PART II

PARTICULAR TORTS

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CHAPTER 1

TRESPASS TO THE PERSON

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1. INTRODUCTORY

The writ of trespass, from which the modern law of trespass comes, was among the most ancient and important of the old original writs upon which most of the law of civil obligations was founded. The reason for this importance was that this writ was not only the immediate root-stock of the law of trespass itself, but also, indirectly (*a*), the parent of the actions of trespass on the case, or of "case". The fundamental difference between trespass and these other actions which sprang from it was, however, that whereas in trespass the *mere act of trespass* (whether to person, to land or to goods) was in itself actionable, most actions on the case could as has already been remarked only be brought upon proof of ***actual damage*** to the plaintiff. It was and still is, therefore, the hall-mark (*b*) of trespass that it is actionable *per se*.

Further, the essence of a trespass was, and still is, that it is a direct and forcible (*c*) (*i.e.* physical) injury. Thus it is a trespass to throw something at someone, or even to cause injury by throwing something dangerous, like a firework, at another who then, in fear for his own safety, throws it at the plaintiff (*d*). But, though it may be negligence, it is not a trespass to cause injury to someone by allowing him to climb a ladder which you know to be unsafe: for here, though the injury is "forcible" it is not directly caused.

Trespass consists in (a) infringements of the right of safety and

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(*a*) This is not the place to discuss the history of the connexion between trespass and "case": see Maitland, *Forms of Action at Common Law*, and, for an up-to-date account, Fifoot, *History and Sources of the Common Law*, Chapter 9.

(*b*) Though for historical reasons this is not entirely peculiar to trespass; and as will be seen, some torts originally founded upon "case" are also actionable *per se*, *e.g.* libel.

(*c*) The formal allegation in the old writ of trespass was that the defendant had acted "*vi et armis et contra pacem Domini Regis*". At one time these words may have borne the full force of their natural meaning; for in origin trespass was what we should call a hybrid, half tort, half crime. But when the action lost its original association with crime the way the matter was put was, as in the text, that to be a trespass an act must be "direct and forcible", though as will be seen the threat as opposed to the actuality of physical force suffices to satisfy the latter requirement.

(*d*) See *Scott* v. *Shepherd* (1773), 2 Wm. Bl. 892.

freedom of the person (trespass to the person); (b) infringements of rights of real property (trespass to land); and (c) infringements of rights to goods (trespass to goods). These three kinds of trespasses will be considered in this and the two following Chapters.

In the modern law there are three kinds of trespass to the person; assault, battery and false imprisonment. But it is now usual to use the word "assault" to include an act which is technically both an assault and a battery.

At one time assault may well have been a tort of strict liability in the sense that the defendant would be liable without proof of intention or negligence. This rule has for a long time been relaxed and it is well established that if the act is an accidental one and "utterly without" the defendant's "fault" (*e*) he will not be liable. But until recently it would not appear to have been seriously doubted (*f*) that in trespass, as opposed to the tort of negligence, the burden of proof rested upon the *defendant* to affirm that his act was not a careless one—whereas in negligence the burden rests upon the plaintiff to establish the lack of care. However, in *Fowler* v. *Lanning* (*g*) DIPLOCK, J., held that though it is true that trespass is still actionable *per se* whereas negligence is only actionable upon proof of special damage, trespass to the person (unless intentional) is only actionable if the plaintiff can prove, as well as the assault or battery, negligence—that is negligence in the sense of mental inadvertence or carelessness.

This ruling was affirmed by the Court of Appeal in *Letang* v. *Cooper* (*h*) where Lord DENNING, M.R., went, in his own phrase, "one step further" by pronouncing that

> "... when the injury is not inflicted intentionally, but negligently, I would say that *the only cause of action is negligence* and not trespass. If it were trespass it would be actionable without proof of damage; and that is not the law to-day" (*i*).

This proposition must now be accepted with the result that in respect of direct personal injury there are three possibilities: *either* the thing was an accident, or the defendant acted intentionally, *or* he was careless. If it was an accident it is no longer for the defendant to prove this fact since the plaintiff who can establish neither intent nor negligence cannot succeed. If the defendant acted inten-

(*e*) See *Weaver* v. *Ward* (1616), Hob. 134 and *Stanley* v. *Powell*, [1891] 1 Q. B. 86 (a case similar to *Fowler* v. *Lanning*—Illustration 18).

(*f*) In *Fowler* v. *Lanning* DIPLOCK, J., admits to little doubt in academic opinion, but it is also thought that there was little doubt among practitioners.

(*g*) Illustration 18.

(*h*) [1964] 2 All E. R. 929; [1965] 1 Q. B. 232.

(*i*) *Ibid.* at pp. 932, 240 respectively (italics ours).

tionally the plaintiff must prove it (not an easy thing to do) and then the case is one of assault, with the consequence that he may succeed without proof of special damage. If the defendant acted carelessly and the plaintiff can prove it and can also establish special damage (why should I if you punch me on the nose?) the case is technically no longer one of assault, though all the pre-existing rules of law must still apply to define the deed, but one of Negligence. Further, if we confine attention to the second possibility (still "assault" and trespass to the person in the technical sense) the old law has departed this much from its former self that instead of the boisterous defendant having to exculpate himself (and why should he not be forced to do so?) the onus lies upon the plaintiff to establish the intention.

All this seems hard on plaintiffs and it is believed that it is not an improvement of the law, but the reverse. It is clear that both DIPLOCK, J., and Lord DENNING, M.R., regarded themselves as applying the precept of Lord ATKIN that

> "When the ghosts of the past (*i.e.* the forms of action) stand in the path of justice, clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred (*k*)."

In other words, they thought that the ancient distinction between Trespass and Case gave rise in this respect to injustice; and they would have none of it.

> "These forms of action have served their day. They did at one time form a guide to substantive rights; but they do so no longer (*l*)."

But "justice" in mediaeval times is justice to-day. Reform is fine and so is weeding, but do not pull up the plants. In fact it may be argued that, though doubtless unconsciously, the distinction between Trespass and Case was in this instance both just and sound. For a rule which prescribes that if I shoot you it is up to me to excuse myself may seem more reasonable than formalistic: whereas it is also true that if you stumble on a rock which besets your path it may be considered reasonable—apart from the fact that it will usually be inevitable—that the onus should lie upon you to bring home to me the charge of putting it there.

It may be hoped that if this matter should come before the House of Lords they will give it the consideration which it deserves. All change is by no means good change and, indeed, DIPLOCK, L.J., was, after *Fowler's Case*, guilty of what might be termed a Freudian

(*k*) *United Australia Ltd.* v. *Barclay's Bank, Ltd.*, [1940] 4 All E. R. 20, 37; [1941] A. C. 1, 29. Cited by Lord DENNING, M.R. in *Letang's Case*.

(*l*) *Letang's Case* at pp. 932, 239 respectively; per Lord DENNING, M.R.

slip (*m*). Apart from the fact that this innovation would seem to have arisen either from the mere caprice to cast off all things old and tried, or from a by no means invariably commendable zeal to ape all things American (*n*), it is an innovation at present confined to trespass to the person, the old rule pertaining still in relation to trespass to goods (*o*). A situation which is believed to be unnecessary, confusing and inelegant. However, *Fowler's Case* and *Letang's Case* now represent the law.

ILLUSTRATION 18

In order to succeed in an action for trespass to the person the plaintiff must establish not merely the trespass but also intention or negligence.

Fowler *v.* Lanning, [1959] 1 All E. R. 290; [1959] 1 Q. B. 426.

The plaintiff in his statement of claim claimed damages for trespass to the person alleging simply that "the defendant shot the plaintiff". The accident took place at a shooting party. The defendant by his defence denied the shooting and he objected that no cause of action was disclosed since there was no allegation that the shooting was intentional nor was there any allegation of negligence. *Held:* No cause of action was disclosed since in order to succeed the plaintiff must either allege intent or negligence, stating the facts alleged to constitute negligence.

2. ASSAULT

Using the word "assault" in its proper technical sense, as distinct from its common use to mean assault *and* battery, an assault is in essence the tort of putting another in *present fear of violence*. It may be committed in two ways, either by attempting to touch him or to bring something into direct contact with him, or by threatening to do so. But in either case, to constitute an "assault" in the true sense the attempt or the threat must not be consummated.

Thus it is an assault to menace a person with a stick while within reach of him, or to advance upon a person with apparent intent to strike him when another intervenes and wards off the blow (*p*). And it is also an assault, within range, to point a gun at another,

(*m*) "Since arrest involves trespass to the person and any trespass to the person is *prima facie* tortious, the onus lies on the arrestor to justify the trespass . . ." *Dallison* v. *Caffery*, [1964] 2 All E. R. 610, 619; [1965] 1 Q. B. 348, 370, *per* DIPLOCK, L.J. Unfortunate? How hard it is to keep upon new courses!

