴⁷ Accordingly, successive causes of action could accrue indefinitely.⁴⁸ Theoretically, a plaintiff could sue more than once for damages arising from the trespass. This would be inconvenient and compel plaintiff to repeatedly harass defendant with a multiplicity of suits.⁴⁹ Accordingly, most jurisdictions do not recognize successive causes of action for a continuing trespass; there must be a single

41. *Id.*

42. *Id.* at 340.

43. *Id.* at 339.

44. *Id.* at 339–40.

45. *Conrad v. Jones*, 228 S.E.2d 618, 619 (N.C. Ct. App. 1976) (“[P]laintiffs’ claim is based upon ‘continuing trespass,’ and equitable relief in the form of a permanent injunction is the proper remedy . . . to avoid a multiplicity of actions at law for damages.” (citing *Young v. Pittman*, 29 S.E.2d 551, 552 (N.C. 1944); *Collins v. Freeland*, 183 S.E.2d 831 (1971); *Dobbs, Remedies for Trespass*, *supra* note 7, at 359; H.H. Henry, Annotation, *Injunction Against Repeated or Continuing Trespasses on Real Property*, 60 A.L.R.2d 310 (1958); J.A. Bock, Annotation, *Right of Private Sewerage System Owner to Enjoin Unauthorized Persons from Using Facilities*, 76 A.L.R.2d 1329 (1961))).

46. RESTATEMENT (SECOND) OF TORTS § 161 cmt. B (AM. LAW INST. 1965). *See also* *Bishop v. Reinhold*, 311 S.E.2d 298, 300 (N.C. Ct. App. 1984) (“A continuing trespass is a peculiar animal in the law. The difficulty arises as to whether a plaintiff may maintain successive actions . . . or whether he must recover all damages . . . in a single action. This determination naturally controls the running of the statute of limitations.” (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 13 (4th ed. 1971))).

47. Restatement (Second) of Torts § 161 cmt. b.

48. DOBBS, *LAW OF TORTS*, *supra* note 5, § 57, at 116.

49. *See id.*

recovery for all damages.⁵⁰ North Carolina is among the jurisdictions that require recovery of all damages for a continuing trespass in one action.⁵¹

This limitation to a single recovery for damages is another reason encroachment cases are so complex. If there is a single recovery for damages, there must be a definite point for determining when the statute of limitations begins to run.⁵² Courts hold two very different views on this issue. Some jurisdictions take the view that an encroachment constitutes a permanent injury for which the statute of limitations begins to accrue at the time of the original trespass.⁵³ Those courts will bar an action not brought within the statutory period.⁵⁴ Other jurisdictions take the view that an encroachment, although permanent in nature, is a continuing trespass for which successive causes of action may accrue indefinitely.⁵⁵ North Carolina courts follow the latter view.⁵⁶

The North Carolina statute of limitations governing a continuing trespass is three years.⁵⁷ Damages incident to the original wrong must be brought in a single action within the statutory period.⁵⁸ In order to recover damages for any acts committed after the initial trespass, plaintiff must

50. *Id.* at 115–16.

51. *See Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 668 (N.C. Ct. App. 1986) (“North Carolina does not recognize successive causes of action for continuing trespass.” (citing *Phillips v. Chesson*, 58 S.E.2d 343 (N.C. 1950); *Cherry v. Canal Co.*, 53 S.E. 138 (N.C. 1906); WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 13 (3d ed. 1941))).

52. *See V.G. Lewter*, Annotation, *When Does Cause of Action Accrue, For Purposes of Statute of Limitations, Against Action Based Upon Encroachment of Building or Other Structure Upon Land of Another*, 12 A.L.R.3d 1265 (1967) (explaining the various points at which the statute may begin to run).

53. *Id.* at 1266.

54. *Id.*

55. *Id.* at 1267.

56. *Bishop v. Reinhold*, 311 S.E.2d 298, 301 (N.C. Ct. App. 1984) (“The wrongful maintenance of a portion of the defendants’ dwelling house on the plaintiffs’ lot is a separate and independent trespass each day it so remains and the three-year statute for removal begins to run each day the encroaching structure remains upon the plaintiffs’ land.”).

57. N.C. GEN. STAT. § 1-52(3) (2015) (“For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.”); *see also Sample v. Roper Lumber Co.*, 63 S.E. 731, 732 (N.C. 1909) (“[T]he term [continuing trespass] could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of the wrong.”).

58. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 668 (N.C. Ct. App. 1986).

plead and prove the increased or special damages.⁵⁹ However, a plaintiff seeking a permanent remedy is subject to the twenty-year statute of limitations for adverse possession instead of the three-year statute of limitations for continuing trespass.⁶⁰ The twenty-year statute applies because a suit for permanent damages is brought for the purpose of recovering the value of an easement, which the defendant could obtain “only by grant, condemnation,” or adverse possession.⁶¹ Awarding permanent damages, therefore, is “equivalent to the acquisition of an easement by condemnation” or private eminent domain.⁶²

C. Characterization Determines the Remedy

North Carolina has “permitted permanent monetary damages only in those situations involving quasi-public entities.”⁶³ A private party who fails to bring suit for the original trespass within the statutory period and fails to prove subsequent damages is barred from recovering monetary damages caused by the trespass.⁶⁴ If the defendant is entitled to demand permanent damages in lieu of an injunction, he is forcing the plaintiff to sell an interest in his land.⁶⁵ If plaintiff is allowed to demand permanent damages and is successful, he is forcing defendant to purchase an interest in his land.⁶⁶ In theory such an award would be analogous to condemnation by a private citizen without the right of eminent domain, which the courts will not sanction.⁶⁷ Thus, plaintiff’s only claim for relief is removal of the structure that remains on his property.⁶⁸ It is for this reason that courts will grant a mandatory injunction to compel removal of an encroachment as a matter of law; therefore, an action for permanent redress is not barred, only an action for permanent damages.⁶⁹

59. See *Bishop*, 311 S.E.2d at 302; see also *Lightner v. City of Raleigh*, 174 S.E. 272, 277 (N.C. 1934); *Price v. Bunn*, 187 S.E.2d 423, 426 (N.C. Ct. App. 1972).

60. *Williams*, 346 S.E.2d at 668 (“[P]laintiff seeks a permanent remedy and is subject to the twenty-year statute of limitations for adverse possession.”).

61. *Love v. Postal Tel.-Cable Co.*, 20 S.E.2d 337, 338 (N.C. 1942).

62. *Id.* (citing *Geer v. Durham Water Co.*, 37 S.E. 474 (N.C. 1900); *Query v. Postal Telegraph-Cable Co.*, 101 S.E. 390 (N.C. 1919)).

63. *Williams*, 346 S.E.2d at 669.

64. See *Bishop*, 311 S.E.2d at 302.

65. DOBBS, LAW OF TORTS, *supra* note 5, § 57, at 115.

66. *Id.* at 115–16.

67. *Williams*, 346 S.E.2d at 668.

68. *Bishop*, 311 S.E.2d at 302.

69. See *Williams*, 346 S.E.2d at 669.

A plaintiff should seek an injunction as well as damages. If a court denies damages, plaintiff still has an equitable remedy available to him.⁷⁰ In North Carolina, a court that denies damages will, nevertheless, likely grant a mandatory injunction to compel removal if requested.⁷¹ A mandatory injunction is available to plaintiff until a prescriptive easement or a fee simple interest is acquired by adverse possession.⁷²

In sum, an encroachment, although permanent in nature, is a continuing trespass that courts can and will abate. As long as the encroachment remains wrongfully on another's land, it gives rise to a new cause of action each day it remains, and a new statute of limitations begins to run. In North Carolina, a plaintiff can bring only one trespass cause of action for damages, must do so within the statutory three years, and must plead and prove damages for subsequent harm for the three years prior to the suit. In addition to damages, a plaintiff almost always seeks a mandatory injunction to compel removal. If plaintiff seeks injunctive relief, the North Carolina courts will grant a mandatory injunction to compel removal as a matter of law, barred only by the twenty-year statute for adverse possession.

II. MANDATORY INJUNCTION—THE EQUITABLE REMEDY

A mandatory injunction orders an affirmative act or mandates a specified course of conduct.⁷³ It is an equitable remedy issued at the discretion of the court only under certain conditions and after careful consideration of specific factors.⁷⁴ In encroachment cases, mandatory injunctions compel removal of permanent structures partially built on the land of another.⁷⁵ This Section addresses when, to whom, and under what conditions the court will issue a mandatory injunction to compel removal.

70. See DOBBS, *HANDBOOK ON REMEDIES*, *supra* note 30, § 5.4, at 341–43.

71. See, e.g., *O'Neal v. Rollinson*, 192 S.E. 688, 690 (N.C. 1937) (deeming a wharf a continuous trespass on plaintiffs' riparian rights, entitling plaintiffs to mandatory injunction); *Conrad v. Jones*, 228 S.E.2d 618 (N.C. Ct. App. 1976) (“[P]laintiffs’ claim is based upon ‘continuing trespass,’ and equitable relief in the form of a permanent injunction is the proper remedy in such cases in order to avoid a multiplicity of actions at law for damages.” (citing *Young v. Pittman*, 29 S.E.2d 551 (N.C. 1944); *Collins v. Freeland*, 183 S.E.2d 831 (N.C. Ct. App. 1971); *Dobbs, Remedies for Trespass*, *supra* note 7, at 359; *Henry*, *supra* note 45; *Bock*, *supra* note 45)).

72. See *Love v. Postal Tel.-Cable Co.*, 20 S.E.2d 337, 338 (N.C. 1942) (citing *Teeter v. Postal Tel. Co.*, 90 S.E. 941, 941 (N.C. 1916)); *Williams*, 346 S.E.2d at 668; *Bishop*, 311 S.E.2d at 301.

73. *Mandatory Injunction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

74. See DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(3), at 807–08.

75. *Id.* § 5.10(4), at 817.

A. *In General*

“A mandatory injunction is one that compels the defendant to restore things to their former condition, and virtually directs him to perform an act.”⁷⁶ Ordinarily, an injunction will issue in encroachment cases where the plaintiff shows a genuine need, and there is no genuine need to deny the issuance.⁷⁷

Historically, courts have been reluctant to issue an injunction against a trespass.⁷⁸ If there was an adequate remedy at law, an injunction would not issue.⁷⁹ Although this rule is still current, courts often find the remedies at law inadequate and will restrain the trespass if a plaintiff has a genuine need for the injunction.⁸⁰ Encroachments classified as continuing trespasses come within this exception to the rule. When a continuing trespass is at issue, resorting to a remedy at law may require a multiplicity of suits,⁸¹ and the nature of the injury makes it difficult to ascertain the amount of damages.⁸² For these reasons, courts frequently deem a remedy at law inadequate.⁸³

However, courts generally will not issue a permanent injunction to determine the disputed question of title.⁸⁴ Moreover, equity should not and does not transfer possession by injunctive relief because a change of possession changes the burden of proving title in a later ejectment action.⁸⁵ North Carolina courts have been extremely reluctant to issue injunctions to try title or affect possession. Whenever possession has been an issue or a

76. *Keys v. Alligood*, 100 S.E. 113, 114 (N.C. 1919) (quoting GEORGE TUCKER BISHAM, *PRINCIPLES OF EQUITY* § 400, at 634 (9th ed. 1915)).

77. *Dobbs, Remedies for Trespass*, *supra* note 7, at 351–52.

78. *Id.* at 352.

79. *Id.*

80. *Id.*

81. *Conrad v. Jones*, 228 S.E.2d 618, 619 (N.C. Ct. App. 1976) (holding a permanent injunction to be the proper form of equitable relief for plaintiffs' claim of a "continuing trespass" to avoid multiple legal actions for damages (citing *Young v. Pittman*, 29 S.E.2d 551 (N.C. 1944); *Collins v. Freeland*, 183 S.E.2d 831 (1971); *Dobbs, Remedies for Trespass*, *supra* note 7, at 359; *Henry*, *supra* note 45, at 314; *Bock*, *supra* note 45)).

82. *Henry*, *supra* note 45, at 314.

83. *See, e.g., id.*; *see also Collins*, 183 S.E.2d at 832.

84. *Young*, 29 S.E.2d at 552 (citing *Black v. Jackson*, 177 U.S. 349 (1900)) (underscoring that ordinarily a court of equity will not grant an injunction to determine a disputed question of title to land; injunction is only proper after a final determination of the issues of fact).

85. *DOBBS, LAW OF REMEDIES*, *supra* note 3, § 5.10(3), at 811.

boundary line has been in dispute, the appellate courts have remanded the case to the trial court for determination of ownership.⁸⁶

B. Adequacy of a Legal Remedy

In encroachment cases, the majority view is that the landowner does not have an adequate remedy at law; therefore, equity has jurisdiction.⁸⁷ Accordingly, a mandatory injunction to compel removal is a proper remedy for a landowner to invoke against an adjoining landowner. This is especially true if the continuing trespass will ripen into an easement or prescriptive right.⁸⁸ To invoke this remedy, the plaintiff must plead facts which, if proved, will establish that the threatened injury is irreparable, a resort to law would result in a multiplicity of law suits, or another ground for equitable relief exists.⁸⁹ If plaintiff successfully pleads and proves his case, a mandatory injunction will issue to protect the landowner's interest in the use and enjoyment of his land.⁹⁰

The North Carolina Court of Appeals in *English v. Holden Beach Realty Corp.* set forth the established principles courts use to determine adequacy of a remedy at law with respect to an action for a mandatory injunction.⁹¹ Plaintiffs commenced an action alleging defendant, a developer, trespassed on their lands by laying out and grading a road, and they requested damages and a mandatory injunction to compel removal of the road.⁹² In addressing defendant's contention that a mandatory injunction was improper, the court stated that "[e]quitable relief in the form of a mandatory injunction will lie in cases of continuing trespass in order to avoid a multiplicity of actions at law for damages."⁹³ The court went on to state that "[i]njunction is a proper remedy for relief against continuing trespass either where perpetual injunction is sought in an independent

86. See, e.g., *English v. Holden Beach Realty Corp.*, 254 S.E.2d 223, 233 (N.C. Ct. App. 1979) ("Clearly, plaintiffs will not be entitled to the injunction until questions of boundary, title and possession have been resolved."); *Conrad*, 228 S.E.2d at 619 ("[T]here can be no determination as to whether the plaintiffs are entitled to equitable relief until there has been a finding as to the nature and extent of plaintiffs' interest . . .").

87. L.C. Warden, Annotation, *Mandatory Injunction to Compel Removal of Encroachments by Adjoining Landowner*, 28 A.L.R.2d 679, 685 (1953).

88. Henry, *supra* note 45, at 334–35.

89. *Id.* at 316.

90. See DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 815–16.

91. *English*, 254 S.E.2d at 233.

92. *Id.* at 226–27.

93. *Id.* at 233 (citing *Conrad v. Jones*, 228 S.E.2d 618 (N.C. Ct. App. 1976); *Collins v. Freeland*, 183 S.E.2d 831 (N.C. Ct. App. 1971); *Young v. Pittman*, 29 S.E.2d 551 (N.C. 1944); 7 STRONG'S N.C. INDEX 3D, *Injunctions* § 7.1, at 240).

action or where . . . the injunction is ancillary to an action in which the title to land or the right to its possession is at issue.”⁹⁴ In addition, the court stated that “injunctive relief is not a matter of right” but is issued or denied at the discretion of the court.⁹⁵

C. *Factors Determining Issuance of a Mandatory Injunction*

This Section discusses the factors considered by the courts in granting or denying a mandatory injunction. It will discuss the conduct of both the defendant and the plaintiff and the extent of the trespass. But first, this Section discusses the threshold factor of the adequacy of a legal remedy.

In a majority of jurisdictions, the prevailing factor is the adequacy or inadequacy of a legal remedy.⁹⁶ Courts in these jurisdictions generally hold that a landowner does not have an adequate remedy at law because damages are difficult to determine and would require a multiplicity of lawsuits.⁹⁷ Moreover, if defendant’s building remains on the plaintiff’s land long enough, the defendant may acquire title by adverse possession.⁹⁸ If an award of monetary damages were granted for a permanent encroachment, it would be comparable to condemnation by a private citizen without the right of eminent domain.⁹⁹ In jurisdictions that hold monetary damages to be adequate, the courts would likely “assess damages on a permanent basis and award the landowner the [lost] value of his property” in lieu of allowing the landowner to bring successive causes of action.¹⁰⁰

There is consensus “that a mandatory injunction should issue, regardless of the . . . relative hardship[s]” of the parties, when the encroachment is willful or intentional.¹⁰¹ One who intentionally or willfully encroaches on another’s land does so at his own peril.¹⁰² “Where there is a deliberate, unlawful, and inexcusable invasion, by one man, of another’s land . . . and there has been neither acquiescence nor delay in applying to [the] court for relief, . . . [the court will issue] a mandatory

94. *Id.* (citing *Jackson v. Jernigan*, 5 S.E.2d 143 (N.C. 1939)).

95. *Id.* (quoting 43 C.J.S. *Injunctions* § 14, at 768 (1978)).

96. *Adjoining Landowners*, *supra* note 26, § 123.

97. *See, e.g., Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 668 (N.C. Ct. App. 1986).

98. DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 818.

99. DOBBS, *HANDBOOK ON REMEDIES*, *supra* note 30, § 5.4, at 340.

100. Dobbs, *Remedies for Trespass*, *supra* note 7, at 348.

101. Warden, *supra* note 87, at 685; *see also Adjoining Landowners*, *supra* note 26, § 125.

102. Warden, *supra* note 87, at 685.

injunction against a continuance of [a] trespass.”¹⁰³ This reasoning extends to cases where defendant had notice he was encroaching on another’s land.¹⁰⁴ A defendant who continues to erect a structure on plaintiff’s land after receiving notice the building is on the wrong property obviously takes a major risk.¹⁰⁵ Any actual notice, written or oral, will invoke the rule; a court-issued notice is not required.¹⁰⁶

On the other hand, if a defendant can show that plaintiff consented to the encroachment, the court will deny a mandatory injunction to compel removal.¹⁰⁷ The landowner may provide express or implied consent.¹⁰⁸ For example, suppose a landowner observes his neighbor building a garage that extends a fraction of a foot over the boundary line. The parties are good friends, so the landowner tells the neighbor the garage may remain as it is. In that case, the landowner has expressly consented to the encroachment. Suppose, however, the landowner tells the neighbor of the encroachment but does not request removal. The neighbor can infer from the landowner’s actions that the landowner has given implied consent for the neighbor to continue the trespass.¹⁰⁹

Another factor considered is the conduct of plaintiff. One of the principles of equity is that one who seeks equity must come before the court with clean hands.¹¹⁰ For example, suppose plaintiff and defendant owned adjoining properties, and each parcel of land was subject to an easement for ingress and egress. Defendant built a fence that was slightly crooked and encroached upon the land subject to the easement in several places. Plaintiff passed by the construction each day but made no objections to the location of the fence. After construction was complete, plaintiff brought an action to compel removal of the encroaching portions of the fence. However, before trial, defendant produced evidence that

103. *Leaksville Woolen Mills v. Spray Water Power & Land Co.*, 112 S.E. 24, 25 (N.C. 1922) (quoting *Broome v. N.Y. & N.J. Tel. Co.*, 7 A. 851, 852 (N.J. Ch. 1887)).

104. *Adjoining Landowners*, *supra* note 26, § 125.

105. *Warden*, *supra* note 87, at 685.

106. *See, e.g.*, *Bunn Lake Prop. Owner’s Ass’n v. Setzer*, 560 S.E.2d 576 (N.C. Ct. App. 2002); *Steel Creek Dev. Corp. v. James*, 294 S.E.2d 23 (N.C. Ct. App. 1982); *Schell v. Rice*, 246 S.E.2d 61 (N.C. Ct. App. 1978).

107. *Warden*, *supra* note 87, at 710.

108. *Adjoining Landowners*, *supra* note 26, § 126.

109. *See id.*

110. *Allen v. Wilmington & W.R. Co.*, 11 S.E. 826, 828 (N.C. 1890) (Avery, J., concurring) (“Where it has been held that the conduct of a person was such as to prevent him, in a court of conscience, from seeking a remedy to which he would have been entitled . . . the ruling has rested on the maxim that ‘he who seeks equity must do equity, and he who comes into a court of equity must come with clean hands.’” (quoting 2 JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* § 816 (1881))).

plaintiff's fence also encroached several inches on the land subject to the easement. Plaintiff was aware of this fact, but defendant had no knowledge of the encroachment. In this case, the court would deny a mandatory injunction because plaintiff comes before the court with unclean hands.¹¹¹ One must do equity to seek equity, and plaintiff, who is also an obstructor of the easement, did not come into the court with clean hands and did not act equitably.¹¹²

In addition, some jurisdictions consider the extent of a trespass in determining whether an injunction should issue.¹¹³ These jurisdictions apply the "de minimis" rule when the encroachment is minor and defendant acted in good faith.¹¹⁴ The rule is based on the maxim "*de minimis non curat lex*: the law is not concerned with trifles."¹¹⁵ A minority of courts applies the de minimis rule.¹¹⁶ North Carolina is not one of these jurisdictions.¹¹⁷

Before an injunction will issue, courts consider each of the factors and determine whether equity entitles the complainant to relief. Once the court evaluates the factors, it will grant or deny an injunction at its discretion. Except where title is an issue, a majority of jurisdictions will issue an injunction without a great deal of reluctance.

111. See RESTATEMENT (SECOND) OF TORTS § 940 cmt. b (AM. LAW INST. 1979).

112. See *Scuorzo v. Infantino*, 146 A. 326, 327 (N.J. Ch. 1929) (applying the clean hands doctrine to hold plaintiff, who constructed a curb five inches in width onto a common driveway, was not entitled to a mandatory injunction requiring defendant to remove a brick wall which encroached to a lesser extent on the opposite side of the driveway).

113. See, e.g., *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 596 (Colo. 1951) (en banc) (finding mandatory injunction unwarranted to compel removal of building footings which encroached on plaintiffs' land between 2 to 3.5 inches); *Serrano v. Brosnan*, No. 14 MISC 482350 (HPS), 2016 WL 5900082, at *1 (Mass. Land Ct. Oct. 11, 2016) (finding *de minimis* a stone wall representing a less-than-one-inch encroachment); *Averaimo v. Tavares*, 941 N.Y.S.2d 629, 631 (N.Y. App. Div. 2012) (finding *de minimis* a fence that measured one foot at the back of the property and four inches on other portions of the property).

114. *Warden*, *supra* note 87, at 709.

115. *Id.* at 709 n.7

116. See, e.g., *Capodilupo v. Vozzella*, 704 N.E.2d 534 (Mass. App. Ct. 1999) (refusing to compel removal of 4.8-inch encroachment by walls); *Gelderloos v. Duke*, 88 P.3d 814 (Mont. 2004) (holding foundation encroachment to be *de minimis* and refusing to compel removal of house); *Zhuang Li Cai v. Uddin*, 871 N.Y.S.2d 675 (N.Y. App. Div. 2009) (holding encroachment to be *de minimis* and denying plaintiff's request to compel removal of defendant's fence posts encroaching approximately two inches onto plaintiff's property).

117. See, e.g., *O'Neal v. Rollinson*, 192 S.E. 688 (N.C. 1937) (granting plaintiffs a mandatory injunction to compel removal of wharf that extended 3.8 feet onto plaintiffs' riparian rights); *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986) (requiring removal of defendant's two-story apartment building that encroached one square foot on plaintiff's property).

D. Policy Considerations

This Section addresses the property rights of a landowner and why the court will issue a mandatory injunction to protect these rights. It will discuss the right of the landowner to exclusive possession and quiet enjoyment of his property. It will then discuss the landowner's right to have his property free from encumbrances and the right to the physical integrity of his property.

The common law considers property unique.¹¹⁸ No two parcels of land are identical; therefore, one parcel of land cannot be substituted for another.¹¹⁹ When a seller breaches a contract for the sale of land, the buyer can request, and the court will enforce, the specific performance of the contract.¹²⁰ The court will grant injunctive relief for the same reasons it will grant specific performance of a contract to purchase land—to protect the peculiar nature of the right and subject matter invaded.¹²¹ The right invaded is the right to exclusive possession and quiet enjoyment of land; the subject matter invaded is the land itself.¹²² A court bases its rationale for granting injunctive relief on policy considerations, which reflect the unique quality of land, the possession of the land, and the vested rights of ownership.¹²³

Injunctive relief will issue against an encroachment because a money judgment cannot protect the landowner's right to exclusive possession and quiet enjoyment of his land.¹²⁴ The interest at issue in encroachment cases is not financial; it is an interest in these valuable property rights.¹²⁵ Monetary damages cannot replace or restore these interests when the invasion is permanent in nature and will continue unless abated.

An owner of land has the right to keep his property free from encumbrances and to maintain the physical integrity of the land.¹²⁶ An encroachment violates the right to have property free from encumbrances from its outset, and the encumbrance will remain unless abated.¹²⁷ The

118. Nancy Perkins Spyke, *What's Land Got to Do with It?: Rhetoric and Indeterminacy in Land's Favored Legal Status*, 52 *BUFF. L. REV.* 387, 387 (2003).

119. WILLIAM B. STOEBOCK, & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 10.5, at 738 (3d ed. 2000).

120. *Id.*

121. *See* DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(3), at 807.

122. *Id.*

123. *Id.*

124. *Id.*

125. Dobbs, *Remedies for Trespass*, *supra* note 7, at 354.

126. *See id.*

127. *See id.*

encroachment also violates the physical integrity of the land, and, if allowed to continue, it can cause irreparable damage to the property. For these reasons, monetary damages are not an adequate remedy; they can neither free the land from encumbrances nor restore the physical integrity of the property. "Defendants must attain its [sic] ends . . . in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others, *sic utere tuo, ut alienum non laedas*."¹²⁸ A structure that encroaches on the land of another violates the true landowner's legal right of ownership, and the statute of limitations for adverse possession runs against the original trespass.¹²⁹ Protection of the landowner's right is based upon the danger that a continuing encroachment can result in title to the land vesting in defendant by adverse possession or an easement by prescription.¹³⁰ The courts will grant injunctive relief to prevent this possibility from becoming a reality.¹³¹

Moreover, a private citizen does not have the power of eminent domain; he cannot take property simply because he needs or wants it.¹³² If a court allows a defendant to continue an encroachment upon a single payment of damages, a private eminent domain would be sanctioned.¹³³ Unless injunctive relief is available, a landowner can become prey to anyone who wants the landowner's land for whatever reason.

When the court issues a mandatory injunction to compel removal, it forces the trespassing party to remove the encroachment at his or her own expense.¹³⁴ The law should not force an aggrieved landowner to resort to self-help to rid land of encroachments, which reduce the value of the land and place a cloud on its title. In addition, the law should not force a landowner to incur the expense of removal; instead, it should place the burden of removal on the party who created the wrong.

128. *Cook v. Town of Mebane*, 131 S.E. 407, 409 (N.C. 1926) (quoting *Rhyne v. Flint Mfg. Co.*, 109 S.E. 376, 378 (N.C. 1921)).

129. *Bishop v. Reinhold*, 311 S.E.2d 298, 301 (N.C. Ct. App. 1984) (citing *Love v. Postal Tel.-Cable Co.*, 20 S.E.2d 337 (N.C. 1942)).

130. DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 815-16; *see, e.g.*, *Brittain v. Correll*, 335 S.E.2d 513 (N.C. Ct. App. 1985).

131. For a complete discussion, *see supra* Section I.B.

132. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 668 (N.C. Ct. App. 1986).

133. *McCoy v. Peach*, 251 S.E.2d 881, 884 (N.C. Ct. App. 1979) (deeming it an impermissible private right of eminent domain to force defendant to sell to plaintiff the land on which plaintiff had encroached).

134. *See, e.g.*, *Mathis v. Hoffman*, 711 S.E.2d 825, 826 (N.C. Ct. App. 2011); *Williams*, 346 S.E.2d at 669; *Bishop*, 311 S.E.2d at 305; *Terry v. Jim Walter Corp.*, 175 S.E.2d 354 (N.C. Ct. App. 1970).

In sum, courts grant a mandatory injunction to compel removal in encroachment cases to protect property rights.¹³⁵ Monetary damages are inadequate because they expose the landowner to the risk of losing his property either through private eminent domain or adverse possession.¹³⁶ Courts will not grant injunctive relief to affect transfer of possession; neither will the courts deny injunctive relief if it will affect the landowner's right of possession.¹³⁷

III. RELATIVE HARDSHIP DOCTRINE

Before deciding whether to grant or deny an injunction—"the most oppressive of equitable remedies"¹³⁸—the court should weigh the equities and hardships of the parties.¹³⁹ These include "the nature of the interests affected, and the relative proportion of the interests of each that will be lost by whichever course of action is taken."¹⁴⁰

Consider the following example: Defendant purchased his home from a contractor in 2006; the final sale price of the home and property was over \$600,000.¹⁴¹ Prior to closing, the contractor provided defendant with a 2006 property survey; the survey did not show any anomalies, encroachments, or other violations on the property.¹⁴² In 2010, plaintiff, a power company, sent defendant a letter alleging that a portion of defendant's house encroached onto an easement owned by plaintiff and demanding that defendant remove the encroaching portion of his residence.¹⁴³ When defendant did not take any action, plaintiff sued defendant for encroachment upon its easement.¹⁴⁴ The trial court granted defendant's motion for summary judgment on the basis that the claim was barred by the statute of limitations.¹⁴⁵ After plaintiff appealed, the North Carolina Court of Appeals affirmed.¹⁴⁶ In June 2016, the North Carolina

135. *See Williams*, 346 S.E.2d at 665.

136. *Id.* at 668 (citing *Bishop*, 311 S.E.2d 298).

137. *See* DOBBS, LAW OF REMEDIES, *supra* note 3, §5.10(4), at 816.

138. David E. Cole, Note, *Judicial Discretion and the "Sunk Costs" Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689, 713 (2003).

139. HENRY L. McCLINTOCK, HANDBOOK OF EQUITY § 140, at 248 (1936).

140. *Id.*

141. *Duke Energy Carolinas, LLC v. Gray*, 789 S.E.2d 445, 446–47 (N.C. 2016).

142. *Id.*

143. *Id.* at 447.

144. *Id.*

145. *Id.* (barring plaintiff's claim by applying a six-year statute of limitations for injury to any incorporeal hereditament).

146. *Id.* (citing *Duke Energy Carolinas, LLC v. Gray*, 766 S.E.2d 354 (N.C. Ct. App. 2014)).

Supreme Court granted discretionary review and reversed the decision of the court of appeals; the case was remanded to the trial court for further proceedings.¹⁴⁷

The question now becomes: What happens to defendant's residence? Consider the relative proportion of each party's interest lost by whichever course of action the court takes. If the trial court denies an injunction, the use of plaintiff's property will be only slightly less valuable but, if the court grants an injunction, the ruling would prevent the defendant from using his property for its only valuable purpose. Does the benefit to plaintiff outweigh the hardship brought on defendant? Plaintiff's benefit is that it will be able to maintain the easement free of structural encroachments. Defendant, on the other hand, may have to remove the house since the encroachment is structural and includes part of the foundation.¹⁴⁸

Simple justice requires balancing the equities of the parties before deciding whether a mandatory injunction to compel removal should issue.¹⁴⁹ This Section will give an overview of the relative hardship doctrine, also known as balancing of the equities.¹⁵⁰ Mistakenly, some authorities have indicated that the legislature has codified the relative hardship doctrine as it applies to permanent encroachments in North Carolina under the betterments statute.¹⁵¹ This Section will address this inaccuracy before discussing how jurisdictions outside of North Carolina have applied the relative hardship doctrine.

A. *Balancing the Equities*

Injunctions issue not as "a matter of right"; the grant or refusal rests in the court's discretion.¹⁵² The prevailing approach in this type of action is to "balance the relative hardships and equities [of the parties] and to grant or deny the injunction as the balance" indicates.¹⁵³ This doctrine is best stated in the *Restatement (Second) of Torts*:

147. *Id.* at 447, 449 (holding that the twenty-year statute of limitations for adverse possession, not the six-year statute of limitations for incorporeal hereditaments, applied where the easement was both an incorporeal hereditament and real property).

148. *See, e.g., Phillip Bantz, Limitation for Encroachment Suit is 20, Not Six, Years*, N.C. LAW. WKLY., Sept. 12, 2016, at 2.

149. *See* RESTATEMENT (SECOND) OF TORTS § 941 cmt. a (AM. LAW INST. 1979).

150. *See Weeks, supra* note 2, at 74-85 for an in-depth discussion of the relative hardship doctrine.

151. *See infra* Section III.B.

152. *English v. Holden Beach Realty Corp.*, 254 S.E.2d 223, 233 (N.C. Ct. App. 1979) (quoting 43 C.J.S. *Injunctions* § 14, at 768 (1978)).

153. DOBBS, *LAW OF REMEDIES, supra* note 3, § 5.10(4), at 816.

When a plaintiff proves that a tort has been committed or is threatened and shows that other remedies will not make him whole, an injunction is not to be issued as a matter of course. Elementary justice requires consideration of the hardship the defendant would be caused by an injunction as compared with the hardship the plaintiff would suffer if the injunction should be refused. Though the expression “balance of convenience” is sometimes used to designate the weighing process here involved, it does not state the proper test. The term suggests a nice measurement of relative advantages and a denial of the injunction if the scales tip in the defendant’s favor. The law does not grant an injunction merely because of the advantage that the plaintiff might reap from it, and it does not refuse an injunction merely because of the convenience that the refusal might afford the defendant. The problem is more complex than that. It cannot be summed up in any phrase less elastic than “relative hardship.”¹⁵⁴

When the encroachment of a permanent structure is involved, the problem is complex, and it poses special problems for the courts.¹⁵⁵ If the court denies an injunction, the landowner is stuck with the encroacher’s structure partially on his property and must accept damages instead of an injunction to compel removal.¹⁵⁶ If the court grants a mandatory injunction to compel removal, the encroacher must remove the encroachment, and the landowner will once again have complete possession of his property.¹⁵⁷ At what point does a court determine the proper remedy, and what policies and other factors are considered by the court in its decision making process?

1. Policy Considerations

When permanent encroachments are involved, the courts are guided by two fundamental considerations in balancing the equities between the parties.¹⁵⁸ First, just because a party can pay market price for land, he should not be allowed to take another party’s land.¹⁵⁹ This would amount to a private taking equivalent to eminent domain.¹⁶⁰ Second, demolishing a structure may result in the undesirable results of extortion or economic waste.¹⁶¹ If tearing down a portion of a large structure is the only way the encroachment can be removed, but the harm to the adjoining landowner is

154. RESTATEMENT (SECOND) OF TORTS § 941 cmt. a; *see generally* Jared A. Goldstein, *Equitable Balancing in the Age of Statutes*, 96 VA. L. REV. 485, 504 n.78 (2010).

155. *See* DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 815.