(*n*) The distinction between trespass and case seems to have been discarded by American jurisdictions: and see *Walmsley* v. *Humerick*, [1954] 2 D. L. R. 232 where Canada dutifully follows suit.

(*o*) See *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd.*, [1951] 2 All E. R. 310; [1951] 2 K. B. 861 (Illustration 2 (a)).

(*p*) *Stephens* v. *Myers* (1830), 4 C. & P. 349.

and this even though the gun be unloaded (*q*) if he does not know of the fact; for he will be put in fear. But the circumstances must be such that a reasonable man would in the position of the plaintiff apprehend that violence might ensue;

> "If you direct a weapon, or if you raise your fist within those limits which give you the means of striking, that may be an assault; but if you simply say, at such a distance as that at which you cannot commit an assault, 'I will commit an assault', I think that is not an assault" (*r*).

Since force is the essence of the matter words alone cannot constitute an assault (*s*). But an act which might otherwise amount to an assault may be qualified by words (or other circumstances) which negative the inference that an assault has been committed. When, therefore, a man put his hand on the hilt of a sword (which might in some circumstances be an assault), but at the same time said, "If it were not assize time, I would not take such language from you", this was held to be no assault (*t*).

3. BATTERY

Battery consists in applying force to a person hostilely or against his will, however slightly (*u*). It is actionable, *per se* even though no real harm is caused; but of course the amount of harm actually done will affect the question of the amount of damages to be awarded.

As has already been explained, this tort, which in the true technical sense is "battery" (*i.e.* an assault consummated), is now usually called "assault and battery", or, confusingly, simply "assault".

The ordinary way in which a battery takes place is of course by physical striking (the word "battery" literally means "beating"), but the application of the force need not be quite as direct as this;

(*q*) *R.* v. *St. George* (1840), 9 C. & P. 483. Pointing a *loaded* gun is of course assault—even with the safety-catch on—see *Osborn* v. *Veitch* (1858), 1 F. & F. 317, 318; *per* WILLES, J.

(*r*) *Cobbett* v. *Grey* (1850), 4 Exch. 729, 744; *per* POLLOCK, C.B. (In the first two mentions of "assault" he presumably meant "battery".)

(*s*) Though, like some gestures, such as rolling up the sleeves (see *Read* v. *Coker* (1853), 13 C. B. 850), they may help to make the intent to commit one clear.

(*t*) *Tuberville* v. *Savage* (1669), 1 Mod. Rep. 3.

(*u*) "The least touching of another in anger is a battery": *Cole* v. *Turner* (1705), 6 Mod. Rep. 149, *per* HOLT, C.J.

for it is also a battery to strike someone with a missile (*a*), to throw water over him (*b*), to spit in his face or even to injure him by removing a chair from under him (*c*). But of course, at any rate where the battery does not amount to a serious crime (*d*), the rule "*volenti non fit injuria*" applies; so that, for example, it is not a battery to make a medical examination of a person who consents to it (*e*).

In accordance with commonsense, merely touching a person in order to engage his attention, and without undue force, is no battery (*f*).

4. FALSE IMPRISONMENT

This tort consists in *the imposition of a total restraint* for some period, however short, *upon the liberty of another* without lawful justification.

Like other forms of trespass it is actionable "*per se*", without proof of special damage. Though the "imprisonment" may be incarceration in the ordinary sense, it need not necessarily be so for

> "every restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison" (*g*).

Thus where a bailiff tells a person that he has a writ against him, and thereupon the person peaceably accompanies the bailiff this may constitute imprisonment (*h*). So, too, it is imprisonment if a person is restrained in his own house from leaving a room and

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(*a*) A brickbat would do. Though the famous but ill-fated prisoner who "ject un Brickbat" at RICHARDSON, C.J., "que *narrowly mist*" (see 2 Dyer 188b, n.—the full passage is cited in original law-French, Pollock, *First Book of Jurisprudence*, 297) was of course only guilty of an assault, though perhaps somewhat aggravated. What is probably an apocryphal variant of the story is to be found in Campbell's account of Richardson in his *Lives of the Chief Justices*.

(*b*) *Pursell* v. *Horn* (1838), 8 Ad. & El. 602 (the water was boiling which added to the plaintiff's other discomforts).

(*c*) *Hopper* v. *Reeve* (1817), 7 Taunt. 698, 700.

(*d*) See *R.* v. *Donovan*, [1934] All E. R. Rep. 207; [1934] 2 K. B. 498; *Director of Public Prosecutions* v. *Rogers*, [1953] 2 All E. R. 644. Though these decisions would not of course be binding in a civil case.

(*e*) *Latter* v. *Braddell* (1881), 50 L. J. Q. B. 448. See also *Christopherson* v. *Bare* (1848), 11 Q. B. 473.

(*f*) *Coward* v. *Baddeley* (1859), 4 H. & N. 478.

(*g*) Coke (2 Ins. Statute of Westminster II, c. 48). For once Coke finds himself in the company of the poets; for shortly after Richard Lovelace was to pen "stone walls do not a prison make, nor iron bars a cage". But Coke, who hated poets, would have been pleased to discover that Lovelace's lines intended to convey just the opposite meaning of his.

(*h*) *Grainger* v. *Hill* (1838), 4 Bing. (N. C.) 212, 220; *Wheeler* v. *Whiting* (1840), 9 C. & P. 262.

going upstairs (*i*), or, probably, even if while he is asleep the key of his bedroom is turned upon him and the door then unlocked before he awakes (*k*).

But there must be a *total* restraint. A partial restraint of movement is not enough; the essence of the tort is restraint of liberty (*l*), and liberty is not restrained merely because a barrier is so placed as to prevent the plaintiff from taking a particular route or going in a particular direction (*m*). And it has even been held that where A has a room with two doors, one opening into the street, the other into a room belonging to B, it is no false imprisonment on the part of C to lock the street door; for A can get out of his room, even though in doing so he must trespass in B's room (*n*).

Where there is total restraint of liberty the action will nevertheless lie however short in duration the restraint may be: so where a prisoner who had been acquitted was taken down to the cells and detained for a short time while some questions were put to him by the warders he was held to have been falsely imprisoned (*o*). But restraint of plaintiff by defendant there must be. Hence unless he is under a legal duty, contractual or otherwise, to free another, a man is not to be held responsible for false imprisonment merely because finding him incarcerated he fails to release him. Thus in *Herd* v. *Weardale Steel, Coal and Coke Co., Ltd.* (*p*) the respondents were held not to be liable for false imprisonment of one of their employees, a miner, when after he had improperly ceased work in the pit, they refused to bring him up at once by the lift and made him wait, stranded in the pit, until the ordinary time when the cage was due to ascend to the pithead. The appellant was in fact responsible for his own incarceration.

ILLUSTRATION 19

To constitute false imprisonment there must be such restraint of the plaintiff's freedom of movement as to prevent him from proceeding in every direction.

(*k*) *Warner* v. *Riddiford* (1858), 4 C. B. (N. S.) 180. *Meering* v. *Grahame-White Aviation Co., Ltd.* (1919), 122 L. T. 44, 53–4; *per* ATKIN, L.J.

(*l*) And of course, outside the law of torts, the ultimate remedy for the vindication of personal freedom, the writ of *Habeas Corpus*, may have to be resorted to.

(*m*) *Bird* v. *Jones* (1845), 7 Q. B. 742 (Illustration 19). But in such cases there may be some other right of action, *e.g.* in nuisance for causing an obstruction.

(*n*) *Wright* v. *Wilson* (1699), 1 Ld. Raym. 739. Though HOLT, C.J., held that A would be entitled to a special action upon the case.

(*o*) *Mee* v. *Cruikshank* (1902), 86 L. T. 708.

(*p*) [1915] A. C. 67. See also *Robinson* v. *Balmain New Ferry Co., Ltd.*, [1910] A. C. 295 (J. C.); *Morriss* v. *Winter*, [1930] 1 K. B. 243.

Bird *v.* Jones (1845), 7 Q. B. 742.

During a regatta on the Thames the defendant—the clerk of the bridge company which then owned Hammersmith Bridge—caused the footway, as opposed to the carriageway, of it to be fenced off to provide seats for such as should care to pay for them to watch the rowing. The plaintiff, wishing to assert his right to use the footway, climbed the fence but was stopped by the police from proceeding, and ultimately had to give up his attempt. In an action for false imprisonment. *Held:* No claim, since there was no total restraint; the plaintiff was free to go back, and even to go across by the carriageway if he wished. "I cannot bring my mind to the conclusion that, if one man merely obstructs the passage of another in a particular direction . . . he can be said thereby to imprison him" (*q*).

5. JUSTIFICATION OF TRESPASS TO THE PERSON

A trespass to the person will only be actionable if it is unjustifiable. And in the case of this tort some of the commoner kinds of justification require to be examined.

(a) Defence of Person or Property

A battery is justified if it is done in reasonable defence of oneself or another. What is reasonable so as to amount to a justification depends of course upon all the circumstances; but clearly the battery must be committed, if it is to be justified, in actual defence and not for example after an attack, by way of retaliation (*r*). And further, the self-defence which is the ground of the battery must be reasonably commensurate with the attack which it presupposes: thus "if A strike B, B cannot justify drawing his sword and cutting off his hand" (*s*).

It is also justifiable to commit assault and battery in defence of property, provided that it is one's own or that one is defending it as agent of the owner or occupier (*t*); but again, the force employed must be no more than is necessary to the occasion (*u*), and under the old pleading the appropriate plea was that the defendant "*molliter manus imposuit*" (had gently laid hands upon) the plaintiff

(*q*) (1845) 7 Q. B. at p. 751–2; *per* Patteson, J.
(*r*) *Cockcroft* v. *Smith* (1705), 11 Mod. Rep. 43.
(*s*) *Cook* v. *Beal* (1697), 1 Ld. Raym. 176, 177, *per curiam*. See also Illustration 20 (*b*).
(*t*) But not otherwise. See *Dean* v. *Hogg* (1834), 10 Bing. 345 (*Hirer* of pleasure boat not entitled to eject stranger by force).
(*u*) See *Collins* v. *Renison* (1754), Say. 138 (Illustration 20 (*a*)); *Hemmings* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720.

in order to expel him. Thus I may, if necessary, forcibly prevent a person from driving away my cattle. But there is a distinction to be observed (*a*): if a man enters my land forcibly, I may at once use reasonable force to remove him, but if he uses no force, and merely comes upon my land or into my house as a trespasser, then I must first *request him to leave* before any force on my part can be justified. However, one who has been requested to leave and fails to do so will himself be guilty of assault and battery if he resists a forcible attempt to remove him (*b*).

ILLUSTRATION 20

(a) *Although it may be justifiable to use force to remove a trespasser the force must not be excessive.*

Collins *v.* Renison (1754), Say. 138.

To an action for assault and battery the defendant pleaded that he had found the plaintiff upon a ladder in his (defendant's) garden, nailing a board to defendant's wall. He requested plaintiff to come down, and upon his refusal he "gently shook the ladder, which was a low ladder, and gently overturned it, and gently threw the plaintiff from it upon the ground". (In effect a plea that plaintiff was a trespasser and "*molliter manus imposuit*".) *Held:* The plea was bad. The force used was not justifiable in defence of the defendant's possession of his land.

(b) *Self-defence must be reasonably commensurable with the attack which it presupposes.*

Lane *v.* Holloway, [1967] 3 All E. R. 129; [1968] 1 Q. B. 379.

"On July 21st, 1966, the peace of the ancient borough of Dorchester was disturbed" (*c*) this was because plaintiff and defendant were neighbours; plaintiff living in a court yard off the High Street and defendant having a café, complete with juke box, backing on to the yard. At 11 p.m. plaintiff, after returning from a public house, was talking to a friend in the yard. Hearing this, defendant's wife called out "You bloody lot". Plaintiff not to be outdone, replied: "Shut up you monkey-faced tart". Defendant, who had been in bed at the time drinking a cup of coffee, sprang up and shouted: "What did you say

(*a*) *Green* v. *Goddard* (1702), 2 Salk. 641; *Weaver* v. *Bush* (1798), 8 Term Rep. 78; *Polkinhorn* v. *Wright* (1845), 8 Q. B. 197.

(*b*) *Wheeler* v. *Whiting* (1840), 9 C. & P. 262, 266. See also *Aglionby* v. *Cohen*, [1955] 1 All E. R. 785; [1955] 1 Q. B. D. 558 (a landlord who has been successful in a possession action is not thereby debarred from himself evicting his former tenant). But it must be noted that no landlord can now evict a tenant without taking legal proceedings: Rent Act, 1965, ss. 31 and 32 (45 Halsbury's Statutes (2nd Edn.) 846).

(*c*) [1967] 3 All E. R. at p. 130; [1968] 1 Q. B. at p. 385; *per* Lord DENNING, M.R. The facts are taken almost verbatim from this graphic judgment.

to my wife?" Plaintiff replied: "I want to see you on your own". (A challenge for a fight.) Out came defendant in pyjamas and dressing gown, got close enough to plaintiff to make him think he (plaintiff) might be hit, and plaintiff punched defendant's shoulder. Defendant then punched plaintiff in the eye; a very severe blow. The eye needed nineteen stitches and plaintiff was in hospital for a month. *Held:* The defendant in anger went too far. He gave a blow out of proportion to the occasion for which he must answer in damages (*d*).

(b) Parental and other Authority

Whatever may have been the rule once-upon-a-time, a husband is not now legally justified in chastising his wife or restricting her personal freedom (*e*); but the law does allow a

> "parent, teacher, or other person having lawful control or charge of a *child or young person* to administer punishment to him" (*f*).

And this is a statutory recognition of a common law privilege, which extends to permitting the adult concerned to give corporal punishment or to restrain the liberty of the child. But the punishment must be reasonable and moderate (*g*); so that any excess will expose the adult to an action for assault, battery or false imprisonment as the case may be.

It is important to note that the privilege is not confined solely to parents and persons in *loco parentis*, but is also afforded to teachers (*h*), to whom the parents are presumed to delegate it (*i*), and also in all probability to masters of apprentices (*k*).

Masters of ships, too, are justified in confining people on board ship during a voyage if they have reasonable cause to believe that such action is necessary for safety (*l*).

(c) Judicial Authority

When a person is arrested or imprisoned by judicial authority no action for trespass to the person lies against the judge who gives the authority, or against persons executing his lawful orders, or against the person who set the law in motion.

But this must be understood subject to three qualifications.

(*d*) *Ibid.* at pp. 1313 and 387 respectively.
(*e*) *R.* v. *Jackson*, [1891] 1 Q. B. 671.
(*f*) Children and Young Persons Act, 1933, s. 1 (7) (italics ours).
(*g*) *Ryan* v. *Fildes*, [1938] 3 All E. R. 517, 521.
(*h*) *Fitzgerald* v. *Northcote* (1865), 4 F. & F. 656.
(*i*) *Mansell* v. *Griffin*, [1908] 1 K. B. 160; on appeal, [1908] 1 K. B. 947.
(*k*) See, *e.g.*, *Penn* v. *Ward* (1835), 2 Cr. M. & R. 338.
(*l*) *Hook* v. *Cunard S.S. Co., Ltd.*, [1953] 1 All E. R. 1021.

First, the judge must be acting within his lawful powers (*m*); if he exceeds them his protection will be lost. Secondly, it is the interposition of lawful *judicial* authority that affords the protection. Thirdly, though a person who wrongfully instigates the exercise of *judicial* powers cannot be held liable in trespass to the person in any of its forms, he may be liable for *malicious prosecution* (*n*).

The second and third of these points require examination. The second means this. If I lay an information before a justice of the peace and he thereafter issues a warrant for the arrest of the offender, I cannot be liable in trespass to the latter, even though he prove innocent, for in issuing the warrant the justice uses a judicial discretion, and the cause of the arrest thereafter lies in him and not in me. So too I cannot be liable for battery or false imprisonment if I give information to a policeman who arrests of his own initiative (*o*); though, of course, if the arrest is not justified *he* may be. And again the mere signing of a charge sheet is not in itself (*p*) evidence to support an action for false imprisonment against the person who signs it (*q*). But on the other hand, if I *direct* a constable to arrest a person, I make him my agent for that purpose and if the arrest is not lawfully justified I may be liable just as if I had myself effected the arrest (*r*). In every case the question is, "Has a considered and judicial act of another been interposed between the actions of the defendant and the imprisonment of the plaintiff, or was the act of the other person merely ministerial and dictated by the defendant?" If the facts establish the second alternative the defendant, being the person who *caused* the trespass, will be liable for it; if they establish the first alternative the judicial act relieves him of responsibility.