156. *Id.* at 816.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

small, the defendant is placed in an untenable position. These principles are inconsistent with each other and, as such, courts should instead balance the equities and hardships of each party.¹⁶²

A classic illustration of these competing considerations is found in *Williams v. South & South Rentals, Inc.*¹⁶³ Defendant's two-story apartment building crossed plaintiff's property by approximately one foot.¹⁶⁴ When defendant learned of the encroachment, he informed plaintiff, who offered to sell defendant the land, one-fourth to one-third acre of unusable creek bed, for a sum in excess of \$45,000.¹⁶⁵ Defendant refused to pay the exorbitant amount, and plaintiff brought an action demanding defendant remove the encroaching portion of his building.¹⁶⁶ The North Carolina Court of Appeals remanded the case to the superior court to issue the mandatory injunction.¹⁶⁷

If the court had denied the injunction, it would have granted a license to private eminent domain,¹⁶⁸ yet, in granting the injunction, the court sanctioned the possibility of extortion and economic waste.¹⁶⁹ Defendant was forced to remove the portion of his building encroaching onto plaintiff's land or pay plaintiff his asking price to waive the mandatory injunction. Granted, the law should not allow an individual to take another's land simply because he is willing to pay for it.¹⁷⁰ This is a type of private eminent domain and to allow it would set an unwise precedent.¹⁷¹ Setting such a precedent could lead land developers and others to intentionally encroach on adjoining land thinking they could acquire the land by paying fair market value.¹⁷² On the other hand, should a defendant who innocently encroaches one foot onto plaintiff's property suffer the hardships resulting from a mandatory injunction to compel removal when

162. *Id.*

163. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

164. *Id.* at 667.

165. *Id.* at 666.

166. *Id.*

167. *Id.* at 669.

168. *Id.* at 668.

169. *See* AMKCO, Ltd. v. Welborn, 985 P.2d 757, 764 (N.M. Ct. App. 1999), *rev'd*, 21 P.3d 24 (N.M. 2001) ("If [defendant does] not want to 'waste' [his] investment, then as this Court has said in the past under somewhat analogous circumstances, 'nothing forbids [defendant] from negotiating with [plaintiff] to waive its right to compel removal of the building.' The fact that a 'court injunction provides [plaintiff] with a very strong bargaining position is no grounds [to deny an injunction]." (citation omitted) (quoting *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs.*, 952 P.2d 435, 443 (N.M. Ct. App. 1997))).

170. DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 816.

171. *Id.*

172. *See id.*

he had no intention of taking land that was not his? Balancing the equities of the parties should result in a more equitable solution for both parties.

The second policy consideration is that courts should not sanction extortion.¹⁷³ Certainly, the judicial system should not pave the path enabling extortion. The nature of continuing trespasses, and the options available to plaintiff, place the defendant in an untenable position: caught between the devil and the deep blue sea. The fact remains that regardless of his intentions, the defendant is the offender, and no one is more aware of this than plaintiff. Under these circumstances, it is reasonably certain plaintiff will be willing to compromise for an extortionate figure when defendant's only alternative is the threat of a court-issued injunction to compel removal of his building.¹⁷⁴

In addition, the economic waste that may result from destroying a structure is not a desired result.¹⁷⁵ Injunctive relief, in most cases, will result in the destruction of a portion of defendant's building, and the harm to plaintiff would be quite small in comparison.¹⁷⁶ Therefore, a "mandatory injunction [will result in] economic waste or else put the plaintiff in position to demand an unconscionably high price to let the building stay in place."¹⁷⁷ Neither option is ideal for the innocent defendant.

Punishing the encroacher is one of the underlying reasons for granting a mandatory injunction.¹⁷⁸ One who is responsible for the wrong should not escape punishment simply because he is willing and capable of paying for his wrongdoing.¹⁷⁹ A mandatory injunction to compel removal not only vindicates the plaintiff, but it punishes the defendant, as well.¹⁸⁰ Punishing the defendant serves two purposes. Specific to the case, the defendant must pay for the wrong he has done, and, more broadly, a general deterrent of intentional encroachments results.¹⁸¹ In jurisdictions that do not apply the equitable hardship doctrine, the punishment is the same for both the intentional and accidental encroacher.¹⁸² An innocent defendant must

173. *Id.*

174. *See, e.g., Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 666 (N.C. Ct. App. 1986).

175. DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 816.

176. *See AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 29 (N.M. 2001) (holding that hardship to the adjoining landowner did not require removal).

177. DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 816.

178. *See W. Page Keeton & Clarence Morris, Notes on "Balancing the Equities,"* 18 TEX. L. REV. 412, 415 (1940).

179. *See id.* at 416; DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 816.

180. Keeton & Morris, *supra* note 178, at 415.

181. *Id.* at 417.

182. *See id.* at 413.

remove the encroachment and pay any damages caused by the removal. His innocent mistake will be severely punished, and the deterrent factor will serve no useful purpose. Ignoring the difference between intentional wrongdoing and innocent mistakes is bad policy.

In any encroachment case, protection of property rights will always be a policy consideration.¹⁸³ If courts apply the relative hardship doctrine to innocent encroachments, the encroacher must still overcome this consideration, which is more concerned with the protection of the landowner's property rights than the rights of the encroacher.¹⁸⁴

2. *Equities Considered by the Courts*

Courts will deny injunctive relief against an encroaching landowner if the harm that would result from a mandatory injunction to compel removal is disproportionate to the plaintiff's injury.¹⁸⁵ Often when a court grants an injunction, the harm done to the encroaching landowner is much greater than the benefit gained by the plaintiff; therefore, whenever possible "the greater harm will be not caused for the protection of the lesser benefit."¹⁸⁶ If the disproportion between the harm to the encroaching landowner and the plaintiff is the only reason for denying plaintiff relief, "the disproportion must be one of considerable magnitude."¹⁸⁷ For example, suppose defendant builds a toolshed that encroaches a few feet on plaintiff's land. If ordered to remove the encroachment, defendant's cost is very little to give the plaintiff the relief he needs. Therefore, the harm to defendant is not disproportionate to the plaintiff's benefit. But, suppose that instead of building a shed, defendant builds a house a fraction of a foot over his boundary line. In this case, the cost of removal is considerable without conferring a significant benefit to plaintiff. Here, the disproportion between the harm and benefit is significant. However, the disproportion between the harm and benefit to the parties is rarely the only basis for denying relief.¹⁸⁸

In most cases, courts evaluate multiple factors before granting or denying an injunction.¹⁸⁹ The threshold factor considered by the court is the defendant's conduct. "Where the encroachment is deliberate and

183. See *McClintock*, *supra* note 139, § 140.

184. See, e.g., *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 27-29 (N.M. 2001).

185. RESTATEMENT OF PROP. § 563 (AM. LAW INST. 1944).

186. *Id.* § 563 cmt. a (citing RESTATEMENT (SECOND) OF TORTS § 941 (AM. LAW INST. 1979)).

187. *Id.* § 563 cmt. c.

188. *Id.*

189. *Id.*

constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless" of the relative hardships of the parties.¹⁹⁰ "[W]here the encroachment was in good faith, . . . the court should weigh the circumstances so that it shall not act oppressively."¹⁹¹ Thus, the defendant is essentially treated as the wrongdoer in an encroachment case whether his conduct is innocent or intentional.¹⁹² The defendant was either ignorant of the situation, knew but did not care, or made an honest mistake.¹⁹³ Before the relative hardship doctrine will apply, the court must find the defendant made an innocent mistake.¹⁹⁴ An innocent mistake can be made by one who does not have notice he is invading another's property rights or by one who had notice but made a "good faith error" that caused slight damage to another's property.¹⁹⁵ The burden is upon the defendant to prove the encroachment was innocent; however, in the case of non-willfulness, the burden of proof is on the plaintiff.¹⁹⁶ If the defendant successfully proves his innocence, he must then prove that the intrusion on plaintiff's property is slight and does not impair the plaintiff's enjoyment of his property.¹⁹⁷ It is only after the defendant meets his burden of proof that the court will balance all of the equities between the parties before issuing or denying an injunction.¹⁹⁸

The plaintiff's conduct, the property interest affected, and the relative interest of each party are additional factors considered by the court.¹⁹⁹ Although the court "must consider the peculiar equities of the case,"²⁰⁰

190. *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (citing 5 JOHN NORTON POMEROY, *EQUITY JURISPRUDENCE* § 508 (3d ed. 1905)).

191. *Id.* (citing POMEROY, *supra* note 190, § 508).

192. *See* RESTATEMENT (SECOND) OF TORTS § 941 cmt. b (AM. LAW INST. 1979).

193. *See id.*

194. *See Norfolk S. R. Co. v. Stricklin*, 264 F. 546, 574 (E.D.N.C. 1920) ("Without laying down any absolute rule, it is of great importance to see if defendant knew he was doing wrong and was taking his chances about being disturbed in doing it." (quoting *Smith v. Smith*, 20 L.R. 500 (1875))).

195. Jeffrey C. Palkovitz, Note, *Comparative Hardship Doctrine Applied in Easement Action*, 38 WASH. & LEE L. REV. 709, 711 (1981).

196. *Id.* An innocent mistake carries a higher standard of proof than non-willfulness. "Non-willfulness and innocence do not have precisely the same connotation." *Id.* Something may be non-willful without being innocent, but defendant's showing of non-willfulness shifts the burden of proof to the plaintiff. *Id.* To prove innocence, defendant must prove he did not know of plaintiff's rights, or if he had notice, "he made a good faith error which resulted in slight interference with plaintiff's rights." *Id.*

197. *Id.* at 713.

198. *Id.* at 713–14.

199. HENRY L. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 144 (2d ed. 1948).

200. *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 594–95 (Colo. 1951).

there is “no specific and universally-accepted rule as to encroachments.”²⁰¹ A court may deny a request for an injunction if the encroachment caused minimal damage to the plaintiff or where the expense and difficulty of removal by the defendant would be disproportionate to plaintiff’s inconvenience if the encroachment remained.²⁰² However, other courts take the position that the amount of damage suffered by plaintiff is an “insufficient reason to deny a mandatory injunction requiring . . . removal.”²⁰³

Courts must also consider the conduct of plaintiff.²⁰⁴ Courts may decline to issue a mandatory injunction if the plaintiff’s conduct or behavior was inequitable in some way.²⁰⁵ Examples of factors considered by the court are misleading conduct by plaintiff,²⁰⁶ prejudicial delay in asserting his rights,²⁰⁷ and coming to the court with unclean hands.²⁰⁸ “In some situations, however, the plaintiff may be partly responsible for the hardship the defendant would suffer from an injunction,” and courts will consider this in balancing the equities of the parties.²⁰⁹

At the heart of all encroachment cases are property rights. The amount of property actually affected is generally small in terms of the land involved.²¹⁰ Representative of the amount and type of property interests

201. *Id.* at 595.

202. *Adjoining Landowners*, *supra* note 26, § 124.

203. *Id.*

204. Dobbs, *Remedies for Trespass*, *supra* note 7, at 358.

205. *Id.*

206. *See, e.g.*, Bunn Lake Prop. Owner’s Ass’n v. Setzer, 560 S.E.2d 576, 581–82 (N.C. Ct. App. 2002) (holding that “defendant’s letters and other documents . . . [that] establish[ed] his intention to proceed with building, with or without the plaintiff’s permission” proved that defendant did not detrimentally rely on plaintiff’s representations).

207. *See, e.g.*, Rudisail v. Allison, 424 S.E.2d 696, 699 (N.C. Ct. App. 1993) (“[T]he equitable defense of laches may not be raised as a defense in an action at law of ejectment.” (quoting *Phipps v. Robinson*, 858 F.2d 965, 970 (4th Cir. 1988))).

208. *See, e.g.*, Allen v. Wilmington & W.R. Co., 11 S.E. 826, 828 (N.C. 1800) (Avery, J., concurring) (“[H]e who seeks equity must do equity, and he who comes into a court of equity must come with clean hands.” (quoting 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 816 (1881))).

209. RESTATEMENT (SECOND) OF TORTS § 941 cmt. b (AM. LAW INST. 1979).

210. *See, e.g.*, Carolina Power & Light Co. v. Bowman, 51 S.E.2d 191 (N.C. 1949) (building encroached fifty feet onto plaintiff’s right of way); O’Neal v. Rollinson, 192 S.E. 688 (N.C. 1937) (wharf extended 3.8 feet onto riparian rights of plaintiffs); Leaksville Woolen Mills v. Spray Water Power & Land Co., 112 S.E. 24 (N.C. 1922) (embankment constructed twenty feet in length upon plaintiff’s driveway); Williams v. S. & S. Rentals, 346 S.E.2d 665 (N.C. Ct. App. 1986) (two-story building encroached one square foot); Bishop v. Reinhold, 311 S.E.2d 298 (N.C. Ct. App. 1984) (house encroached fifty feet onto plaintiffs’ lot).

involved are fence posts that encroached approximately two inches onto plaintiff's property,²¹¹ foundations that crossed the property line a fraction of a foot,²¹² and a structure with eaves overhanging several inches on the adjoining landowner's property.²¹³ In each of these examples, plaintiff's property is only slightly less valuable if the court denies injunctive relief, but granting an injunction to compel removal would substantially affect the defendant.²¹⁴ An injunction would deprive defendant of using his property, the building, "for its only valuable purpose."²¹⁵ However, plaintiff's interest must not be overshadowed by the hardship defendant would suffer if an injunction was granted.²¹⁶ The court should base its decision not on what plaintiff will gain if equitable relief is granted but on the hardship denial will force him to endure.²¹⁷

Therefore, before an injunction will issue, the court will consider the relative property interests that will be lost by the granting or denial of an injunction.²¹⁸ One of the underlying policies in encroachment cases is the unique quality of land.²¹⁹ This quality becomes particularly relevant when a court seeks to determine whether there is an adequate legal remedy.²²⁰ If the court denies an injunction, the ruling forces plaintiff to accept monetary damages as just compensation for the land taken by the encroachment.²²¹ If the court grants an injunction, the ruling compels defendant to remove the structure.²²² This places the defendant at a great disadvantage, although one of his own making, to plaintiff's superior bargaining power. For this reason, most injunctions under these circumstances are "for sale."²²³ The plaintiff will enforce the mandatory injunction only if the defendant does not agree to exchange the right price for dissolution of the injunction.²²⁴ "In civilized society punishment is seldom put in the hands of those

211. *Zhuang Li Cai v. Uddin*, 871 N.Y.S.2d 675, 676 (N.Y. App. Div. 2009).

212. *Golden Press, Inc. v. Rylands*, 235 P.2d 592, 593 (Colo. 1951).

213. *Beaty v. Gordon*, 364 S.W.2d 311, 314 (Ark. 1963).

214. *McCLINTOCK*, *supra* note 139, § 140.

215. *Id.*

216. RESTATEMENT (SECOND) OF TORTS § 941 cmt. b (AM. LAW INST. 1979).

217. *Id.*

218. *See* *McCLINTOCK*, *supra* note 139, § 140.

219. *STOEBUCK & WHITMAN*, *supra* note 119, § 10.5.

220. *Spyke*, *supra* note 118, at 392.

221. *Dobbs, Remedies for Trespass*, *supra* note 7, at 367.

222. *See* *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986).

223. *Keeton & Morris*, *supra* note 178, at 416; *see, e.g., AMKCO, Ltd. v. Welborn*, 985 P.2d 757, 764 (N.M. Ct. App. 1999).

224. *Keeton & Morris*, *supra* note 178, at 416.

harmed, and no special justification exists for giving landowners the office of punishing encroachers.”²²⁵

“Without implying that all men are mercenary, the conclusion is still possible that a case can hardly occur in which land of more than monetary value is seriously threatened by a substantial encroachment.”²²⁶ A landowner who values his property and considers it priceless surely will not sit by and fail to object while his neighbor builds a structure partially on his land. Every landowner has a reasonable obligation to police his own land.²²⁷ A landowner is not entitled to sit idly by while his neighbor builds on his land; the landowner has a moral responsibility to notify his neighbor to prevent the harm from occurring.²²⁸ If the landowner observes and does nothing, the court could interpret this to mean the landowner does not consider the land priceless and thus deem monetary damages an adequate remedy.²²⁹ This theory, however, would not apply to a landowner who lives out of state or is away from home for an extended period of time and returns to find a completed structure encroaching on his property.²³⁰ In this situation, it would seem unjust to make the landowner sell his land at a price set by the court if he does not want to sell.

B. Encroachments Doctrine Distinguished from the Betterments Doctrine

Although North Carolina courts do not apply the relative hardship doctrine under the encroachment doctrine,²³¹ some sources indicate that the relative hardship doctrine as it applies to encroachment cases has been codified in the doctrine of betterments.²³² The doctrine of betterments, however, “is separate and distinct from the more familiar encroachments doctrine” and by extension the equitable hardship doctrine as it applies to permanent encroachments.²³³ The betterments doctrine is a defense to

225. *Id.*

226. *Id.* at 414.

227. Joseph William Singer, *The Rule of Reason in Property Law*, 46 U.C. DAVIS L. REV. 1369, 1396 (2013).

228. *Id.*

229. Keeton & Morris, *supra* note 178, at 414–15.

230. See *Bishop v. Reinhold*, 311 S.E.2d 298, 300. (N.C. Ct. App. 1984) (upholding plaintiffs’ injunction requiring removal after returning from overseas military orders and finding defendants’ new home encroaching fifty feet onto plaintiffs’ property).

231. The encroachment doctrine as applied here refers to the permanent encroachment of a structure onto an adjoining landowner’s property.

232. Singer, *supra* note 227, at 1396 n.77 (“Some states have adopted laws called ‘betterment statutes’ that effectively codify the relative hardship doctrine”).