In relation to this defence the point of time when a judicial discretion is exercised by some other person is therefore vital. If the arrest or imprisonment is wrongful the defendant may be liable in trespass up to that moment, but not after it (*s*). Thereafter it *may* be that he will be liable for malicious prosecution; but in *trespass* he can only be sued in respect of what happens before.

(*m*) This question has already been discussed: Part I, Chapter 2, section 3.
(*n*) See Part II, Chapter 14.
(*o*) *Grinham* v. *Willey* (1859), 4 H. & N. 496.
(*p*) But see *Austin* v. *Dowling* (1870), L. R. 5 C. P. 534 (Illustration 21).
(*q*) *Sewell* v. *National Telephone Co.*, [1907] 1 K. B. 557.
(*r*) *Hopkins* v. *Crowe* (1836), 4 Ad. & El. 774.
(*s*) See, *e.g.*, *Diamond* v. *Minter*, [1941] 1 All E. R. 390, 404; [1941] 1 K. B. 656, 674.

The position was aptly stated by WILLES, J.:—

"The distinction between false imprisonment and malicious prosecution is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment because he does *not set a ministerial officer* in motion *but a judicial officer*. The opinion and *judgment of a judicial officer are interposed between* the charge and the imprisonment" (*t*).

ILLUSTRATION 21

Although the interposition of a judicial act will be a bar to a claim for false imprisonment, the interposition of a purely ministerial act will not.

Austin *v.* Dowling (1870), L. R. 5 C. P. 534.

Defendant's wife gave plaintiff into custody on an unfounded charge of felony. Defendant attended at police station and signed the charge sheet; plaintiff was detained in custody until the next morning when, being brought before the magistrates, he was discharged. At the time when defendant signed the charge sheet the police inspector on duty *warned him* that he (the inspector) *would incur no responsibility*, and that responsibility for the detention lay upon defendant. *Held:* (*inter alia*) signing the charge sheet *after such a warning* was the act which caused the plaintiff's imprisonment, the inspector had merely acted ministerially, and not judicially; the defendant was therefore responsible for the imprisonment.

It will have been noted that it has been assumed in the foregoing discussion that the effecting of an arrest may be actionable. This will of course only be so where the arrest is one which is not justified by law. In certain circumstances however both the police and private individuals have a right and a duty to make arrests, whether with or without a warrant, and it follows that an arrest made in such circumstances will not be a trespass and no claim can be based upon it. But undue force may not be used and the Criminal Law Act, 1967 (*u*) provides that:—

s. 3—(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

and s. 3 (2) enacts that this provision supersedes the rules of the common law on the matter. If, therefore, in such circumstances unreasonable force is used an action may lie.

(*t*) *Austin's Case* (*supra*), at p. 540 (italics ours).
(*u*) 47 Halsbury's Statutes (2nd Edn.) 339.

The law governing rights of arrest is highly complex and extremely technical, and it is a matter more fit for discussion in books treating of the criminal law or of constitutional law than in a work of this nature. Discussion of it has therefore been omitted here, and the standard works on those subjects should be consulted (*y*).

6. CRIMINAL PROCEEDINGS

Assault and battery is a crime as well as a tort, and criminal proceedings may therefore be taken in respect of it. But where *summary* proceedings are taken and the case has been tried upon the merits and either the accused has been *convicted and punished* (*a*) or, the case having been dismissed, the magistrates have awarded a *certificate of dismissal*, no further proceedings civil or criminal may be brought for the same cause (*b*).

The effect of this is that if B assaults A, and is tried summarily for the assault A cannot thereafter sue him in tort, nor can anyone else aggrieved (*c*). But there must have been a trial "*upon the merits*" (*d*); and this result will not be achieved if the summons is dismissed because the prosecutor has failed to appear and no evidence has been heard (*e*).

A certificate of dismissal may be granted either because the court deems the offence charged not to have been proved, or because it decides that the alleged assault was justified, or because it considers it so trifling as not to deserve punishment (*f*); and one or other of these grounds of dismissal should appear upon the certificate (*g*). The court has no discretion in the matter of granting the certificate, but must do so on demand (*h*).

(*y*) Of the modern cases *Christie* v. *Leachinsky*, [1947] 1 All E. R. 567; [1947] A. C. 573 and *John Lewis & Co.* v. *Tims*, [1952] 1 All E. R. 1203; [1952] A. C. 676, are probably the most important. See also *Dallison* v. *Caffery*, [1964] 2 All E! R. 610; [1965] 1 Q. B. 348; *Wiltshire* v. *Barrett*, [1965] 2 All E. R. 271; [1966] 1 Q. B. 312.

(*a*) An order for him to enter into recognizances is not enough: *Hartley* v. *Hindmarsh* (1866), L. R. 1 C. P. 553.

(*b*) Offences against the Person Act, 1861, ss. 42–45 (5 Halsbury's Statutes (2nd Edn.) 802–804). The rule applies to common assaults (s. 42) and to certain aggravated assaults (s. 43).

(*c*) *E.g.* the complainant's husband: *Masper* v. *Brown* (1876), 1 C. P. D. 97.

(*d*) Offences against the Person Act, 1861, s. 44.

(*e*) *Reed* v. *Nutt* (1890), 24 Q. B. D. 669.

(*f*) Offences against the Person Act, 1861, s. 44.

(*g*) *Skuse* v. *Davies* (1839), 10 Ad. & El. 635.

(*h*) *Hancock* v. *Somes* (1859), 1 E. & E. 795; *Costar* v. *Hetherington* (1859), 1 E. & E. 802.

CHAPTER 2

TRESPASS TO LAND AND DISPOSSESSION

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A trespass to land (under the old practice called "trespass *quare clausum fregit*") is committed when a person *enters upon the land of another without lawful authority*. Dispossession (formerly remedied by the action of ejectment) occurs when a person *ousts another or withholds the possession of land from the rightful owners* (*a*). Although both these things were formerly treated as types of trespass, their nature is different and they require separate treatment.

1. TRESPASS TO LAND

This will be considered under the following heads:—the nature of trespass to land; trespass *ab initio*; the right of the plaintiff; remedies available to the plaintiff other than his right of action.

The Nature of Trespass to Land

Any unauthorized entry upon the land of another is a trespass; and it is actionable "*per se*" without proof of special damage. The entry need not necessarily take the form of walking or going upon the land; it will also be a trespass to bring anything into direct contact with the land, as by placing objects against a wall (*b*) or leaving débris upon a roof (*c*); and it may be that an act even less direct than this will amount to a trespass, as where a person looses oil upon the sea and the force of the tide washes it onto the foreshore which is in the possession of another (*d*).

Further, where a person has authority to use another's land for a particular purpose, any use of it going beyond the authorized purpose

(*a*) For fuller information relating to the land law, see Cheshire, *Modern Real Property*.

(*b*) *Gregory* v. *Piper* (1829), 9 B. & C. 591.

(*c*) *Konskier* v. *B. Goodman, Ltd.*, [1928] 1 K. B. 421.

(*d*) There are, however, differences of opinion about this. See *Southport Corporation* v. *Esso Petroleum Co.*, [1953] 2 All E. R. 1204; [1954] 2 All E. R. 561; [1954] 2 Q. B. 182; *sub nom. Esso Petroleum Co.* v. *Southport Corporation*, [1955] 3 All E. R. 864; [1956] A. C. 218.

is a trespass (*e*). For example the soil over which a highway runs is vested in the owner of that land, and therefore a member of the public who walks up and down the road not merely in exercise of his right of way, but in order to annoy the landowner (*f*), or to watch and take notes of the performance of horses training on the land (*g*), commits a trespass for which the landowner may sue. The public only have a right to use the highway as a highway, and an activity upon the road which goes beyond this limited right of user cannot be justified.

For the purposes of this tort "land" includes not only the soil itself but also anything, such as a house, that is permanently affixed to it. Moreover the maxim "*cujus est solum, ejus est usque ad coelum et ad inferos*" applies to some extent at least in our law. That is to say the owner or possessor of the soil also owns or possesses all the land *beneath* the soil (unless it has been granted to another—as where a man grants a lease of mining rights), and consequently he may bring an action in trespass against anyone who delves into the subsoil without his authority (*h*). It may also be true that he may claim in trespass for any direct invasion of the air-space above his land; but the exact extent of this right is doubtful (*i*).

The position in respect of aircraft is, however, partially governed by statute; for the Civil Aviation Act, 1949, s. 40(1) (*k*) provides that

> "*No* action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of an aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of such flight . . ." (*l*).

But the section (*m*) also goes on to provide that if any material loss or damage is caused to any person or property by aircraft in

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(*e*) *The Six Carpenters' Case* (1610), 8 Co. Rep. 146a.

(*f*) *Harrison* v. *Duke of Rutland*, [1893] 1 Q. B. 142.

(*g*) *Hickman* v. *Maisey*, [1900] 1 Q. B. 752 (Illustration 22); but contrast *Randall* v. *Tarrant*, [1955] 1 All E. R. 600.

(*h*) *Clegg* v. *Dearden* (1848), 12 Q. B. 576.

(*i*) See McNair, *Law of the Air*, Chapter II, 1, and Salmond, *Law of Torts* and see *Davey* v. *Harrow Corporation*, [1957] 2 All E. R. 305; [1958] Q. B. 60 (C. A.), which also appears to conflict with *Kelsen* v. *Imperial Tobacco Co., Ltd.*, [1957] 2 All E. R. 343; [1957] 2 Q. B. 334 (McNAIR, J.). As to protruding parts of houses not included in plans, see *Corbett* v. *Hill* (1870), L. R. 9 Eq. 671; *Truckell* v. *Stock*, [1957] 1 All E. R. 74.

(*k*) This reproduces Air Navigation Act, 1920, s. 9 (1).

(*l*) (Italics ours.) The immunity is only afforded, however, if certain provisions contained in Parts II and IV of the Civil Aviation Act and any Orders in Council made thereunder are complied with.

(*m*) Section 40 (2) (28 Halsbury's Statutes (2nd Edn.) 234).

flight, taking off or landing, or by any article or person falling from aircraft, *damages are to be recoverable without proof of negligence*, intention or any other cause of action from the owner of the aircraft who may, however, have a right of indemnity against any person who was responsible for causing the loss or damage.

Of course leave and licence of the owner or possessor negatives a trespass to land (*n*) and although mistake is no excuse, in all probability inevitable accident is (*o*). Thus if I walk upon your land thinking that it is my own I may be liable in trespass (*p*), but I should probably not be liable if a violent gale blew me upon your flower beds so as to cause damage to your plants.

There are also many special defences to an action for trespass to land. For instance where X takes Y's goods and places them on his (X's) land Y will be justified in entering upon the land in a reasonable way to retake them (*q*). A landlord or a sheriff's officer are entitled to enter a house in the course of a lawful distraint for rent or in levying execution (*r*); and a reversioner may enter land in order to ensure that no waste is being committed (*s*).

Land may of course also be lawfully entered in the exercise of a public (*t*) or of a statutory (*u*) right; and in case of necessity, as where a man enters the property of another in order to take such reasonable measures as may be required to prevent fire from spreading from that land to his own (*v*). Also, as common experience will suggest, a person may lawfully walk up another person's garden path in order, for example, to make an enquiry; though if upon meeting the occupier he is then requested to leave he must do

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(*n*) But walkers are reminded that it is inadvisable to take leave and licence for granted. The author recalls embarrassing rambles with a solicitor friend who believed in walking in a straight line: he would arm himself with sixpences and traverse strangers' orchards, picking an apple or two for refreshment and remarking that sixpence by way of amends would settle all claims.

(*o*) Since it is a defence to trespass to goods; *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd.*, [1951] 2 All E.R. 310; [1951] 2 K. B. 861.

(*p*) *Basely* v. *Clarkson* (1681), 3 Lev. 37. This is *probably* still the law.

(*q*) *Patrick* v. *Colerick* (1838), 3 M. & W. 483.

(*r*) See above, p. 31, n. (*m*). But sheriff's officers must not break open outer doors: *Semayne's Case* (1604), 5 Co. Rep. 91a.4. As to the degree of force permissible, see *Ryan* v. *Shilcock* (1851), 7 Exch. 72; *Nash* v. *Lucas* (1867), L. R. 2 Q. B. 590; *Southam* v. *Smout*, [1963] 3 All E. R. 104; [1964] 1 Q. B. 308.

(*s*) *The Six Carpenters' Case* (1610), 8 Co. Rep. 146a, 146b.

(*t*) As in the case of the ordinary use of a highway.

(*u*) See, *e.g.* Rights of Way Act, 1932, s. 1 (5) (11 Halsbury's Statutes (2nd Edn.) 217)—landlord's right to place and maintain notice that way over land is not dedicated.

(*v*) *Cope* v. *Sharpe* [1912] 1 K. B. 496.

so with reasonable promptitude and if he fails to do this he will become a trespasser (*a*).

It should be added that the peculiar rule as to cattle trespass forms a special kind of liability which merits separate treatment (*b*).

ILLUSTRATION 22

Where a right to enter upon land is granted for a particular purpose it will be a trespass to enter upon it without permission, for some other purpose.

Hickman *v.* Maisey, [1900] 1 Q. B. 752.

The plaintiff was possessed of land which was crossed by a highway, the subsoil of which was vested in him, and he had agreed to allow a trainer of race-horses to use the land for training. The defendant, who was proprietor of a racing publication, walked up and down on the highway taking notes of the horses' form. *Held:* Since the defendant had exceeded the ordinary and reasonable user of the highway he was guilty of trespass.

TRESPASS AB INITIO

Where a person enters upon premises in exercise of a right conferred upon him by common law or statute and then abuses the right by doing some wrongful act, he will be treated as a trespasser *ab initio*; that is, he will be treated *as though* he had been a trespasser *from the start*, from the moment of entry. The law it has been said presumes in such a case that the defendant intended the wrongful purpose when he first entered.

The practical effect of this doctrine is that the owner or possessor of the premises will be entitled to damages not only in respect of the wrongful act subsequently done, but also in respect of the original entry which has been notionally converted into a trespass.

It must be noted that the doctrine only applies where the entry is permitted under authority of *law*, as in the case of the commoner's right to enter upon common land, or the right to enter a public inn; it does *not* apply where the entry is made by leave of the owner or under some contract.

Further, the doctrine will only apply where the wrongful act is a *misfeasance* (*i.e.* a positive act), as opposed to non-feasance (*i.e.* mere omission) (*c*); and it has also been held that there can only be a trespass *ab initio* if the abuse of the right of entry is of such a nature that once it has been done the defendant's presence upon the

(*a*) See *Robson* v. *Mallett*, [1967] 2 All E. R. 407; [1967] 2 Q. B. 939.
(*b*) See Part II, Chapter 11.
(*c*) *Six Carpenters' Case* (1610), 8 Co. Rep. 146a (Illustration 23 (a)).

land becomes entirely without justification; if it remains justified for any reason independent of the wrongful act the doctrine will not apply (*d*).

Formerly trespass *ab initio* applied to the case of a landlord who, in levying a lawful (*e*) distress, exceeded his rights in some way; but by the Distress for Rent Act, 1737, s. 19, this particular application of the doctrine was abandoned, and a landlord will now only be liable for such acts as he does that are actually wrongful.

ILLUSTRATION 23

(a) *The doctrine of trespass ab initio applies only in the case of positive acts of misfeasance.*

Six Carpenters' Case (1610), 8 Co. Rep. 146a.

Six carpenters entered an inn and were served with wine for which they paid. Later they were served with more wine for which they wrongfully refused to pay. *Held:* Although this was a case of an abuse of a right conferred by law—namely, the right to enter a public inn—there was no ground for applying the trespass *ab initio* rule, since refusal to pay is a *non-feasance*, not a misfeasance.

(b) *A person will only be treated as a trespasser ab initio if the effect of his wrongful act is to render his presence upon the premises entirely unjustified.*

Elias *v.* Pasmore, [1934] All E. R. Rep. 380; [1934] 2 K. B. 164.

Defendant police officers entered plaintiff's premises in order to effect a lawful arrest; in the course of making the arrest they seized and removed certain documents which they were not entitled to seize. *Held:* Since the defendants' entry upon the land remained justified by their duty to make the arrest even after the wrongful seizure of the documents, they were trespassers only as to the documents, not trespassers *ab initio* as to the land.

It must be added that in *Chic Fashions (West Wales), Ltd.* v. *Jones* (*f*) where it was held that police entering property under a search warrant in respect of specified goods are entitled to seize other goods which they reasonably suspect to have been stolen, the Court of Appeal were disposed to doubt the validity of the doctrine of Trespass *Ab Initio* in modern times, Lord DENNING, M.R., went further, declaring that the *Six Carpenters' Case* was a by-product of the old forms of action. "Now that they are buried it can be in-

(*d*) *Canadian Pacific Wine Co., Ltd.* v. *Tuley*, [1921] 2 A. C. 417; *Owen and Smith* v. *Reo. Motors, Ltd.*, [1934] All E. R. Rep. 734; 151 L.T. 274; *Elias* v. *Pasmore*, [1934] All E. R. Rep. 380; [1934] 2 K. B. 164 (Illustration 23 (b)).