233. 1 PATRICK K. HETRICK & JAMES B. McLAUGHLIN, JR., *WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA* § 14.26 (6th ed. 2016).

prevent unjust enrichment by a plaintiff landowner, and the equitable hardship doctrine is a principle used by the courts to determine if injunctive relief will issue against an encroaching defendant.²³⁴ The encroacher may attempt to seek compensation for a court-ordered injunction by asserting a claim under the betterments doctrine; however, it will be an exercise in futility.²³⁵

An interesting North Carolina case clearly illustrates this point. The plaintiff's garage and driveway encroached twenty-five feet onto the defendant landowner's adjoining property because of improvements plaintiff made on her land in 1973.²³⁶ In 1977, plaintiff filed an action asking the court to require defendant "to sell and convey plaintiff a strip of land on which [the] improvements are located at a reasonable price."²³⁷ Naturally, defendant filed a motion to dismiss, and plaintiff filed a motion for leave to amend the complaint. The amended complaint alleged that if defendant elected to require plaintiff to remove the encroachments from defendant's land, defendant should be required to pay "the cost of removal and the cost of rebuilding plaintiff's house."²³⁸ The district court dismissed the action and plaintiff appealed.²³⁹ On appeal, plaintiff argued that her claim fell under the doctrine of betterments.²⁴⁰ The plaintiff alleged she acted in good faith; the defendant was aware of and did not object to the encroachments; defendant should not be unjustly enriched by the improvements on her land; plaintiff was willing to pay for the strip of land involved; and the harm to defendant would be minimal.²⁴¹ The appellate court stated that "plaintiff's action [was] not based on . . . [the] statutory provision for betterments or under the common law right to claim for betterments"; thus, "plaintiff [was] not entitled to such an action."²⁴² The court went on to state that "[i]t is not necessary for us to determine whether defendant might prevail in a subsequent action seeking a mandatory injunction for removal of the encroachment. However, such an action might present a more appropriate forum for . . . resolving the conflict between the parties to this action."²⁴³

234. *See id.*

235. *See id.*

236. *McCoy v. Peach*, 251 S.E.2d 881, 882 (N.C. Ct. App. 1979).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 883.

243. *Id.* at 884 (citing *Warden*, *supra* note 87, at 692–721).

The claim for betterments only applies when a person possesses land under color of title, constructs permanent improvements on the land, and is later sued in ejectment by the true owner.²⁴⁴ The right is a “defensive right” that accrues when the true owner asserts his rights to the land and obtains a judgment giving him the right to eject the improver.²⁴⁵ At this point, “[t]he improver must file his claim for betterments in the same action he has been named a defendant but after judgment for possession has been rendered against him.”²⁴⁶

“The purpose of the betterments doctrine is to prevent the successful title claimant from being unjustly enriched by taking not only the title but also the value of permanent improvements made to the land in good faith by the one who loses title.”²⁴⁷ In encroachment cases, however, title to land is rarely an issue. The encroacher inadvertently builds across his property line because of a mistake in judgment, not because he, in good faith, thinks he has title to the land.

In addition, the equitable hardship doctrine in encroachment cases is not a defense. It is a standard applied by the court to protect a landowner from the forced taking of his land by an encroaching structure.²⁴⁸ The betterments doctrine protects the defendant who loses title to land he thought he owned; the equitable hardship doctrine protects the true landowner from the taking of his land by one with no legal or enforceable right or permission to encroach.

Oddly enough, before equity will apply in either the encroachments or the betterments doctrines, one must, in good faith, believe he had the right to build where he did.²⁴⁹ Under the betterments doctrine, “an honest belief of the improver in his right or title satisfies the requirement of good faith”; however, the court must be satisfied with the improver’s reason for his

244. *Beacon Homes, Inc. v. Holt*, 146 S.E.2d 434, 437 (N.C. 1966) (citing *Pamlico Co. v. Davis*, 107 S.E.2d 306 (N.C. 1959); *Harrison v. Darden*, 26 S.E.2d 860 (N.C. 1943); *Rogers v. Timberlake*, 25 S.E.2d 167 (N.C. 1943); *Faison v. Kelly*, 62 S.E. 1086 (N.C. 1908)).

245. HETRICK & McLAUGHLIN, JR., *supra* note 233, § 14.30.

246. *Id.*

247. *State v. Taylor*, 368 S.E.2d 601, 604 (N.C. 1988) (Exum, C.J., dissenting).

248. *See Singer, supra* note 227, at 1395.

249. *See Golden Press, Inc. v. Rylands*, 235 P.2d 592, 595 (Colo. 1951) (“[W]here the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively.” (citing *POMEROY, supra* note 190, § 508)); *Beacon Homes*, 146 S.E.2d at 437 (“[The betterments doctrine] applies only where the improvement was constructed by one who was in possession of the land under color of title and who, in good faith and reasonably, believed he had good title to the land.” (citing *Pamlico Co.*, 107 S.E.2d 306; *Harrison*, 26 S.E.2d 860; *Rogers*, 25 S.E.2d 167; *Faison*, 62 S.E. 1086)).

belief.²⁵⁰ In encroachment cases, the innocent encroacher must prove he did not have notice that he was invading the land of another.²⁵¹ In the former, defendant's claim must be under color of title while in the latter the defendant is not required to make this assertion.

A claim for betterments may allow the defendant "to recover the value of the improvements" he has placed on the land of the true owner.²⁵² This is because the betterments doctrine is "rooted in the equitable notion that one who successfully claims title to realty from another who held the land in a good faith belief that he owned it ought to pay for the permanent improvements which will be acquired with the title."²⁵³ Under the encroachments doctrine, plaintiff is not seeking to acquire title; he instead seeks to have an encroaching structure removed from his property and any damages that result therefrom to be paid by the defendant. The court applies the relative hardship doctrine to determine the relative harm that will result to each party if a court issues an injunction to compel removal.²⁵⁴

In sum, the relative hardship doctrine applied under the encroachments doctrine is not codified under the betterments statutes. The doctrines are separate and distinct and should not be confused with each other. North Carolina courts have clearly stated this point.²⁵⁵

C. *Application of the Relative Hardship Doctrine in Other States*

When the court orders an encroacher to remove his structure, the ruling ends the invasion of property rights, but the subsequent harm to the encroacher may be great. A mandatory injunction can be harsh, and one who builds an encroachment in good faith may not deserve such punishment. Many courts view the traditional rule as unfair and inefficient and have decided to subject "property rights to a reasonableness standard that requires judgment about the excusability of the builder's conduct rather than rigid application of formal boundary designations."²⁵⁶ In other

250. HETRICK & McLAUGHLIN, JR., *supra* note 233, § 14.27.

251. Palkovitz, *supra* note 195, at 711 (discussing innocent mistakes made without notice and innocent mistakes made with notice but in good faith error).

252. HETRICK & McLAUGHLIN, JR., *supra* note 233, § 14.26.

253. *State v. Taylor*, 368 S.E.2d 601, 604 (N.C. 1988) (Exum, C.J., dissenting).

254. *See Singer*, *supra* note 227, at 1396.

255. *See McCoy v. Peach*, 251 S.E.2d 881, 884 (N.C. Ct. App. 1979); *Beacon Homes, Inc. v. Holt*, 146 S.E.2d 434, 437 (N.C. 1966) (court defines the betterments statute which is clearly distinguishable from the relative hardship doctrine); N.C. GEN. STAT. ANN. § 1-340 (West 2015) (Notes of Decision, In General).

256. *Singer*, *supra* note 227, at 1397.

words, these courts, unlike the North Carolina courts, have abandoned the traditional rule and adopted the relative hardship doctrine.²⁵⁷

Courts have refused to grant injunctions to compel removal where the encroachments were unintentional, defendants made an innocent mistake, and the encroachments involved less than four inches²⁵⁸ or as much as fifty-eight feet.²⁵⁹ The focus of the courts in these cases was not only the amount of land involved but also the greatly disproportionate damage the encroacher would suffer if he had to remove the structure. For example, plaintiff brought an action against defendant for a mandatory injunction to compel removal of building footings that extended seven feet below the ground and encroached two- to three-and-one-half inches onto plaintiff's property.²⁶⁰ The trial court granted the mandatory injunction, and defendant appealed.²⁶¹ The appellate court noted that the encroachment was slight and did not interfere with plaintiff's use of his property.²⁶² In addition, defendant's expense and his resulting hardship "would be so great in comparison with any advantage of plaintiffs" that to require removal would be "unconscionable"; the trial court should have denied the mandatory injunction.²⁶³ Another example involved a warehouse that encroached 2.3 feet on the adjoining landowner's property, and the landowner brought an action seeking a mandatory injunction to compel removal of the encroaching portion of the warehouse.²⁶⁴ The chancery court denied the injunction, and the landowner appealed.²⁶⁵ On appeal, the court affirmed the lower court's decision, stating that "the right to an injunction requiring the removal of encroaching buildings . . . is governed

257. *Id.* at 1396-97.

258. *See* Stuttgart Elec. Co. v. Riceland Seed Co., 802 S.W.2d 484, 484 (Ark. Ct. App. 1991) (warehouse encroached 2.3 feet onto adjoining landowner's property); Graven v. Backus, 163 N.W.2d 320, 324 (N.D. 1968) (wall encroached 1.2 inches and window sills and roof overhang in the wall encroached 3 inches); Golden Press, Inc. v. Rylands, 235 P.2d 592, 592 (Colo. 1951) (building footings 7 inches below ground encroached 2 to 3.5 inches onto plaintiff's land).

259. Hunter v. Carroll, 15 A. 17, 17 (N.H. 1888) (two houses encroached onto plaintiff's property, one 7.45 feet and another 4.95 feet); AMKCO Ltd. v. Welborn, 21 P.3d 24, 24 (N.M. 2001) (truck stop encroached 58 feet onto adjoining property).

260. *Golden Press*, 235 P.2d at 594.

261. *Id.* (encroachment was a one-story brick-and-cinder-block business building).

262. *Id.* at 596.

263. *Id.*

264. *Stuttgart Elec. Co. v. Riceland Seed Co.*, 802 S.W.2d 484, 485 (Ark. Ct. App. 1991).

265. *Id.* at 484.

by equitable principles.”²⁶⁶ In this case, it would cost defendant \$10,000 to remove the building, the harm to plaintiff was slight, and forcing “the removal of the building would be harsh, drastic, and totally inequitable.”²⁶⁷

An interesting resolution in a North Dakota case was where the trial court gave defendant the option of removing the encroachment or paying plaintiff for the invaded portion of the land, and in turn plaintiff would convey that portion of the land to defendant.²⁶⁸ The price of the land was set by the court based on the total value of the plaintiff’s land, the amount of land encroached upon by defendant, and defendant’s cost to remove the encroachment.²⁶⁹ The court, by setting the price itself, avoided the extortion problem. In this case, one wall of defendant’s building encroached onto plaintiff’s land 1.2 inches, and “two windowsills located in the wall and the roof overhang encroached 3 inches.”²⁷⁰ Plaintiff brought an action requesting a mandatory injunction to compel removal, and defendant prayed for dismissal or a court-ordered sale of the portion of land at issue.²⁷¹ The trial court found the encroachment resulted from an innocent mistake, plaintiff did not establish present or future injury, and the severe effect of a potential mandatory injunction was “plain.”²⁷² The plaintiff appealed and contended the trial court erred in not granting an unconditional mandatory injunction. On appeal, the North Dakota Supreme Court affirmed the trial court’s judgment stating that a court of equity has the option of awarding damages instead of an injunction and gave defendant sixty days from entry of judgment on remittitur to make his choice.²⁷³

One of the most interesting encroachment cases arose in New Mexico and is unique because of the amount of land involved and the option of remedies given the encroacher. AMKCO, one of the plaintiffs, purchased

266. *Id.* at 488 (reversing the chancery court’s grant of an easement to each party over the property of the other).

267. *Id.* (taking the same approach as the RESTATEMENT (SECOND) OF TORTS to balance the equities).

268. *Graven v. Backus*, 163 N.W.2d 320, 324 (N.D. 1968). The trial court applied the balancing of the equities doctrine before granting a conditional mandatory injunction. *Id.* The court also set the amount of damages. *Id.* See also *Morgan v. Veach*, 139 P.2d 976, 983 (Cal. Dist. Ct. App. 1943) (finding plaintiff was entitled to a mandatory injunction but rendering an alternative judgment which ordered the defendant to remove the encroachment or pay the plaintiff a specific amount in damages).

269. See *Graven*, 163 N.W.2d at 326–28.

270. *Id.* at 324. The encroachment ran a length of 49.35 feet for a total encroachment of approximately 12 square feet or an area equaling 0.17 percent of the lot. *Id.* at 326.

271. *Id.* at 320.

272. *Id.*

273. *Id.* at 329 (citing 28 AM. JUR. *Injunctions* § 292, at 805 (1965)).

land on which to build a \$1,250,000 truck stop/convenience center.²⁷⁴ Prior to construction, plaintiffs sold the land it did not need to defendant Welborn.²⁷⁵ After completing the truck stop, plaintiffs discovered the building encroached fifty-eight feet on defendant's land.²⁷⁶ Plaintiffs notified defendant, offered to purchase the land affected by the encroachment, and, of course, defendant declined to sell.²⁷⁷ Plaintiffs went a step further and "purchased a fifty-eight foot strip of property" that adjoined defendant's property on the south side and offered to exchange the parcels of land; again, defendant refused.²⁷⁸ Plaintiffs sought a declaratory judgment to determine the rights of the parties and an order compelling defendant to convey the property at issue for a fair market price.²⁷⁹ The trial court found plaintiffs relied in good faith on a survey and unknowingly constructed the encroachment on defendant's property; the defendant was unaware of the encroachment until plaintiffs notified him; and the cost for plaintiffs to remove the encroachment and resulting damages would be disproportionate to any damage to defendant's property.²⁸⁰ The court entered a judgment in favor of the plaintiffs and ordered the defendant to convey the fifty-eight foot strip of land to plaintiffs "in exchange for its fair market value or for the replacement lot."²⁸¹

Defendant appealed, and the court of appeals reversed and remanded for entry of an order requiring removal of the encroachment.²⁸² Of course, plaintiffs raised the issue of economic waste on appeal, and the court's response was most interesting.²⁸³ The court stated that if plaintiffs did not

274. *AMKCO, Ltd. v. Welborn*, 985 P.2d 757, 758 (N.M. Ct. App. 1999), *rev'd*, 21 P.3d 24 (N.M. 2001).

275. *AMKCO*, 985 P.2d at 759.

276. *Id.* at 758.

277. *Id.* Plaintiffs did not know the site plan and the survey "placed a portion of the construction site fifty-eight feet south of the project's north boundary line." *Id.* After the building was completed, plaintiffs sought permanent financing from Conoco Oil Company. *Id.* *AMKCO* requested a new survey which revealed the building encroached on approximately nine percent of defendant's land. *Id.*

278. *Id.*

279. *Id.* Alternatively, plaintiffs sought reformation of the deed to defendant alleging the deed was a result of a surveyor's error. *Id.* Plaintiffs abandoned this claim; however, defendant counterclaimed for ejectment. *Id.*

280. *Id.* at 760. Plaintiffs would lose \$188,837 in improvements made on the land as well as \$107,687 in an annual loss of revenue, and "the \$1,250,000 project would be rendered unviable." *Id.* Defendant offered no evidence he suffered any hardship other than the taking of approximately nine percent of his vacant land. *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 29 (N.M. 2001).

281. *Id.* at 26.

282. *AMKCO*, 985 P.2d at 764.

283. *Id.* at 763-64.

want to waste their investment, “then as this Court has said in the past under somewhat analogous circumstances, ‘nothing forbids [plaintiffs] from negotiating with [defendant] to waive its right to compel removal of the building.’”²⁸⁴ The court went on to state that the fact that a “‘court [ordered] injunction provides [defendant] with a very strong bargaining position,’ is no grounds for denying [defendant] the sole use and possession of his own private property, particularly when that bargaining position is simply a natural consequence of [plaintiffs’] own mistake.”²⁸⁵ The defendant appealed the court’s decision to the New Mexico Supreme Court.²⁸⁶

The New Mexico Supreme Court applied a two-part test combining the irreparable harm rule and the relative hardship doctrine.²⁸⁷ According to the court, the first part of the test establishes a threshold; “[t]he party seeking the injunction must show that it will suffer irreparable harm if the court denies injunctive relief.”²⁸⁸ However, even if the party shows irreparable harm, the court must then balance the equities to determine if it should issue the injunction.²⁸⁹

Here, the court held the defendant proved irreparable harm because the encroachment deprived defendant “of all use of a portion of his property.”²⁹⁰ Then, the court applied the second part of the test and stated that it had to consider factors other than the size of the encroachment.²⁹¹ The court looked at the innocence of plaintiffs, “the disparity in economic consequences,” and the lack of evidence defendant would suffer a hardship if it denied injunctive relief.²⁹² The court reversed the court of appeals and affirmed the trial court’s denial of an injunction to compel removal of the improvements.²⁹³ The final issue before the court was the appropriate remedy when no injunction would issue. The court ruled that the defendant could elect a remedy from among three options: (1) an easement in which

284. *Id.* at 764 (quoting *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs.*, 952 P.2d 435, 443 (N.M. Ct. App. 1997)).

285. *Id.* at 764 (quoting *Cafeteria Operators*, 952 P.2d at 443). Although courts are not supposed to sanction extortion in encroachment cases, the court’s statements here certainly suggest defendant can use his superior bargaining position to ask for and receive an amount far in excess of the property’s value.

286. *AMKCO*, 21 P.3d at 25.

287. *Id.* at 26–27.

288. *Id.* at 27.