(*e*) Of course if the distress is unlawful, *e.g.* in respect of rent not due, the landlord will be a trespasser from the start.

(*f*) [1968] 1 All E. R. 229.

terred with their bones (*g*)." "Can be" is true, but this statement does not, it is thought, as yet represent the law. DIPLOCK, L.J., and SALMON, L.J., were more cautious; the former remarking: "What application, if any, the rule applied in the *Six Carpenters' Case* has, in the modern law of tort, may some day call for re-examination, but it has no relevance to the present case . . .." (*h*) After all, all that the doctrine, with its archaic-sounding name, implies is that the plaintiff's right to damages may relate back to the moment of entry instead of starting at the moment of the wrong. Is this unjust?

THE RIGHT OF THE PLAINTIFF

The reason the action of trespass was invented was to protect the possessor of property. It may be that the policy which dictated this invention was to discourage people from causing disturbance by dispossessing their neighbours, or it may be that the aim was to protect possession as evidence of ownership. But whatever the reason was, the fact is that trespass to land is a wrong to the *possessor* (*i*) rather than the owner of the land. Consequently where the owner has no right to immediate possession at the time of the trespass—as in the case of a landlord who has leased his land (*k*)—he will have no claim.

In this context the concept of "possession" includes more than an actual physical occupation of the land; for it embraces possession through the medium of servants or agents and constructive possession—as where an owner, being abroad, leaves his house furnished but unoccupied (*l*). But it *excludes* mere *use* of the property, as in the case of a lodger, even though he has a separate room, for the landlord retains the right to control and furnish it (*m*).

As a matter of principle therefore a *reversioner* (*i.e.* someone who has a claim to the land expectant upon the determination of an

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(*g*) *Ibid.* at p. 236. Lord DENNING'S dislike of the forms of action is obvious. See above, p. 69. Anyhow what had the rule got to do with the forms of action? Street, *Foundations of Legal Liability*, Vol. I, pp. 45–46, describes it as "an element which destroys privilege in the field of trespass just as malice does in the law of libel". Both rules seem to be no more than permissible rules of policy.

(*h*) *Ibid.* at p. 239.

(*i*) Long contested assertion of right may be sufficient evidence of possession to entitle the assertor to claim in trespass: *Fowley Marine (Emsworth), Ltd.* v. *Gafford*, [1968] 1 All E. R. 979.

(*k*) *Baxter* v. *Taylor* (1832), 5 B. & Ad. 72 (Illustration 24).

(*l*) And possession may sometimes be even more exiguous: for an extreme instance see *Wuta-Ofei* v. *Danquah*, [1961] 3 All E. R. 596.

(*m*) See *Allan* v. *The Overseers of Liverpool* (1874), L. R. 9 Q. B. 180, 191–2; *per* BLACKBURN, J.

existing interest) should have no claim in respect of a trespass, for he has neither possession nor even the right to possess, and in general this is the case. *But*, as commonsense dictates, he may sue in respect of any trespass "of such a permanent nature as to be necessarily injurious to his reversion" (*n*), such as destruction of buildings, cutting of timber, or removal of support.

Where possession of the land is divided—for instance X possesses the surface, Y the subsoil—each party may sue in respect of trespass to the part *he* possesses. For example, Y in this case could not sue Z for walking on the surface of the land (though X could), but Y could sue Z for digging beneath it (*o*). Similarly the possessor of minerals beneath the soil may sue in respect of trespass to them whereas the surface owner could not (*p*).

But it must be noted that when a person dedicates a highway to the public, or grants an easement such as a right of way over his land, he retains possession of the land subject to the special right which he has granted away. He may therefore maintain an action for trespass to the soil, as by throwing stones upon it or erecting a bridge over it (*q*).

ILLUSTRATION 24

Since a reversioner is not in possession he cannot sue for a trespass unless it does some permanent injury which affects his reversion.

Baxter *v.* Taylor (1832), 4 B. & Ad. 72.

The plaintiff *owned* certain premises which he had *demised to tenants*. The defendant, in purported exercise of a right of way, entered upon the premises with horses and carts and deposited a pile of stones upon the land. *Held:* Since this act was not necessarily injurious to the reversion plaintiff had no claim.

Actual possession of land suffices to sustain an action of trespass against any person *wrongfully* entering the land. It is most important to appreciate this because it means that the plaintiff need only prove his actual possession, no more; it *does not even matter* if *his possession is itself wrongful* as against, say, the true owner. It follows that the trespasser cannot set up the "*jus tertii*"

(*n*) *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 318; *per* LINDLEY, L.J. Reversioners also have special rights under the Rights of Way Act, 1932, s. 4 (11 Halsbury's Statutes (2nd Edn.) 220).

(*o*) *Cox* v. *Glue* (1848), 5 C. B. 533. See also *Back* v. *Daniels*, [1925] 1 K. B. 526.

(*p*) *Lewis* v. *Branthwaite* (1831), 2 B. & Ad. 437; *Keyse* v. *Powell* (1853), 2 E. & B. 132. But of course the owner may have *some* right of action other than trespass.

(*q*) *Mayor of Northampton* v. *Ward* (1745), 1 Wils. 107; *Goodtitle d. Chester* v. *Aker and Elmes* (1757), 1 Burr. 133; *Every* v. *Smith* (1857), 26 L. J. Ex. 344.

in defence of the claim; that is to say, the trespasser cannot defend himself by establishing that the plaintiff's possession was wrongful as against someone else.

But on the other hand the matter, which really rests upon the simple fact that trespass is a wrong to possession, may begin to appear more complicated (though in fact it is not) when it is appreciated that if the *alleged trespasser is himself* the person *entitled to immediate possession* as against the plaintiff, this will of course afford him a complete defence (*r*). And he will equally be protected if he effects the entry by means of a servant or agent (*s*).

But even a person who thus enters the land as of right must beware of the *criminal* law, for the Statute of Forcible Entry, 1381, provides that such entry must be peaceable, and if he uses force he will be in danger of indictment; though the fact that the provisions of this statute have been infringed will *not* make the entry *actionable* by the wrongful possessor (*t*). And now by the provisions of the Rent Act, 1965 (*u*), a landlord cannot retake possession of his premises under a right of re-entry or forfeiture without taking court proceedings.

Further when a person thus entitled to enter has made his entry, the possession at once vests in him and the person upon whom he entered becomes a mere trespasser and may be treated as such in all respects.

"A party having a right to enter the land, acquires by entry the lawful possession of it, and may maintain trespass against any person who being in possession at the time of his entry, wrongfully continues upon the land" (*v*).

But it must be remembered that it is *only the person entitled to immediate possession* who can justify an entry. Thus if a tenant has been dispossessed by a stranger, the *tenant* and *not* his landlord will be the person entitled to effect an entry (*a*). And where the person entering does so not in his own right, but claiming through the person who is entitled to do so, the authority of that person must be proved (*b*).

(*r*) *Taunton* v. *Costar* (1797), 7 Term Rep. 431 (landlord entering upon premises after expiry of tenancy). See also *Delaney* v. *T. P. Smith, Ltd.*, [1946] 2 All E. R. 23; [1946] K. B. 393.

(*s*) *Jones* v. *Chapman* (1849), 2 Exch. 803.

(*t*) *Hemmings* v. *Stoke Poges Golf Club*, [1920] 1 K. B. 720.

(*u*) ss. 31 and 32 (45 Halsbury's Statutes (2nd Edn.) 846).

(*v*) *Butcher* v. *Butcher* (1827), 7 B. & C. 399, 402; *per* BAYLEY, J. The act of the defendant's servants in ploughing the land was held to constitute a sufficient "entry".

(*a*) *Ryan* v. *Clark* (1849), 14 Q. B. 65.

(*b*) *Chambers* v. *Donaldson* (1809), 11 East 65.

ILLUSTRATION 25

Actual possession, however wrongful, is sufficient to entitle the possessor to claim against a trespasser.

Graham *v.* Peat (1801), 1 East, 244.

The plaintiff was in possession of glebe land under a lease, which by virtue of a statute relating to leases of benefices was wholly void. *Held:* Plaintiff's possession was sufficient to maintain trespass against someone who was not rightfully entitled to possession, for "*Any possession is a legal possession against a wrong-doer*" (*c*).

Joint owners can only sue one another in trespass for acts done by the one which are inconsistent with the right of the other (*d*). Among such acts may be mentioned the destruction of buildings (*e*), carrying off soil (*f*) and actual expulsion of the plaintiff from the land (*g*). But if the property is something such as a mine (*h*), that can only be used profitably if it is worked, the remedy of a joint owner who considers that another has taken more than his share is not trespass but an action for an account (*i*).

REMEDIES OTHER THAN ACTION

It has already been noted that a person who is in lawful possession of land may, subject to the "*molliter manus imposuit*" rule, forcibly eject a trespasser.

But the law also permits a further degree of self-help in the form of "*distress damage feasant*" (*k*). This is an ancient common law remedy, distinct from the right to levy distress for rent (*l*), by which a person in possession of land may seize and detain an animal or other chattel which *trespasses and does damage* (*m*) upon the land.

(*c*) (1801), 1 East 246; *per* Lord KENYON, C.J.

(*d*) See *Jacobs* v. *Seward* (1872), L. R. 5 H. L. 464. This case and the cases cited in the following notes related to tenancies in common. There is now no such thing as a legal tenancy in common, but the same principles will apply to cases of joint tenancy.

(*e*) *Cresswell* v. *Hedges* (1862), 1 H. & C. 421.

(*f*) *Wilkinson* v. *Haygarth* (1847), 12 Q. B. 837.

(*g*) *Murray* v. *Hall* (1849), 7 C. B. 441.

(*h*) Though, since the Coal Industry Nationalisation Act, 1946, this matter is of course now academic in respect of coal mines.

(*i*) *Job* v. *Potton* (1875), L. R. 20 Eq. 84.

(*k*) On the whole subject, see Glanville Williams, *Liability for Animals*. See also *Report of Committee on Law of Civil Liability for Damage done by Animals* (1957), Cmd. 8746, which recommends that this remedy be replaced by a less complicated one.

(*l*) See *Watkinson* v. *Hollington*, [1943] 2 All E. R. 573; [1944] K. B. 16.

(*m*) Though obstruction will suffice: *Ambergate Rail. Co.* v. *Midland Rail. Co.* (1853), 2 E. & B. 793 (locomotive obstructing line).

The purpose of allowing such seizure is to force the owner to make proper compensation (*n*) for the damage, and when he has tendered compensation the chattel must be returned. There is *no* power of *sale* and animals which are subject to distraint must be properly cared for and fed. Only the thing that actually does the damage may be seized (not, therefore, a herd for damage done by one member of it); but "damage" includes damage to other property, such as cattle, not merely to the land itself (*o*). The remedy is only available where the chattel is unattended, so that a sheep may not be seized if the shepherd is there; and the initial seizure must also be effected while the animal or other thing is still creating a trespass upon the land—there is no right to take or demand it once it has left, by whatever means (*p*). The right to distrain damage feasant is *alternative* to an action for damages; hence while the thing distrained is kept by the distrainor he cannot bring an action for damages based upon the trespass (*q*).

Since *wild* animals usually have no owner distress damage feasant does not apply to them. But as a rule (*r*) they may lawfully be captured or killed by the possessor of land upon which they stray though it seems that there will be no civil remedy against their breeder—unless the circumstances of their escape amount to a nuisance—if, as may happen in the case of rabbits for example, they happen to have one (*s*). On the other hand there are some wild animals, such as carrier pigeons, which may be the subject of ownership; these may be killed by a landowner in case of necessity, as where a farmer shoots pigeons in protection of his crops, but he will be liable to an action unless he can establish that such a drastic course was essential in the circumstances (*t*). Though he, for his

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(*n*) It is for the distrainee to estimate the compensation due and tender it; *Sorrell* v. *Paget*, [1949] 2 All E. R. 609; [1950] 1 K. B. 252. But if an excessive amount is demanded and paid, the excess can be recovered in an action for money had and received from the distrainor; *Green* v. *Duckett* (1883), 11 Q. B. D. 275.

(*o*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608 (Illustration 26).

(*p*) *Vasper* v. *Edwards* (1702), 12 Mod. Rep. 658. This decision recently acted as a useful mentor to the writer. Cows entered his garden, causing some havoc: his wife, in his absence, managed to evict them onto the highway. She rang the farmer who merely reminded her that her own act was unlawful. Upon return home, the writer, being minded to recapt the cow's damage feasant, saved himself from a labour of Hercules and possible ridicule by consulting his own book.

(*q*) *Boden* v. *Roscoe*, [1894] 1 Q. B. 608 (Illustration 26).

(*r*) Some wild animals are of course "protected" by law.

(*s*) *Hannam* v. *Mockett* (1824), 2 B. & C. 934, 939; *per* BAYLEY, J., citing *Boulston's Case* (1597), 5 Co. Rep. 104b.

(*t*) *Hamps* v. *Darby*, [1948] 2 All E. R. 474; [1948] 2 K. B. 311.

part, may probably claim in respect of any damage they may do (*u*).

ILLUSTRATION

Distress damage feasant is an alternative remedy to an action for damages; and it is available in respect of damage to chattels as well as in respect of damage to land.

Boden *v.* Roscoe, [1894] 1 Q. B. 608.

Defendant's pony trespassed upon plaintiff's land and kicked plaintiff's filly. Plaintiff distrained damage feasant, claiming £5 compensation in respect of the kick. Defendant made no tender. Plaintiff claimed in County Court £5 damages *and* nominal damages for injury to grass. Defence claimed no action could be brought while plaintiff retained pony. The County Court judge held that the defence was good as regards the injury to the *land*, but not as regards the injury to the pony, since in his view distress damage feasant applied only to injury to land. On appeal. *Held:* judgment for the defendant; *no action could lie while plaintiff retained the distress* and the remedy of distress damage feasant applies whether the injury is to *land or other property*. "You may distrain damage feasant anything animate or inanimate which is wrongfully on the land . . . and is doing damage there" (*a*).

2. DISPOSSESSION

Dispossession or ouster consists in wrongfully withholding possession of land from the rightful owner.

This wrong may be committed by a person *taking* possession of the land or by *keeping* possession of it after the expiration of a period of lawful possession, *e.g.* after the expiration of a lease under which the land was held.

Since the Judicature Act, 1873, the remedy for this wrong has been an action for the recovery of the land wherein the plaintiff claims possession. The old remedy was the action of *ejectment* (a form of trespass to land), which was a fictitious proceeding abolished by the Common Law Procedure Act, 1852 (*b*).

A successful plaintiff is entitled to judgment for possession and to *mesne profits*, *i.e.* damages for profits of the land which he has lost whilst the defendant was wrongfully in possession, and for any harm done to the land by him while he was in possession. He may also, without claiming possession, bring an action for *mesne profits*.

(*u*) *Hannam* v. *Mockett* (1824), 2 B. & C. 934, 940, citing *Dewell* v. *Sanders* (1618), Cro. Jac. 490.

(*a*) [1894] 1 Q. B. at p. 611; *per* CAVE, J.

(*b*) For an account of ejectment, see Blackstone's *Commentaries*, III.

This remedy may upon reflection seem peculiar, for one who is in fact *out of possession* should not in strict theory be entitled to claim the fruits of possession during that period. But it is an application, and the most important application, of the doctrine of *Possession by Relation* (often called "Trespass by Relation"). According to this doctrine a person who is not in actual possession at the time of a trespass may maintain his claim if he was then entitled to immediate possession and was also, at time of action brought, in actual possession. His possession is then said to *relate back* in law to the time when his title arose, and for the purpose of his action he is considered to have been in possession from that time (*c*).

Dispossession will be examined under two heads: first Onus of Proof of Title, secondly Limitation.

Onus of Proof

The law presumes possession to be rightful, and the plaintiff in a claim for dispossession must recover upon the *strength of his own title* (*d*), and not in reliance upon the weakness of the defendant's.

The person who is in possession of land is no more required to prove that his possession is rightful when sued in an action for recovery of the land than he is when he himself brings an action for trespass to it, and a person who seeks to deprive him of his possession must prove his right to do so as strictly as a person who seeks to justify an entry upon land which would, without such justification, be a trespass.

Where the claimant relies upon a paper title, that is to say upon deeds, wills or other instruments to prove his right to the possession of the land, the application of this rule presents no difficulty. He must prove his title strictly, otherwise the defendant is entitled to judgment (*e*).

It sometimes happens, however, that the claimant himself has no paper title and seeks to rely upon possession by himself or those through whom he claims. Where that possession has lasted for a sufficient time (*f*) to give him a *possessory title* it will be quite sufficient (*g*); but even if it has not lasted so long it will still be

(*c*) *Anderson* v. *Radcliffe* (1858), E. B. & E. 806; *Ocean Accident and Guarantee Corporation* v. *Ilford Gas Co.*, [1905] 2 K. B. 493. Contrast *Elliott* v. *Boynton*, [1924] 1 Ch. 236.