289. *Id.*

290. *Id.*

291. *Id.* at 28–29.

292. *Id.*

293. *Id.* at 30.

appropriate payment should not exceed a specified amount, (2) "conveyance of title . . . in exchange for its fair market value," or (3) "conveyance of title in return for the replacement" lot.²⁹⁴ This was a novel remedy that would result in a just outcome for both parties.

These cases are only a few of the many in which courts applied the relative hardship doctrine and denied injunctive relief. The amount of land involved varied from mere inches to fifty-eight feet; the structures included houses, office buildings, and service stations, but there were common factors in each case. The encroacher made an innocent mistake; the encroachment was not intentional and was unknown to the encroacher when made. Also, the harm to the encroacher caused by granting injunctive relief would be greatly disproportionate to the harm to the adjoining landowner caused by denying injunctive relief. In each of these cases, the courts denied injunctive relief based on the equities between the parties. Not all jurisdictions follow this line of reasoning. North Carolina is one of those jurisdictions, and the real issue is why.

IV. NORTH CAROLINA'S APPLICATION OF THE LAW IN ENCROACHMENT CASES

The law in North Carolina is simple. If a landowner builds a structure that encroaches on his neighbor's property, and the neighbor requests a mandatory injunction to compel removal, a court will grant it.²⁹⁵ North Carolina courts treat innocent, negligent, and willful defendants the same.²⁹⁶ Balancing the equities is a doctrine commonly invoked by other jurisdictions in encroachment cases in which the court will deny injunctive relief to the aggrieved party in favor of money damages if the encroaching party created the encroachment innocently; it was a mistake, and the encroachment is slight compared with the injury to defendant if he has to remove it.²⁹⁷ North Carolina courts have discussed the relative hardship doctrine but refuse to apply it in cases where a permanent structure encroaches on an adjoining landowner's property.²⁹⁸ This Section discusses North Carolina courts' rationale for refusing to apply the relative hardship doctrine. It will then discuss how courts have applied this

294. *Id.* at 29. The appropriate remedy was an issue of first impression. The court stated it had not "had the opportunity to address the proper remedy for an encroachment when the relative hardship doctrine necessitates a remedy other than removal." *Id.*

295. *See Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986).

296. *See id.* (holding that defendant must remove its building even though neither party was aware of the encroachment onto plaintiff's property).

297. *See, e.g., Keeton & Morris, supra* note 178, at 412-17.

298. *See infra* Section IV.C.

rationale in subsequent cases. But first, this Section will look at the rare instance where both the North Carolina Court of Appeals and the North Carolina Supreme Court advocated for the relative hardship doctrine.

A. *Clark v. Asheville Contracting Co.: The Enigma*²⁹⁹

Landowners brought a suit alleging their property damage was caused by disposed land and rock, and their prayer for relief sought both a mandatory injunction and pecuniary damages.³⁰⁰ At trial, the court asked plaintiffs which remedy they desired to pursue: the remedy for damages or the equitable remedy.³⁰¹ Plaintiffs elected to pursue the latter.³⁰²

The land and rock deposits at issue resulted from disposal of massive amounts of rock by defendant as part of a highway project.³⁰³ There was evidence defendant would have to remove about 2,400,000 cubic yards of materials, which would take nine years at a cost of \$13,500,000 if the court granted the mandatory injunction to compel removal.³⁰⁴ The trial court found in favor of plaintiffs.³⁰⁵ It also found, however, that “plaintiffs would suffer irreparable harm for which they had no adequate remedy at law” and, accordingly, “ordered defendants to remove the waste” within a reasonable time to be established by the court.³⁰⁶

On appeal, the North Carolina Court of Appeals held the trial court erred in granting summary judgment against defendants and reversed and remanded the case.³⁰⁷ However, in dicta, the court addressed the trial court’s issuance of the mandatory injunction compelling defendant to

299. See Weeks, *supra* note 2, at 88–90 (providing context for the application of the equitable hardship doctrine in North Carolina).

300. *Clark v. Asheville Contracting Co.*, 323 S.E.2d 765, 767 (N.C. Ct. App. 1984), *modified and aff’d*, 342 S.E.2d 832 (N.C. 1986). Multiple plaintiffs brought suit against Asheville Contracting Co., which was under contract with the Department of Transportation (DOT). The court dismissed the claims against DOT. *Id.*

301. *Clark*, 342 S.E.2d at 836.

302. *Id.*

303. *Id.* at 834.

304. *Clark*, 323 S.E.2d at 768. The facts indicate the harm to plaintiffs in this case was the dumping of rocks near their property, which created a nuisance and violated a restrictive covenant on two of the lots. *Id.* at 767. Plaintiffs also claimed water damages on their property caused by the flow of water as a result of the rock piles. *Id.*

305. *Id.* at 768.

306. *Id.* There is no indication the trial court considered the hardship to defendant if the rocks had to be removed in comparison to the hardship the plaintiffs would suffer if the rocks remained. The court issued the injunction based on irreparable harm to the plaintiffs without balancing the equities of the parties.

307. *Id.* at 769.

remove the rocks.³⁰⁸ In its comments, the court reiterated the evidence regarding the cost and amount of time it would take to remove the rocks, the fact the trial court made no findings of fact on the evidence, and that findings of fact should be made before ordering an injunction to compel removal.³⁰⁹ The court went on to state that “[i]n determining whether to grant an injunction, the court must consider the relative convenience-inconvenience and the comparative injuries to the parties.”³¹⁰ Defendant petitioned for discretionary review, which was granted.³¹¹

On grant of certiorari, the North Carolina Supreme Court held that “substantial issues of material fact” precluded summary judgment; the court affirmed and modified the holding of the court of appeals.³¹² This court, again in dicta, addressed the issue of the mandatory injunction.³¹³ The court stated that because plaintiffs had only pursued injunctive relief, it must remand the case for further findings of fact before ordering defendants to remove the rocks.³¹⁴ “[W]e find it worthwhile to repeat the cautionary statement of the Court of Appeals that on remand ‘the court must consider the relative convenience-inconvenience and the comparative injuries to the parties.’”³¹⁵

Of note, the court in this case did not address the nature of the trespass. However, considering the massive amount of rock at issue, one can conclude that, even though the trespass was not a permanent structure, it was physically permanent in nature. In addition, the court did not characterize the trespass as either continuing or permanent. Because the trial court could and did abate the trespass at the plaintiffs’ request, though, characterization as a continuing trespass is proper. Another interesting fact is the court of appeals stated that under the plaintiffs’ claim, the plaintiffs might prove defendants acted outside the contract or were negligent, yet the court advocated consideration of the relative hardship doctrine.³¹⁶ This is interesting because the conduct of the defendant is a threshold consideration in balancing the equities of the parties. Negligence on the

308. *Id.*

309. *Id.*

310. *Id.* It is interesting that the North Carolina Court of Appeals appears to make the application of the relative hardship doctrine mandatory by using the verb “must.”

311. *Clark v. Asheville Contracting Co.*, 342 S.E.2d 833, 834 (N.C. 1986).

312. *Id.* at 839.

313. *Id.*

314. *Id.*

315. *Id.* (quoting *Clark*, 323 S.E.2d at 769).

316. *Clark*, 323 S.E.2d at 769.

part of the defendant weighs against him in determining whether injunctive relief is proper. Of course, this is only one of several factors considered.³¹⁷

Although the trial court found the plaintiffs would suffer irreparable harm if it denied the injunction, it did not consider the disparity in economic consequences if the defendants had to remove the rocks.³¹⁸ Here, there was evidence that an injunction would force defendants to remove between 1,500,000 and 2,400,000 cubic yards of waste material that would take nine years at a cost of \$13,500,000.³¹⁹ Obviously, the disparity in economic consequences prompted the appellate courts to mandate that the trial court consider the relative hardship doctrine on remand. The real question is why the courts advocated consideration of the doctrine in this case but have not considered it in cases dealing with permanent structures where the disparity between the parties was equally significant.

B. *The Current Standard: Bishop v. Reinhold*

The North Carolina Court of Appeals set out the rationale for granting a mandatory injunction in permanent encroachment cases in *Bishop v. Reinhold*.³²⁰ When the court stated its reasons, it did so without considering the relative hardship doctrine. Since 1984, North Carolina courts have followed the precedent set by this case and its rationale even though the facts in subsequent cases are clearly distinguishable from the facts in *Bishop*.

The defendants in *Bishop* were the original owners of all the land involved in the case.³²¹ They conveyed a portion of the land to plaintiffs and retained a portion for themselves.³²² While the plaintiff was away serving his country in the United States Air Force, defendants built a home that encroached onto plaintiffs' property.³²³ Seven years later, when plaintiff returned and learned of the encroachment, he and his wife sued for removal of the house.³²⁴ A jury found that defendants had wrongfully trespassed and awarded damages; defendants appealed.³²⁵ The court of

317. *See supra* Section III.A.2.

318. *See Clark*, 342 S.E.2d at 836.

319. The court of appeals indicated 2.4 million cubic yards of rock deposits. *Clark*, 323 S.E.2d at 768. The North Carolina Supreme Court indicated an amount between 1.3 and 1.5 million cubic yards. *Clark*, 342 S.E.2d at 835.

320. *Bishop v. Reinhold*, 311 S.E.2d 298, 300 (N.C. Ct. App. 1984).

321. *Id.* at 298.

322. *Id.* at 300.

323. *Id.* at 299.

324. *Id.* at 300.

325. *Id.* at 299.

appeals remanded the case to the trial court and ordered the court to grant a mandatory injunction for the removal of the portion of defendants' house that encroached upon plaintiffs' property.³²⁶

The court of appeals based its rationale on its characterization of the encroachment as a continuing trespass, which it described as "a peculiar animal in the law."³²⁷ This is because "a separate and independent trespass" occurs each day the structure remains on plaintiffs' property, and each day the three-year statute of limitations begins to run. As a result, there is not a statute of limitations bar to an action to remove the encroachment until defendants had been in continuous use of the property for a period of twenty years.³²⁸

Characterizing the encroachment as a continuing trespass also gives rise to the possibility that a plaintiff could bring successive actions at law for damages.³²⁹ North Carolina is in accord with the majority view on this issue.³³⁰ To avoid multiple actions for damages, courts limit the plaintiff to a single recovery of all damages.³³¹ Therefore, it lies within the authority of the court to "grant 'equitable relief in the form of a permanent injunction' as a proper remedy."³³²

Courts deem a permanent injunction to be a proper remedy, and in North Carolina the only remedy, because to deny a right of action for injunctive relief would allow a defendant a right of eminent domain as a private person.³³³ In the alternative, defendant would acquire a permanent prescriptive easement to use plaintiff's land. "This the law will not do, as the defendants have not been in possession 20 years[.]"³³⁴ This is based on

326. *Id.* at 305.

327. *Id.* at 300.

328. *Id.* at 301 ("Any action to remove the encroachment, as in an action for compensation for the easement, or for the fee by adverse possession would not be barred until defendants had been in continuous use thereof for a period of twenty years so as to acquire the right by prescription." (citing *Love v. Postal Tel.-Cable Co.*, 20 S.E.2d 337, 338 (N.C. 1942))).

329. *Id.* at 300 ("Ordinarily, each day the trespass continues a new wrong is committed, which in turn bears a new statute of limitations.").

330. *Id.* (citing *PROSSER*, *supra* note 46, § 13).

331. *Id.* at 300.

332. *Id.* (quoting *Conrad v. Jones*, 228 S.E.2d 618, 619 (N.C. Ct. App. 1976)). In *Conrad*, plaintiffs brought an action to have a sewer line removed. *Conrad*, 228 S.E.2d at 618. The trial court denied injunctive relief because plaintiffs did not offer evidence of irreparable harm. *Id.* at 619. However, the court of appeals stated that plaintiffs' claim was based upon a continuing trespass and the proper remedy in such cases was equitable relief in the form of a permanent injunction. *Id.*

333. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 668-69 (N.C. Ct. App. 1986).

334. *Bishop*, 311 S.E.2d at 302.

the theory that an award of money damages for a permanent encroachment is tantamount to condemnation by a private citizen. North Carolina courts “have allowed permanent damages only in situations involving quasi-public entities.”³³⁵

The principal policy underlying the court’s rationale is the protection of plaintiff’s property rights. Put briefly, if a court finds an encroachment, it is characterized as a continuing trespass, and defendant is not a quasi-public entity, a mandatory injunction will issue as a matter of law. In a later case, the court reaffirmed its position when it stated that “without the threat of a mandatory injunction, builders may view the legal remedy as a license to engage in private eminent domain.”³³⁶ The court will not force a plaintiff to sell his land, nor will it allow the defendant to acquire the land by means of “private eminent domain.”³³⁷

The *Bishop* court did not consider or even mention the relative hardship doctrine, and it did not require the trial court to consider the doctrine on remand. This is inconsistent with the general rule that, where equity has jurisdiction, courts should consider the relative hardships of the parties and the equities between them before granting or denying injunctive relief.³³⁸ However, jurisdictions that take the position that a legal remedy is inadequate to protect plaintiff’s property interest grant injunctive relief without great reluctance and without consideration of the doctrine.³³⁹

Here, defendants’ conduct, the plaintiffs’ explained absence, and the amount of land at issue were significant factors in determining the appropriate remedy.³⁴⁰ The facts indicate the defendants’ conduct was either negligent or intentional. After all, they were the original owner of the land that was conveyed to plaintiffs.³⁴¹ In addition, plaintiffs were absent from the area for an extended period of time and returned to find a completed structure encroaching onto their property.³⁴² The plaintiffs did not know of the encroachment until they had the property surveyed so that they could sell it.³⁴³ The amount of land at issue was not a few inches; defendants’ house encroached fifty feet onto plaintiffs’ land.³⁴⁴ The plaintiffs met their burden of proving irreparable harm if the house

335. *See Williams*, 346 S.E.2d at 669.

336. *Id.*

337. *Id.*

338. *See Dobbs, Remedies for Trespass, supra* note 7, at 358.

339. *See id.* at 352.

340. *Bishop v. Reinhold*, 311 S.E.2d 298, 300–01 (N.C. Ct. App. 1984).

341. *Id.* at 299.

342. *Id.* at 300.

343. *Id.*

344. *Id.* at 303.

remained on their property, but if the court had considered the relative hardship doctrine, would the court have reached a more equitable determination?

Ten months after the *Bishop* decision, the North Carolina Court of Appeals handed down its decision in *Clark v. Asheville Contracting Co.*³⁴⁵ There, the court of appeals required the trial court to consider the relative hardship doctrine before granting a mandatory injunction to compel removal.³⁴⁶ This raises the issue of why the appellate court required consideration of the doctrine in *Clark* but not in *Bishop*. In subsequent cases, courts have discussed the relative hardship doctrine but never applied it to the facts in the case.

C. *Bishop Rationale Applied in North Carolina Encroachment Cases*

This Section demonstrates how North Carolina courts treat all encroaching defendants equally with respect to their mental states. It does not matter whether the defendant was innocent, negligent, or willful; the court will compel him to remove the encroaching structure. Since 1986, the North Carolina Court of Appeals has recognized the relative hardship doctrine in encroachment cases but has based its decisions on its holding in *Bishop*. “[W]e are compelled by this Court’s prior holding . . . that since the encroachment and continuing trespass have been established, and since defendant is not a quasi-public entity, plaintiff is entitled as a matter of law to . . . removal of the encroachment.”³⁴⁷ The court’s position is very clear, but should it have reconsidered its position in subsequent cases based on the facts and equities of each case?

1. *Williams v. South & South Rentals, Inc.: Innocent Encroachment of One Square Foot*³⁴⁸

Two years after its decision in *Bishop*, another permanent encroachment case presented the court of appeals with facts distinguishable from the prior case, yet the holding in both cases was the same. Did the court take the course of least resistance by following the precedent it set in *Bishop*? At least one judge was of the opinion it did.³⁴⁹

345. *Clark v. Asheville Contracting Co.*, 323 S.E.2d 765 (N.C. Ct. App. 1984), *modified and aff’d*, 342 S.E.2d 832 (N.C. 1986).

346. *Id.* at 769; *see supra* Section IV.A.

347. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986).

348. *Id.* It is interesting to note that the court of appeals decided *Williams* three months after the North Carolina Supreme Court decided *Clark v. Asheville Contracting Co.*

349. *Williams*, 346 S.E.2d at 669 (Webb, J., dissenting). For a discussion of *Williams*, *see supra* Section III.A.1.

The facts in the case are interesting and show the plaintiff's superior bargaining position. One corner of defendant's two-story brick apartment building encroached approximately one foot onto plaintiff's property.³⁵⁰ Neither party was aware of the encroachment until nine years after construction of the building.³⁵¹ Defendant decided to sell his property and learned of the encroachment when he had the land surveyed.³⁵² He went to plaintiff, advised him of the encroachment, and offered to purchase the land in question for a fair price.³⁵³ The plaintiff's property was an "oddly shaped" tract of land located largely in a creek bed and "consist[ed] of one-fourth to one-third acre"; plaintiff's asking price for the land was \$45,000.³⁵⁴ Defendant refused to pay that price for an unusable tract of land.³⁵⁵ Plaintiff brought an action in trespass and requested a mandatory injunction to compel removal.³⁵⁶

The lower court barred the action after it found the encroachment to be a continuing trespass and applied the three-year statute of limitations.³⁵⁷ The court dismissed plaintiff's claim, and plaintiff appealed from the entry of the judgment.³⁵⁸ The court of appeals reversed and remanded the lower court's judgment, stating that the action was not barred by the statute of limitations because plaintiff requested a permanent remedy, which was "subject to the twenty-year statute of limitations for adverse possession."³⁵⁹

In its opinion, the court of appeals discussed the relative hardship doctrine and the underlying policy considerations that the doctrine is designed to eliminate. The court went so far as to state, "there may be situations, other than . . . quasi-public franchise[s], where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent damages be awarded."³⁶⁰ Nevertheless, the court stated it was compelled to follow its holding in *Bishop* and remanded the case to the lower court for entry of a mandatory injunction.³⁶¹ The court held that since the plaintiff established the encroachment and continuing trespass,

350. *Id.* at 667.

351. *Id.* at 666.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.* at 667.

358. *Id.*

359. *Id.* at 668.

360. *Id.* at 669 (citing *Rhodes v. City of Durham*, 81 S.E. 938 (N.C. 1914)).

361. *Id.*

and defendant was not a quasi-public entity, plaintiff, as a matter of law, was entitled to have the encroachment removed.³⁶²

Judge Webb in his dissent did not agree with the majority's rationale and stated that the rule in *Clark v. Asheville Contracting Co.* governed in this case.³⁶³ He disagreed with the majority's reasoning that plaintiff was entitled to removal of the encroachment as a matter of law since the defendant was not a quasi-public entity. "In determining whether to grant an injunction, the court must consider the relative convenience-inconvenience and the comparative injuries to the parties."³⁶⁴ The dissenting opinion echoed the principle that before a mandatory injunction will issue courts should consider the relative hardships to the parties and the equities between them.

The majority did not consider this principle but instead followed the precedent set forth in *Bishop*.³⁶⁵ The only fact common to *Bishop* and *Williams* was that, in both cases, the defendant encroached on the plaintiff's property. The encroachment in the former case was at best negligent, while the encroachment in the latter was completely innocent. The extent of the encroachment was significantly different in the two cases: One structure encroached fifty feet, while the other encroached a mere square foot. The defendant in *Williams* notified the plaintiff as soon as he learned of the encroachment and made an offer to purchase the land at fair market value, and the plaintiff only agreed to sell at an unreasonable price.³⁶⁶ In addition, plaintiff did not provide any evidence he would suffer a hardship if the court denied injunctive relief. Despite the fact that these cases are easily distinguishable, the court of appeals based its holding on the one fact that the two cases had in common: the encroachment. It did not consider the conduct of the parties, the amount of property involved, or the potential loss of relative property interests.

At the end of the day, the defendant in *Williams* was in an untenable position. He either had to remove a portion of his building, which would result in economic waste at considerable expense, or negotiate with plaintiff to waive his right to compel removal of the building.³⁶⁷ If the court had considered the relative hardship doctrine, it may have reached a more equitable result.

362. *Id.*

363. *Id.* (Webb, J., dissenting).

364. *Id.*

365. *See supra* notes 291–310 and accompanying text.

366. *Williams*, 346 S.E.2d at 665.

367. *Id.*

2. *Young v. Lica: A Bridge, an Easement, and a Continuing Trespass*³⁶⁸

This case involved an easement granted to defendants by out-of-state plaintiffs.³⁶⁹ The easement allowed defendants to cross plaintiffs' land to access the highway over a single-lane bridge located between the parties' properties.³⁷⁰ Defendants decided to make improvements to the bridge and contacted plaintiffs once before beginning construction.³⁷¹ Defendants constructed a new bridge that was eight feet higher and four times wider than the old bridge, which affected plaintiffs' access to their property.³⁷² As a result, plaintiffs sued defendants "seeking a permanent injunction and damages for trespass to [their] property and nuisance."³⁷³

The trial court concluded that plaintiffs had no valid claim for trespass or nuisance because defendants only improved the easement of which they were always entitled to use; the court denied plaintiffs' injunction and ordered a trial on the issue of damages for the additional burden imposed on plaintiffs' land by the new bridge.³⁷⁴ Plaintiffs decided to abandon their claim for damages and moved for a new trial to pursue their claim for injunctive relief. The trial court denied plaintiffs' motion, and they appealed.³⁷⁵

On appeal, plaintiffs contended defendants trespassed on their land and sought a mandatory injunction to compel removal of the new bridge and replacement of it with a bridge similar to the original.³⁷⁶ The North Carolina Court of Appeals first addressed the trial court's failure "to determine the location and boundary of the easement and whether defendants made an unauthorized entry on plaintiffs' property."³⁷⁷ Until the property interests of the parties were determined, the court could not render a proper judgment.

Next, the court addressed the issue of the trespass. The court stated that when one builds on another's land without permission, he commits a continuing trespass and the usual remedy is a permanent injunction.³⁷⁸ The

368. *Young v. Lica*, 576 S.E.2d 421 (N.C. Ct. App. 2003).

369. *Id.* at 425.

370. *Id.* at 422.

371. *Id.*

372. *Id.*

373. *Id.*

374. *Id.* at 423.

375. *Id.*

376. *Id.* at 423–24.

377. *Id.* at 424.

378. *Id.* (citing *Williams v. S. & S. Rentals*, 346 S.E.2d 665, 669 (1986)).

court then discussed the balancing test recognized in *Clark and Williams*.³⁷⁹ However, despite this discussion, the court recounted that in *Williams* it was compelled to follow its holding in *Bishop*.³⁸⁰ In effect, the court was telling defendant it would continue to follow this precedent.

The court reversed and remanded the case “for findings of fact and conclusions of law regarding the location and width of the easement.”³⁸¹ The court also ordered the trial court to determine if defendants’ new construction trespassed on plaintiffs’ land.³⁸² The court of appeals held that, after the trial court made a determination of whether defendants’ construction was physically located within the boundaries of the easement, it must “render a judgment based upon law and precedents discussed herein.”³⁸³ If the facts establish an encroachment and continuing trespass, and defendant is not a quasi-public entity, plaintiffs will likely be entitled as a matter of law to removal of the bridge.³⁸⁴

The facts here are somewhat analogous to the facts in *Bishop*. The defendants here, like the defendant in *Bishop*, were negligent in determining their property interest. In both cases, defendants dealt with an absent plaintiff who learned of the encroachment after an extended absence from his property. Therefore, it is interesting that the court discussed the relative hardship doctrine in this case and not in *Bishop*. Of course, the court promptly dismissed the doctrine as it did in *Williams*. This raises the question of why the court continues to pay lip service to a doctrine that it is not going to consider before granting or denying injunctive relief.

3. *Cornelius v. Corry: Innocent Encroachment of Twenty-Two Feet*³⁸⁵

In an unpublished opinion, the North Carolina Court of Appeals reiterated the *Bishop* rule. The plaintiff and defendants in this case were adjoining landowners.³⁸⁶ In 1985, defendants moved a house onto their property, which crossed onto land owned by plaintiff’s predecessor in title by twenty-two feet.³⁸⁷ At that time, both parties believed the house was

379. *Id.* at 424–25.

380. *Id.* at 425.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006) (unpublished disposition).

386. *Id.* at *1.

387. *Id.* at *1–2.

located entirely on defendants' property.³⁸⁸ Plaintiff acquired the land in 2001 and approximately three years later had her land surveyed.³⁸⁹ The survey revealed the encroachment, and in 2005, plaintiff filed an action seeking a mandatory injunction to compel removal of the house from her property.³⁹⁰

Plaintiff obtained a mandatory permanent injunction, which required that defendants remove the encroaching structure—the house—within 180 days.³⁹¹ On appeal, defendants argued that the trial court erred because it failed to “make findings of fact regarding the relative convenience and inconvenience, and the comparative injuries to the parties” before granting permanent injunctive relief.³⁹² Defendants maintained the relative hardship doctrine was required by the court's holding in *Clark v. Asheville Contracting Co.*³⁹³ The court, however, disagreed and stated that the holding in *Clark* was “not the most compelling precedent” in determining whether to grant or deny a mandatory injunction.³⁹⁴ The court reasoned that “[w]hen one builds upon another's land without permission or right, a continuing trespass is committed. ‘[T]he usual remedy for a continuing trespass is a permanent injunction which in this case would be a mandatory injunction for removal of the encroachment.’”³⁹⁵ The court went on to state that, in addition to considering *Clark*'s explanation of the relative hardship doctrine, a trial court should also consider the conduct of the defendant and whether the harm to defendant if the injunction issues is disproportionate to the harm plaintiff will suffer if the injunction is denied.³⁹⁶ “Mere inconvenience and expense are not sufficient to withhold injunctive relief. The relative hardship must be disproportionate.”³⁹⁷

Defendants also contended that “the trial court failed to make any findings regarding the injury plaintiff would suffer” if the injunction was issued or denied.³⁹⁸ In this case, the trial court found it would cost defendants \$10,000 to \$15,000 to move the house, the original cost of moving the house to the property was \$12,800, and the current tax value

388. *Id.* at *2.

389. *Id.*

390. *Id.* at *1–2.

391. *Id.* at *2.

392. *Id.* at *5.

393. *Id.* (citing *Clark v. Asheville Contracting Co.*, 323 S.E.2d 765 (N.C. Ct. App. 1984), *modified and aff'd*, 342 S.E.2d 832 (N.C. 1986)).

394. *Id.* at *6.

395. *Id.* (quoting *Young v. Lica*, 576 S.E.2d 421, 424 (N.C. Ct. App. 2003)).

396. *Id.* at *6–7.

397. *Id.* at *7 (quoting *Young*, 576 S.E.2d at 425).

398. *Id.* at *7.

was \$78,000.³⁹⁹ The North Carolina Court of Appeals held that the findings of the trial court satisfied both *Clark* and *Young*.⁴⁰⁰ This addressed defendants' injury if the injunction was granted, but did it really address the injury plaintiff would suffer if the injunction was denied?

The court of appeals then reiterated the rule that when a building encroaches upon an adjoining landowner's property, the proper remedy is removal.⁴⁰¹ The court stated that based on the "prior holdings in *Young*, *Williams*, and *Bishop*, and as the trial court properly found that defendants' house encroached onto plaintiff's property . . . and as defendants are not a quasi-public entity, plaintiff therefore is entitled to a mandatory injunction ordering the removal of the encroaching structure."⁴⁰²

The facts in this case are analogous to the facts in *Williams*. Defendants in both cases innocently encroached onto the plaintiff's property and remained unaware of the encroachment for several years. The encroachment was neither willful nor intentional in either case. The cost for defendants to remove the structures was substantial. And, in each case, the plaintiff was unaware of the encroachment for several years. In both cases, the injury to the defendants was more than a mere inconvenience; the hardship defendants suffered was greatly disproportionate to the injury plaintiffs would have suffered from denial of the injunction. The facts in both cases are distinguishable from the facts in *Bishop*; yet, the court of appeals upheld the granting of a mandatory injunction compelling removal. Considering the facts, was this an equitable outcome in either case?

Although the court discussed the relative hardship doctrine, it promptly dismissed it as it had in previous cases.

4. *Mathis v. Hoffman*:⁴⁰³ *A Fence, an Encroachment, and an Unreasonable Landowner*

This is a case where the parties could easily have resolved their issues outside of court. But, when an encroachment is involved, it appears common sense takes a back seat.

Plaintiffs built a fence between their and defendant's property.⁴⁰⁴ Four years later, plaintiffs learned that defendant believed the fence encroached onto her property.⁴⁰⁵ Defendant then had her property surveyed

399. *Id.*

400. *Id.*

401. *Id.* at *8.

402. *Id.* at *8–9.

403. *Mathis v. Hoffman*, 711 S.E.2d 825 (N.C. Ct. App. 2011).

404. *Id.* at 825.

405. *Id.*

and notified the plaintiffs of the encroachment; however, she refused to give plaintiffs a copy of the survey.⁴⁰⁶ Plaintiffs then initiated a special proceeding to determine the actual property line.⁴⁰⁷ After the court established the boundary line between the two parcels, it was clear that the fence was built on defendant's property.⁴⁰⁸

Plaintiffs offered to pay to move the fence, but defendant was not in a neighborly mood and "refused to allow plaintiffs to remove the fence."⁴⁰⁹ In fact, on more than one occasion, defendant actually contacted local law enforcement to report plaintiffs for trespassing when plaintiffs attempted to relocate the fence.⁴¹⁰ Plaintiffs then brought an action "seeking a declaratory judgment of the parties' rights [and] an injunction granting plaintiffs the right to remove the fence."⁴¹¹ Plaintiffs prevailed at summary judgment and gained the court's permission to enter "defendant's property to remove and relocate the fence."⁴¹² To make a bad situation worse, defendant appealed.⁴¹³

On appeal, defendant contended "the trial court exceeded its authority in granting plaintiffs' motion for summary judgment."⁴¹⁴ The North Carolina Court of Appeals stated that an "injunction is a matter of discretion which the trial court exercises after weighing the equities and the advantages and disadvantages to the parties."⁴¹⁵ Here, the injunction issued by the trial court was equitable. "[T]he injunction is a potential remedy in any case in which it may provide significant benefits that are greater than its costs or disadvantages."⁴¹⁶ The record indicates the cost of constructing the fence was \$15,000, and the cost to remove it was \$2,000.⁴¹⁷ The trial court found that, given the disparity between the amounts, it was "equitable to allow plaintiffs to remove and relocate the fence."⁴¹⁸

406. *Id.*

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.* at 826.

415. *Id.* (quoting *Adams v. Beard Dev. Corp.*, 446 S.E.2d 862, 865 (N.C. Ct. App. 1994)).

416. *Id.* at 826 (quoting *Roberts v. Madison Cty. Realtors Ass'n*, 474 S.E.2d 783, 787 (N.C. 1996)).

417. *Id.*

418. *Id.*

Defendant also contended she was entitled to a choice of remedies: require that plaintiffs remove the fence or allow the fence to remain and be subject to a claim for unjust enrichment.⁴¹⁹ Defendant relied on *Beacon Homes, Inc. v. Holt*⁴²⁰ to support her contention, but the court of appeals stated that defendant's reliance was misplaced.⁴²¹ In *Beacon Homes*, the North Carolina Supreme Court did not hold that a property owner has a choice of remedies where a party mistakenly builds on the owner's property.⁴²² The court of appeals explained that the issue in *Beacon Homes* was not the choice of remedies allowed to defendant, but whether the plaintiffs alleged facts sufficient to find "defendant property owner had been unjustly enriched."⁴²³

The result in this case was equitable, but at what cost to the plaintiffs? While plaintiffs were allowed to do what they had tried to do all along by being a good neighbor, they were allowed to only after incurring the costs of litigation. The parties in this case should have resolved the dispute without resorting to a lawsuit.

Of note, the court of appeals stated that the trial court exercises its discretion in granting injunctive relief after it balances the equities and advantages and disadvantages between the parties.⁴²⁴ Yet, this same court has dismissed the relative hardship doctrine repeatedly in encroachment cases.⁴²⁵ This inconsistency presents a paradox.

5. *Graham v. Deutsche Bank National Trust Co.*⁴²⁶: *Predecessors in Title, No Surveys, and an Encroachment*

The parties owned adjoining lots in a subdivision, and neither party had their lots surveyed at the time of acquisition.⁴²⁷ Plaintiff acquired her lot by general warranty deed, and defendant acquired its lot pursuant to a trustee's deed.⁴²⁸ Plaintiff did not discover the existence of an

419. *Id.*

420. *Beacon Homes, Inc. v. Holt*, 146 S.E.2d 434 (N.C. 1966).

421. *Mathis*, 711 S.E.2d at 826 (citing *Beacon Homes*, 146 S.E.2d 434). For the background of *Beacon Homes*, see *supra* note 8.

422. *Id.*

423. *Id.* (citing *Beacon Homes*, 146 S.E.2d at 437).

424. *Id.*

425. See, e.g., *Young v. Lica*, 576 S.E.2d 421, 425 (N.C. Ct. App. 2003); *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986); *Bishop v. Reinhold*, 311 S.E.2d 298, 304–05 (N.C. Ct. App. 1984).

426. *Graham v. Deutsche Bank Nat'l Tr. Co. (Graham II)*, 768 S.E.2d 614 (N.C. Ct. App. 2015).

427. *Id.* at 615.

428. *Id.*

encroachment on her property until a neighbor approached her about purchasing the adjoining lot from defendant.⁴²⁹ At the time of the neighbor's inquiry, he asked the plaintiff if she was aware of the property line dispute between the two parcels of land.⁴³⁰ Since the plaintiff did not have her property surveyed at the time she acquired it, she was unaware of any dispute and did not look further into the matter.⁴³¹ Later, the issue was raised again when another individual approached the plaintiff about purchasing the defendant's lot and asked about the property line dispute.⁴³² This individual had the defendant's lot surveyed, and the survey indicated the house was on defendant's property and his septic tank system encroached on plaintiff's lot.⁴³³

Plaintiff's title company then had the property surveyed, and the second survey also showed the house and septic system partially encroached on plaintiff's lot.⁴³⁴ Plaintiff's attorney contacted defendant and demanded that defendant remove the encroaching structures from plaintiff's property.⁴³⁵ Defendant was given seven days to respond and was told that if defendant did not respond within that time, "a civil action would be filed."⁴³⁶ Twelve days later, plaintiff sued defendant for an "ongoing and continuing trespass."⁴³⁷ Defendant answered, counterclaimed for reformation of the deed and to quiet title, and filed a third-party complaint against BB&T, the holder of the deed of trust to the encroaching property.⁴³⁸ Defendant later amended its answer and counterclaimed for adverse possession, which it later voluntarily dismissed.⁴³⁹ Plaintiff and BB&T then filed a joint motion for summary judgment.⁴⁴⁰ The trial court granted summary judgment in favor of plaintiff and BB&T and "ordered defendant to remove the encroaching structures."⁴⁴¹ It is interesting to note

429. *Id.*

430. *Id.*

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.* at 616.

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.* In a footnote, the trial court touched on the equitable hardship doctrine and stated that since the parties were private parties, the balancing test was not required. *Graham v. Deutsche Bank Nat'l Tr. Co.*, No. 12 CVS 4672, 2013 WL 9994490, at *3 n.4 (N.C. Super. Ct. Mar. 19, 2013). An order requiring removal of the encroachment was the

that the trial court, in its discretion, stayed the execution of the order for sixty days “to permit the parties time to negotiate a mutually agreeable settlement that [would] not require removal of the encroachment.”⁴⁴² This did not happen. The parties could not come to a mutually agreeable solution, so the defendant opted to take its chances on appeal and filed a motion with the trial court to stay and suspend the injunction pending appeal.⁴⁴³

This case is interesting because it went before the court of appeals twice with opposite outcomes.⁴⁴⁴ In the case’s initial appearance before the court, the court reversed summary judgment for plaintiff and BB&T and remanded the case for entry of summary judgment in favor of defendant.⁴⁴⁵ Defendant contended that summary judgment in favor of plaintiff was improper because plaintiff could not prove all of the essential elements of a trespass.⁴⁴⁶ “A claim of trespass requires possession of the property by plaintiff when the alleged trespass was committed,”⁴⁴⁷ and here the plaintiff was not in possession when the structures were built.⁴⁴⁸ The court agreed with defendant and was guided by its decision in *Woodring v. Swieter*,⁴⁴⁹ where the court held that the plaintiff had no legally recognized interest in the property in question until six years after the original trespass was committed and could not satisfy the first element of a claim for trespass.⁴⁵⁰ Here, like the plaintiff in *Woodring*, plaintiff did not acquire the property in question until “after the construction of the encroaching structures,” and the court stated it was compelled to follow the result in *Woodring*.⁴⁵¹ Plaintiff attempted to rely on the court’s decision in *Bishop v. Reinhold*,⁴⁵² but the

proper remedy. *Id.* at *3 (citing *Young v. Lica*, 576 S.E.2d 421, 424–25 (N.C. Ct. App. 2003)).

442. *Graham*, 2013 WL 9994490, at *4.

443. *Graham v. Deutsche Bank Nat’l Tr. Co.*, No. 12 CVS 4672, 2013 WL 9994491, at *1 (N.C. Super. Ct. May 17, 2013).

444. *Compare Graham v. Deutsche Bank Nat’l Tr. Co. (Graham I)*, No. COA13-881, 2014 WL 3510608, at *1 (N.C. Ct. App. July 15, 2014) (unpublished disposition) (holding that *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984), did not apply because one of the elements of the trespass claim was missing), *with Graham II*, 768 S.E.2d at 616 (holding that all the elements of trespass were met, and the trespass was continuing under *Bishop*).

445. *Graham I*, 2014 WL 3510608, at *4.

446. *Id.* at *2.

447. *Id.* (emphasis omitted) (quoting *Singleton v. Haywood Elec. Membership Corp.*, 588 S.E.2d 871, 874 (N.C. 2003)).

448. *Id.*

449. *Woodring v. Swieter*, 637 S.E.2d 269 (N.C. Ct. App. 2006).

450. *Graham I*, 2014 WL 3510608, at *3 (citing *Woodring*, 637 S.E.2d 269).

451. *Id.*

452. *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984).

court stated that plaintiff's reliance was misplaced because, unlike plaintiff, the defendant in *Bishop* was in possession of the land when the encroachment occurred.⁴⁵³

Plaintiff then petitioned for a rehearing.⁴⁵⁴ The second time this case went before the court of appeals, the court reconsidered its previous position and concluded that its reliance on *Woodring* was inconsistent with prior decisions of the North Carolina courts regarding the law of continuing trespasses to real property.⁴⁵⁵ In its second opinion, the court relied on *Bishop v. Reinhold* as the controlling law on the issue of continuing trespasses.⁴⁵⁶ The court stated, “[i]mplicit in the holding of *Bishop* is the principle that the first element of a trespass claim may be satisfied even where . . . the landowner asserting the claim did not own the property at the time the original trespass was committed”⁴⁵⁷ as long as the landowner was in possession while the trespass continued.⁴⁵⁸ Based on the forecast of the evidence that the trespass elements were met, the court stated that the trial court properly granted summary judgment in favor of plaintiff and BB&T and properly issued a mandatory injunction to compel removal of the encroachment.⁴⁵⁹ The court quoted, “the usual remedy for a continuing trespass is . . . a mandatory injunction for removal of the encroachment.”⁴⁶⁰

In this case, both parties contributed to the resulting property issues even though predecessors in title constructed the encroachments before the parties owned their respective lots.⁴⁶¹ The parties would have discovered the encroachments at the time they acquired their property if either party recognized the value of having their property surveyed.

When the trial court established that there was an encroachment, it gave the parties an opportunity to reach a mutually agreeable solution. Although the court issued a mandatory injunction for the removal of the encroachment, it gave the parties time to negotiate and come to a resolution

453. *Graham I*, 2014 WL 3510608, at *3 (citing *Bishop*, 311 S.E.2d at 298).

454. *Graham v. Deutsche Bank Nat'l Tr. Co. (Graham II)*, 768 S.E.2d 614, 615 (N.C. Ct. App. 2015).

455. *Id.* at 616.

456. *Id.* (citing *Bishop*, 311 S.E.2d at 298) (holding that it did not apply because there, the plaintiff was in possession of his property at the time the encroachment was first committed, while plaintiff in the present case was not).

457. *Graham II*, 768 S.E.2d at 616.

458. *Id.*

459. *Id.* at 618 (citing *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986)).

460. *Id.* (quoting *Williams*, 346 S.E.2d at 669).

461. *Id.* at 615.

that would not require the removal of the encroachment.⁴⁶² It was as if the court was giving the parties an opportunity to reach an equitable solution that the court itself could not reach under the circumstances of the case. The court stayed the execution of its order for sixty days;⁴⁶³ however, defendant filed a motion to stay and suspend the injunction pending appeal just short of the end of the sixty-day period.⁴⁶⁴ This was because the parties could not come to an equitable resolution.⁴⁶⁵

Even though the trial court gave the parties an opportunity to negotiate a reasonable solution, the defendant remained in an inferior bargaining position. If the parties could not agree otherwise, the defendant had to remove the encroachment within ninety days of the expiration of the sixty-day period.⁴⁶⁶ This situation was fraught with an opportunity for extortion and economic waste. The parties did not resolve their dispute, defendant appealed and, after the time and expense of two appeals, the defendant ended up in the same position from which it began.

The foregoing cases involved very little in terms of land, but they created complex problems for the landowners and the courts. In each case, the landowner requested a mandatory injunction to compel removal, and the courts relied on the precedent set in *Bishop v. Reinhold* to reach a decision. In North Carolina, if an aggrieved landowner requests an injunction to compel removal, it will likely be granted. It is apparent that in North Carolina the only remedy for an encroachment is removal of the structure, as shown in *Williams, Young, Mathis, Cornelius, and Graham*.⁴⁶⁷

V. NORTH CAROLINA SHOULD ADOPT AND APPLY THE RELATIVE HARDSHIP DOCTRINE

Over the past thirty years, the North Carolina Court of Appeals has refused to consider the relative hardship doctrine where permanent encroachments were at issue, even while paying lip-service to it. In 1984, the court held that if an encroachment and continuing trespass are established and defendant is not a quasi-public entity, the law entitles

462. *Graham v. Deutsche Bank Nat'l Tr. Co.*, No. 12 CVS 4672, 2013 WL 9994490, at *3 (N.C. Super. Ct. Mar. 19, 2013).

463. *Id.* at *1.

464. *Id.*

465. *Id.*

466. *Id.* at *4.

467. See *Mathis v. Hoffman*, 711 S.E.2d 825, 825 (N.C. Ct. App. 2011); *Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006); *Young v. Lica*, 576 S.E.2d 421 (N.C. Ct. App. 2003); *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

plaintiff to have the encroachment removed.⁴⁶⁸ The court continues to follow this precedent, even when the facts in subsequent cases are clearly distinguishable.⁴⁶⁹ But, is this what the law should be? Should the courts continue to apply a rule that promotes unnecessary litigation, creates a potential for extortion, results in waste, and rarely serves as a deterrent?

A. *A Simple Rule*

North Carolina courts have consistently held that a remedy at law is inadequate to protect plaintiffs' property interest, and they grant injunctive relief without great reluctance.⁴⁷⁰ Courts view a relatively slight benefit to a plaintiff compared to a great hardship to a defendant as an insufficient reason to deny a mandatory injunction.⁴⁷¹ The court's rationale is based on the policy that land is unique, and protection of a landowner's rights is more important than any financial loss to an encroacher if injunctive relief is granted.⁴⁷² Granting injunctive relief vindicates the plaintiff, punishes the defendant, and serves as a deterrent to others.⁴⁷³

It is well-settled that an individual who encroaches on another's land is a trespasser and has placed himself in a vulnerable position.⁴⁷⁴ Whether his actions are innocent, negligent, or intentional, the defendant is still guilty of invading the property interest of another individual. A mandatory injunction punishes the defendant regardless of his intent or lack thereof to take the plaintiff's land.⁴⁷⁵ However, is justice served by applying the same standard to one who innocently encroaches on his neighbor's land and one who encroaches intentionally?⁴⁷⁶ The innocent encroacher will likely not repeat his mistake because he did not intend to take property that was not

468. See *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984); *Williams*, 346 S.E.2d 665.

469. See cases cited *supra* note 425.

470. See *supra* Part IV.

471. See *Williams*, 346 S.E.2d at 665. In *Williams*, the court found that the defendant would have to remove the corner of a two-story apartment building, rendering the structure unusable, and plaintiff's benefit would be enjoyment of the use of one square foot of unusable property. *Id.* The court granted a mandatory injunction to compel removal of the structure. *Id.*

472. See *Adjoining Landowners*, *supra* note 26, § 120.

473. Keeton & Morris, *supra* note 178.

474. See *supra* Section III.A.

475. See 43A C.J.S. *Injunctions* § 142 (2004).

476. Compare *Williams*, 346 S.E.2d at 666 (where the defendant innocently encroached on eleven inches of unusable creek bed), with *Bunn Lake Prop. Owner's Ass'n v. Setzer*, 560 S.E.2d 576 (N.C. Ct. App. 2002) (where the defendant continued to expand his dock and boat house even after he was told the structures encroached upon plaintiff's creek bed and violated the terms of an easement).

his. Therefore, an injunction to compel removal fails to deter him or others in his position.

In a court of equity, the plaintiff must show he will suffer irreparable injury if the court denies injunctive relief.⁴⁷⁷ A plaintiff easily meets this burden because a “given piece of property is considered to be unique, and its loss is always an irreparable injury.”⁴⁷⁸ The court’s inquiry, however, should not stop with the finding of irreparable injury.⁴⁷⁹ It should proceed to balance the hardships between the parties to determine whether an injunction will issue.⁴⁸⁰

In North Carolina, the inquiry begins and ends with the threshold question. If a plaintiff establishes an encroachment and continuing trespass, then irreparable harm exists, a remedy at law is insufficient, and the law entitles a plaintiff to removal of the encroachment.⁴⁸¹ The rule is simple, but sometimes simple rules create complex problems. Application of the relative hardship doctrine would ameliorate these problems.

B. *Problems Created by the Rule*

1. *Promotion of Unnecessary Litigation*

When a court consistently follows precedent, it is a predictor of how courts will decide later cases with similar facts. In the case of an encroachment, *Bishop*⁴⁸² sets the precedent. If the court finds an encroachment exists, the plaintiff is entitled to a mandatory injunction to compel removal as a matter of law.⁴⁸³ The knowledge that a mandatory injunction is a given result in an encroachment case has the potential for promoting unnecessary litigation. If a landowner builds a structure that encroaches mere inches onto his neighbor’s land, the neighbor is automatically in a superior bargaining position. The neighbor knows that the threat of an injunction places him in a position to demand an exorbitant price if the landowner wants the structure to remain intact. If the landowner refuses to pay the price, the neighbor will bring an action asking the court to compel the landowner to remove his structure. This places the

477. See Henry, *supra* note 45, at 334–35.

478. *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 27 (N.M. 2001) (quoting *United Church of the Med. Ctr. v. Med. Ctr. Comm’n*, 689 F.2d 693, 701 (7th Cir. 1982)).

479. See *id.*

480. *Id.* The first part of the *AMKCO* test is a threshold question. If the first part of the test is satisfied, then the court must address the second part of the test, which requires applying the relative hardship doctrine.

481. See, e.g., *Williams*, 346 S.E.2d at 669.

482. *Bishop v. Reinhold*, 311 S.E.2d 298, 305 (N.C. Ct. App. 1984).

483. See, e.g., *id.*

neighbor in an even stronger bargaining position and will no doubt lead to an appeal by the landowner.⁴⁸⁴ Generally, the amount of land involved is very little and the benefit from removal of the structure to the plaintiff is minimal. However, if courts were to level the playing field by actually considering the relative hardship doctrine, the neighbor might not be so eager to bring an action against the landowner. Greed and power are a lethal mix in encroachment cases. If courts remove both from the equation, then maybe the parties would be willing to sit down and negotiate an equitable outcome.

Theoretically, the result in *Williams v. South & South Rentals, Inc.*⁴⁸⁵ would have been more equitable if both parties had been willing to negotiate a solution.⁴⁸⁶ The defendant made an innocent mistake when he encroached approximately one foot onto plaintiff's land.⁴⁸⁷ The parties would have avoided a lawsuit if the plaintiff had been willing to negotiate a fair price for the land. However, greed trumped common sense in this case.

In a bizarre turn of events, the plaintiff in *McCoy v. Peach*⁴⁸⁸ made an unwise decision when seeking to force defendant to sell and convey a strip of property to plaintiff on which plaintiff had encroached.⁴⁸⁹ Evidently, the plaintiff felt threatened by defendant's potential action for removal of the structures. In a preemptive move, plaintiff brought an action under the doctrine of betterments. Plaintiff's complaint prayed that if the court would not force defendant to sell her the strip of land, and defendant elected to have the structures removed, she wanted the court to order defendant to compensate her for the cost of removal and rebuilding.⁴⁹⁰ The court dismissed the case, and plaintiff appealed. If the plaintiff in this case had received proper advice, the case would never have resulted in a lawsuit, much less an appeal. There is no indication the defendant in this case was unwilling to negotiate with the plaintiff, but the threat of an injunction to compel removal led to an unwise decision and unnecessary litigation.

In *Mathis v. Hoffman*,⁴⁹¹ an encroaching landowner was forced to bring an action seeking declaratory judgment of the parties' rights and an

484. See *AMKCO*, 985 P.2d at 764 (providing plaintiffs with a particularly strong bargaining position).

485. *Williams*, 346 S.E.2d at 665.

486. *Id.*

487. *Id.* at 666.

488. *McCoy v. Peach*, 251 S.E.2d 881 (N.C. Ct. App. 1979).

489. *Id.* at 881.

490. *Id.* at 882.

491. *Mathis v. Hoffman*, 711 S.E.2d 825 (N.C. Ct. App. 2011).

injunction granting him the right to remove and relocate his fence.⁴⁹² Defendant refused to allow plaintiffs access to her property and, in fact, contacted local law enforcement and accused plaintiffs of trespassing when they attempted to remove the fence.⁴⁹³ Defendant thought she was entitled to an election of remedies—allowing plaintiffs to remove the encroachment or being subject to a claim for unjust enrichment.⁴⁹⁴ Obviously, defendant wanted to keep the fence on her property and was ill-advised in the matter. The end result in this case was the solution plaintiffs initially proposed. They offered to remove and relocate the fence, pay for the cost of removal, and pay for any damages to defendant's land. This is exactly what the trial court ordered; the court of appeals affirmed the decision but at a great cost to plaintiffs.⁴⁹⁵ The parties could have resolved this case between them and the matter should never have gone to court.

The threat of a mandatory injunction may result in unnecessary litigation. However, an even greater policy concern is the possibility of extortion.

2. *Possibility of Extortion and Economic Waste*

If an encroachment is minimal and the cost of removing the structure is substantial, a court may force a defendant to buy plaintiff's land at a price many times its worth rather than destroy the encroaching structure.⁴⁹⁶ Ethical and economic arguments disfavor this type of result.⁴⁹⁷ However, in the heart of every human being is the potential for greed.

In encroachment cases, the defendant is at a great disadvantage. He faces the real possibility of having to remove a substantial structure at considerable cost. The plaintiff, on the other hand, is in a superior bargaining position. All the plaintiff must do is determine how important it is to the defendant to keep the building intact and how much the defendant is willing to pay for the privilege. If the plaintiff makes an offer to sell the property at an unreasonable price, defendant can either accept it or be ordered by a court to remove his structure. Is this extortion? By any standard, the answer is yes. This scenario is illustrated in *Williams v. South & South Rentals, Inc.*⁴⁹⁸

492. *Id.* at 825.

493. *Id.*

494. *Id.* at 826.

495. *Id.*

496. See DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 818.

497. *Id.*

498. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

The possibility of extortion exists, but rarely does a court sanction such action. However, the New Mexico Court of Appeals did exactly that in dicta.⁴⁹⁹ In the *AMKCO*⁵⁰⁰ case, the court stated that “if [plaintiffs] do not wish to ‘waste’ their investment, then as this Court has said in the past under somewhat analogous circumstances, ‘nothing forbids [plaintiff] from negotiating with [defendant] to waive its right to compel removal of the building.’”⁵⁰¹ The court went on to state that “[t]he fact that a ‘court [ordered] injunction provides [defendant] with a very strong bargaining position,’ is no grounds for denying [defendant] the sole use and possession of his own private property, particularly when that bargaining position is simply a natural consequence of [plaintiff’s] own mistake.”⁵⁰² On appeal, the New Mexico Supreme Court reversed the court of appeals and affirmed the trial court’s decision with modification.⁵⁰³ The trial court had offered defendant a choice of two remedies.⁵⁰⁴ Defendant could elect to convey title to the land in question for a fair market value or convey title to the land for the replacement plot.⁵⁰⁵ The New Mexico Supreme Court added a third choice, an easement to defendant for which an appropriate amount of payment should not exceed the appraised value of the encroached land.⁵⁰⁶

Although North Carolina courts do not sanction extortion, the possibility always exists where encroachments are involved.⁵⁰⁷ The potential for extortion exists when the defendant knows he must pay the plaintiff’s price or a court will force him to remove the structure by court order.⁵⁰⁸ In either situation, the defendant who intentionally encroaches receives his just reward. Yet, the defendant who accidentally crossed the boundary line pays dearly for his mistake.

Often, a substantial building is the subject of an encroachment, and removal of the structure may result in the structure being unusable for the purpose a party built it.⁵⁰⁹ Therefore, the potential for extortion directly relates to the threat of economic waste. If an encroachment can be removed only by destroying a portion of the defendant’s structure, but the

499. See *supra* text accompanying notes 274–94.

500. *AMKCO, Ltd. v. Welborn*, 985 P.2d 757 (N.M. Ct. App. 1999).

501. *Id.* at 764 (quoting *Cafeteria Operators, L.P. v. Coronado-Santa Fe Assocs.*, 952 P.2d 435, 443 (N.M. Ct. App. 1998)).

502. *Id.* (quoting *Cafeteria Operators*, 952 P.2d at 443).

503. *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 26 (N.M. 2001).

504. *AMKCO*, 985 P.2d at 760.

505. *Id.*

506. *AMKCO*, 21 P.3d at 29.

507. See DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 816.

508. *Id.*

509. See MCCLINTOCK, *supra* note 139, § 140.

harm to plaintiff's land is small, a mandatory injunction will result in economic waste.⁵¹⁰ Therefore, defendant may be forced to pay the plaintiff's asking price rather than destroy a building which crossed an inch or two onto plaintiffs' property.⁵¹¹

Consider the economic waste that results in the cases previously discussed where courts forced defendants to remove the encroachments that were mistakenly created. In the *Cornelius* case, the defendants' house encroached twenty-two feet onto the plaintiff's property—a fact she learned three years after she purchased the land.⁵¹² The tax value of the home in 2005 was \$78,000, and the cost of moving and relocating the house would cost between \$10,000 and \$15,000.⁵¹³ In the *Bishop* case, a house that was built partially on a vacant lot had to be removed at defendants' cost.⁵¹⁴ In the *Williams* case, the cost of removing the corner of a two-story brick apartment building was at issue.⁵¹⁵ And, in the *AMKCO* case, the cost of removing a portion of a truck stop/convenience store was \$188,837 and would result in a \$107,687 annual loss in revenue.⁵¹⁶ In any of these situations, the defendant would no doubt be willing to meet the plaintiff's asking price. In all but one of these cases, the court discussed the relative hardship doctrine but applied it in only one, and that is the only case where the court denied injunctive relief.⁵¹⁷

3. *Measure of Economic Consequences*

A defendant's "[m]ere inconvenience and expense" are insufficient to deny injunctive relief.⁵¹⁸ The harm to defendant to remove the structure must be disproportionate to the harm caused by the encroachment.⁵¹⁹ This raises the issue of how courts should measure the disparity of harm between the parties. Stating that the harm must be disproportionate is a vague standard with little guidance as to the weight given to the factors considered. This also raises the issue of what is considered mere

510. DOBBS, *LAW OF REMEDIES*, *supra* note 3, § 5.10(4), at 816.

511. *See id.*

512. *See Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006) (where defendants and plaintiff's predecessor in title were unaware of the encroachment for sixteen years).

513. *Id.* at *3.

514. *See Bishop v. Reinhold*, 311 S.E.2d 298, 395 (N.C. Ct. App. 1984).

515. *See Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

516. *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 24–25 (N.M. 2001).

517. *See id.* at 30.

518. *Williams*, 346 S.E.2d at 669.

519. *Id.*; *see also Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006); *Young v. Lica*, 576 S.E.2d 421 (N.C. Ct. App. 2003).

inconvenience and expense. Is it based on the size of the encroachment, the value of the land to the affected parties, or the cost and resulting damage to remove the structure?

North Carolina courts have found the harm to defendant disproportionate to plaintiff's injury on two occasions. These cases were both decided prior to *Bishop*. One case involved a hospital driveway and the other involved a massive pile of rocks.⁵²⁰ In *Huskins v. Yancey Hospital, Inc.*, the court focused on the use of the land by defendant and determined that no benefit would result to plaintiffs but defendant would suffer great hardship.⁵²¹ Plaintiffs had no "present use for the land," but defendant's continued use of the land was necessary to operate the hospital.⁵²² The court applied the relative hardship doctrine and reached a just result.⁵²³ In *Clark v. Asheville Contracting Co.*,⁵²⁴ the courts focused on the cost and time it would take defendants to remove the massive amount of rocks.⁵²⁵ It would take defendants nine years to remove the materials at a cost of \$13,500,000.⁵²⁶ Both the North Carolina Court of Appeals and the North Carolina Supreme Court required the trial court to consider the relative hardship doctrine to reach an equitable result.⁵²⁷ Thus, it appears that the disparity of the harm between the parties triggers the relative hardship doctrine,⁵²⁸ but measure of the harm still remains vague.

The New Mexico Supreme Court focused on the use of the land in a discussion of the disparity between the parties.⁵²⁹ The court stated that the size of an encroachment is an important factor but "it does not comprise the entire inquiry."⁵³⁰ The court went on to state, "it would be a stifled understanding of 'hardship' that took into consideration only the area of

520. *Huskins v. Yancey Hosp., Inc.*, 78 S.E.2d 116 (N.C. 1953). In *Huskins*, the encroaching structure was a driveway used by ambulances at a hospital. *Id.* at 118. Plaintiffs requested an interlocutory injunction and a mandatory injunction after a trial on the merits. *Id.* Both were denied. *Id.* at 121–22. See also *Clark v. Asheville Contracting Co.*, 323 S.E.2d 765 (N.C. Ct. App. 1984), *modified and aff'd*, 342 S.E.2d 832 (N.C. 1986) (reversing an injunction granted at trial when plaintiff brought an action to compel defendants to remove a massive pile of rocks which affected the enjoyment of their property).

521. *Huskins*, 78 S.E.2d at 121–22.

522. *Id.* at 120.

523. *Id.*

524. *Clark*, 323 S.E.2d at 768.

525. *Id.*

526. *Id.*

527. *Id.* at 769.

528. See *id.*

529. *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 29 (N.M. 2001).

530. *Id.* (citing DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 816).

land affected, but not the value of the land to the affected party.”⁵³¹ In some circumstances, an encroachment of mere inches may result in an extreme hardship if the plaintiff shows the land encroached upon is of great economic or personal value.⁵³² On the other hand, an encroachment of many feet may not result in extreme hardship to the plaintiff if he has no use or value in the land except its market price.⁵³³

It seems that the area of the land affected, the use of the land, and the economic consequences of removing an encroachment are all important factors in determining whether the injury the defendant will suffer is disproportionate to the injury plaintiff will suffer. This still does not answer the question of how courts determine the disproportion and at what point it triggers the relative hardship doctrine in North Carolina.

C. *Leveling the Playing Field*

North Carolina courts do not differentiate between a defendant who mistakenly encroaches on a plaintiff's property and one who does so intentionally.⁵³⁴ The courts have given lip service to the relative hardship doctrine and the propriety of its application in deciding encroachment cases but continue to rely on the precedent set in *Bishop*.⁵³⁵ Yes, there are situations in which a remedy at law is inadequate. However, there are other situations where courts can avoid issuing a mandatory injunction to compel removal while still providing the plaintiff with an adequate substitute.

Courts issue injunctions at their discretion, not as a matter of right.⁵³⁶ The relative hardship doctrine provides a standard by which a court can objectively decide the fate of the parties. It allows the court to consider the size of the encroachment, the value of the land to the affected party, the respective conduct of the parties, and the injury the defendant will suffer in comparison to the benefit gained by the plaintiff. After considering these factors, the court determines whether an injunction is proper or if it can provide the plaintiff with an adequate remedy at law.

Application of the doctrine also eliminates the extremes of private eminent domain, extortion, and economic waste. Courts will not allow a

531. *Id.*

532. *Id.*

533. *Id.*

534. *See, e.g.,* *Cornelius v. Corry*, No. COA06-107, 2006 N.C. App. LEXIS 2135 (N.C. Ct. App. Oct. 17, 2006); *Young v. Lica*, 576 S.E.2d 421 (N.C. Ct. App. 2003); *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

535. *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984); *see Cornelius*, 2006 N.C. App. LEXIS 2135, at *8; *Young*, 576 S.E.2d at 421; *Williams*, 346 S.E.2d at 665.

536. *Injunctions*, *supra* note 475.

party to take the land of another simply because he is willing to pay for it.⁵³⁷ Neither will courts sanction the extortion or economic waste that may result from destroying a structure.⁵³⁸ The two principles are at variance with each other, and it is for this reason most courts seek resolution by balancing the hardships and equities of the parties.⁵³⁹

Since a mandatory injunction can be harsh, and one who creates an encroachment in good faith may not deserve such punishment, a mandatory injunction to compel removal may be imprudent if there is another remedy that can adequately protect property rights.⁵⁴⁰ Therefore, a court in its equitable discretion may adapt relief based on the equities.⁵⁴¹

Courts have traditionally considered the economic cost of an injunction to the defendant compared to the damages suffered by the plaintiff under the relative hardship doctrine.⁵⁴² If the total cost of removing the structure, which includes the loss in value of the remaining structure, was disproportionate to the harm caused to the plaintiff, then the “disparity in economic consequences [was a] significant factor in determining whether to issue the injunction.”⁵⁴³ Courts would deny an injunction unless plaintiff provided evidence that his hardship or loss of property rights was disproportionate if the encroachment was allowed to remain.⁵⁴⁴ In *Huskins v. Yancey Hospital, Inc.*,⁵⁴⁵ the North Carolina Supreme Court determined the hardship to defendant was disproportionate

537. DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 816.

538. *Id.*

539. *Id.*

540. Keeton & Morris, *supra* note 178, at 413.

541. This balancing of equities has been described thusly:

In balancing the equities, the court is not limited to a determination of whether it will grant or refuse the relief in its entirety . . . it may adapt its relief so as to preserve the interests of the parties as far as possible

Though some courts have apparently acted on the theory that the relief plaintiff seeks must be wholly denied, or else defendant’s interests entirely destroyed by an absolute injunction, there should be no question, either theoretical or practical, as to the power of the court to balance the equities in determining whether it can mold its decree so as to avoid the infliction of unnecessary hardship.

McCLINTOCK, *supra* note 199, § 146 (footnotes omitted).

542. DOBBS, LAW OF REMEDIES, *supra* note 3, § 5.10(4), at 817.

543. *Id.*

544. *Id.*

545. *Huskins v. Yancey Hosp., Inc.*, 78 S.E.2d 116 (N.C. 1953).

to plaintiffs because defendant used the driveway as access to its hospital and plaintiffs had no present use for the land.⁵⁴⁶

While an encroachment of only a few inches may cause significant hardship to a plaintiff who attributes immeasurable value to those inches, an encroachment of several feet may not cause significant hardship to a plaintiff who only attributes market value to that portion of the land.⁵⁴⁷ Why, then, was the harm to defendant in *Williams v. South & South Rentals, Inc.*⁵⁴⁸ not found disproportionate, thus triggering the relative hardship doctrine? The court's decision should have turned on the hardship that the plaintiff would suffer in the absence of an injunction, not on the advantage he would gain by issuing one.

One of the overriding reasons North Carolina courts do not consider the relative hardship doctrine is the potential for "private eminent domain."⁵⁴⁹ However, "a defendant who accidentally encroaches on his neighbor's land is not technically vested with the power of eminent domain by a court which refuses to issue a mandatory injunction."⁵⁵⁰ The administration of remedies for a tort is completely different from condemnation proceedings.⁵⁵¹ If the defendant is not a quasi-public entity and the court denies injunctive relief, it is because the result is incidental to what the court determines to be an equitable solution to an unintended situation.⁵⁵² If the defendant's actions are deliberate and the defendant relies on the court to force the plaintiff to sell against his will, the balance of relative hardship weighs heavily in favor of the plaintiff.⁵⁵³

The intentional encroacher should suffer from the smart of a mandatory injunction, and the remedy may very well serve as a deterrent to other builders inclined to obtain property in this manner. However, if the encroachment is innocent, the relative hardship doctrine is applied, and injunctive relief is denied, there is no reason for the court to require "the land pass in fee simple to the defendant if the plaintiff wishes to convey a lesser interest."⁵⁵⁴ For example, if the plaintiff wants his land back, the

546. *Id.* at 121–22 (denying plaintiffs' request for both interlocutory and mandatory injunctions where the encroaching structure was a driveway used by ambulances at a hospital).

547. *Id.*

548. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665 (N.C. Ct. App. 1986).

549. *See Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984); *see also Williams*, 346 S.E.2d at 665.

550. *Keeton & Morris*, *supra* note 178, at 413.

551. RESTATEMENT (SECOND) OF TORTS § 941 cmt. d (AM. LAW INST. 1979).

552. *Id.*

553. *Id.*

554. *Dobbs, Remedies for Trespass*, *supra* note 7, at 367.

judgment can give the defendant the right to keep his building on the land, but with a provision that the land will revert to the plaintiff if the building is destroyed.⁵⁵⁵ The bottom line is that courts can deny a mandatory injunction and still protect property rights without resulting in “private eminent domain.”

The property rights of the parties will always be of major importance to the courts. However, the scale tips heavily in favor of the plaintiff’s rights at the expense of the defendant. Courts must balance these rights so that neither party suffers unjustly. The relative hardship doctrine provides that balance and evens the playing field. “[T]here may be situations . . . where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent damages be awarded.”⁵⁵⁶ The time has come for North Carolina courts to put theory into practice and adopt the relative hardship doctrine as the balancing standard in encroachment cases.

CONCLUSION

Is the law surrounding permanent encroachments what it should be? If the encroachment is deliberate or negligent, the current law punishes the wrongdoer and justly so. However, if the encroachment is innocent and the encroacher had no intention of building on his neighbor’s land, the current North Carolina law is unjust. There should be an “exception to the general rule favoring removal in ‘rare’ and ‘exceptional’ cases where an order of removal would be, for various reasons, ‘oppressive and inequitable.’”⁵⁵⁷ The courts should adopt the relative hardship doctrine and apply it in all cases of encroachments. The result for the deliberate encroacher will be the same as it is under the current law, but the result for the innocent encroacher will be a just result for both parties.

The courts have been reluctant to accept change in this area of the law. Since 1984, North Carolina courts hearing permanent encroachment cases have followed the decision in *Bishop v. Reinhold*.⁵⁵⁸ The law is simple: A court will order an encroacher to remove the encroaching structure. However, the threat of a mandatory injunction creates undesired problems—problems the relative hardship doctrine can eliminate. The

555. *Id.* See also *AMKCO, Ltd. v. Welborn*, 21 P.3d 24, 29 (N.M. 2001) (fashioning a remedy in a case of first impression which, while novel, ended in a just result for both parties).

556. *Williams v. S. & S. Rentals, Inc.*, 346 S.E.2d 665, 669 (N.C. Ct. App. 1986).

557. *Brandao v. Docanto*, 951 N.E.2d 979, 987 (Mass. App. Ct. 2011) (quoting *Goulding v. Cook*, 661 N.E.2d 1322, 1324 n.3 (Mass. 1996)).

558. *Bishop v. Reinhold*, 311 S.E.2d 298 (N.C. Ct. App. 1984).

potential for extortion, economic waste, and unnecessary litigation is significantly curtailed. And, punishment of innocent encroachers will cease.

Perhaps change is on the horizon. North Carolina courts have discussed the relative hardship doctrine as a standard for injunctive relief. In fact, the North Carolina Supreme Court discussed the propriety of applying the doctrine in encroachment cases, and a subsequent dissenting opinion by the court of appeals supported the idea.⁵⁵⁹ Judge Parker, writing for the majority in *Williams v. South & South Rentals, Inc.*, stated:

We recognize that in today's economic environment with multi-investor ownership of properties having substantial improvements, there may be situations, other than the traditional quasi-public franchise, where sufficient public interest exists to make the right of abatement at the instance of an individual improper, and defendant should be permitted to demand that permanent damages be awarded.⁵⁶⁰

Nevertheless, courts continue to follow the holding in *Bishop* regardless of whether the encroachment was deliberate or an innocent mistake. *The law is what it is, but it is not what it should be.* Now is the time for change. It is time for North Carolina courts to balance the equities between parties in permanent encroachment cases and pave the way for a just outcome for both parties.

559. See *Clark v. Asheville Contracting Co.*, 342 S.E.2d 832, 839 (N.C. 1986); see also *Williams*, 346 S.E.2d at 669 (Webb, J., dissenting).

560. *Williams*, 346 S.E.2d at 669 (citing *Rhodes v. City of Durham*, 81 S.E. 938 (N.C. 1914); Dobbs, *Substantive Law*, *supra* note 25) (highlighting the possibility of permanent damages in other cases before refusing to apply the relative hardship doctrine).