(*d*) *Martin* v. *Strachan* (1744), 5 Term Rep. 107n.

(*e*) *Roe d. Haldane* v. *Harvey* (1796), 4 Burr. 2484.

(*f*) Now twelve years (see below), formerly twenty years.

(*g*) *Denn d. Tarzwell* v. *Barnard* (1777), 2 Cowp. 595; *Doe d. Harding* v. *Cooke* (1831), 7 Bing. 346. Compare *In re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1.

primâ facie sufficient to enable the claimant to recover the land from a mere wrongdoer, *i.e.* one who has no title to the land himself (*h*). Thus in *Doe d. Hughes* v. *Dyeball* (*i*) the plaintiff being in possession of a room in a house, the defendant forcibly took possession of it. In an action by the plaintiff to recover possession, it was held that the plaintiff showed sufficient title as against the defendant by proving that the house had been leased to him and that he had enjoyed a year's possession under the lease (*k*).

Much more difficult is the question whether the defendant in such a case may set up the "*jus tertii*"; that is to say, displace the *primâ facie* presumption of title which *possession, even for a short period,* raises in favour of the plaintiff, by proving that some third party, through whom the defendant does not claim, is really entitled to the land and so defeat the plaintiff's claim to recover the land. This may be so, but there is no decision directly on the point. It was indeed held in *Doe d. Carter* v. *Barnard* (*l*) that where the claimant's own evidence establishes that some third party is really the person entitled to possession of the land the claimant will not be able to recover possession from the defendant; but this is of course not the same thing as saying that a defendant who is a mere wrongdoer is entitled to give this evidence himself where the claimant's evidence merely shows a *primâ facie* right by reason of his possession.

Occasionally, however, the ordinary rule as to proof of title is modified by a rule of *estoppel.* Where, for example, the relationship of landlord and tenant exists, and the landlord is seeking to recover the land, all he need prove is the *expiry of the tenancy*; he need not prove his title because a tenant is generally debarred from disputing his landlord's title (*m*) unless a defect in the title appears on the lease itself (*n*). Nevertheless the tenant may show that his landlord's *title has expired or been terminated* by assignment, surrender, or otherwise (*o*). The same principle applies in the case

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(*h*) Or is precluded by the rules of evidence from establishing one: *Doe d. Smith* v. *Webber* (1834), 1 Ad. & El. 119.

(*i*) (1829), Mood. & M. 346. See also *Davison* v. *Gent* (1857), 1 H. & N. 744; *Asher* v. *Whitlock* (1865), L. R. 1 Q. B. 1 (Illustration 27), approved, *Perry* v. *Clissold*, [1907] A. C. 73.

(*k*) Had the lease been void and the plaintiff's possession thereunder illegal it might have been otherwise: see *Doe d. Crisp* v. *Barber* (1788), 2 Term Rep. 749.

(*l*) (1849), 13 Q. B. 945. But this decision has been criticised.

(*m*) *Cooper* v. *Blandy* (1834), 1 Bing. N. C. 45; *Delaney* v. *Fox* (1856), 1 C. B. (N. S.) 166. And see Woodfall, *Landlord and Tenant.*

(*n*) *Saunders* v. *Merryweather* (1865), 3 H. & C. 902.

(*o*) *Doe d. Marriott* v. *Edwards* (1834), 5 B. & Ad. 1065; *Delaney* v. *Fox* 1857), 2 C. B. (N. S.) 768. And see Woodfall, *op. cit.* (see note (*m*), *supra*).

of licensees or servants, for they too are estopped from disputing the title of their licensors or masters (*p*).

ILLUSTRATION 27

Prior possession is in itself a sufficient title to give the claimant a right to dispossess a mere wrongdoer.

Asher *v.* Whitlock (1865), L. R. 1. Q. B. 1.

In 1850 X inclosed some waste land and built a cottage upon it. There he lived until 1860, when he died having devised the land to W, his wife, *as long as she did not remarry*, with remainder to his daughter D. W and D continued to reside on the property; but in 1861 W *did* remarry the *defendant* who came to live there too. The legal effect of W's remarriage was that, although upon X's death the right to possession vested in her, upon the remarriage it became vested in D. The *defendant*—through W—was therefore a mere trespasser; D's right was a *right to possession* though it had not lasted so long as to vest ownership in her. D died in 1863 and the present claim was brought by D's heir-at-law who inherited such right to the land as D possessed. *Held:* The heir-at-law was entitled to recover as against the defendant for "possession is good against all the world except the person who can shew a good title" (*q*); and the heir had the immediate right to possession (though not to ownership) from which he had been ousted by the defendant.

LIMITATION OF ACTIONS

It is provided by the Limitation Act, 1939, s. 4(3), that

> "No action shall be brought by any . . . person to recover any land after the expiration of *twelve years* from the date on which *the right of action accrued to him* or, if it first accrued to some other person through whom he claims, to that person" (*r*).

Where the claimant is the Crown or an ecclesiastical or charitable corporation the period is *thirty* years (*s*).

The effect of the operation of the Act is not merely to bar the remedy of the owner, but *entirely to extinguish his title* (*t*). If therefore he allows an intruder to remain in possession of the land without acknowledgement for the statutory period *he* will cease to be, and the *intruder* will become, owner (*u*).

The question of the length of the statutory period is simple, but

(*p*) *Doe d. Johnson* v. *Baytup* (1835), 3 Ad. & El. 188; *Crossley* v. *Dixon* (1863), 10 H. L. Cas. 293, 304.

(*q*) (1865), L. R. 1 Q. B. at p. 5; *per* COCKBURN, C.J.

(*r*) Italics ours.

(*s*) Section 4 (1), (2) (13 Halsbury's Statutes (2nd Edn.) 1164). As to the Crown's rights in respect of the foreshore, see s. 4 (1), proviso.

(*t*) Limitation Act, 1939, s. 16.

(*u*) See *In re Atkinson and Horsell's Contract*, [1912] 2 Ch. 1.

its commencement, *i.e.* the point of time at which the right of action "*accrues*" presents difficult problems.

The first thing to notice is that it can only start to "accrue" when someone is in adverse *possession* of the land (*a*) that is to say, when someone has entered the land and dispossessed the owner with the result that the twelve year period will begin to run in his favour. The mere fact that the owner has left the land vacant prior to the dispossession cannot confer rights upon anyone.

Thus if A's land lies vacant and B enters and takes possession, time begins to run against A *when B enters*, and not before. Further, if B vacates the land—say after six years of entry—and then after an interval of vacancy during which A fails to repossess himself C takes possession, A's right of action against C accrues *when C enters*; B's period of possession as against A does *not* count in favour of C (*b*), and he will only become entitled to the land after twelve years from his entry. But *continuous* adverse possession by an uninterrupted series of people is another matter. Suppose that in continuous progression, B, C, D and E one after the other, and without lapse, enter into adverse possession over a twelve-year period; then within twelve years of B's entry A's claim to the land will have gone (*c*). But B, relying upon his own *possessory* title, might of course claim against E until twelve years have expired from C's entry, and so on. Moreover, the intruder's ("*squatter's*") title rests solely upon his adverse possession; he acquires his right by succession to no one. Thus, if land be leased to C by B and A, entering upon the land, acquires an adverse title against C, the circumstances may sometimes be such that B, not knowing that A is a squatter, may retain a paramount title as against A. Possession adheres to the *claimant* is the point; in such a case there is no notional transfer of the lessee's title (extinguished though it be) to A (*d*).

Having explained the necessity for the existence of adverse possession, it remains to examine the other factors which determine the "accrual" of the right of action.

First, as to estates *in possession*:

(*a*) Limitation Act 1939, s. 10 (1) (13 Halsbury's Statutes (2nd Edn.) 1171).

(*b*) *Ibid.*, s. 10 (2). And see *Trustees Exors. and Agency Co., Ltd.* v. *Short* (1888), 13 App. Cas. 793.

(*c*) See on this matter, and the subject of accrual generally, Cheshire, *Modern Real Property*.

(*d*) See *Fairweather* v. *St. Marylebone Property Co., Ltd.*, [1962] 2 All E. R. 288; [1963] A. C. 510; *Tidaner* v. *Buzzacott*, [1965] 1 All E. R. 131; [1965] Ch. 426.

"Where the *person bringing an action to recover* land, or some person through whom he claims, *has been in possession* thereof, and has while entitled thereto been dispossessed or discontinued his possession, the right of action shall be deemed to have accrued *on the date of the dispossession or discontinuance*" (*e*).

But where the claim is made as the result of adverse possession which arises after the death of someone who *dies possessed* of the land time runs against a claimant under the will or intestacy of the deceased from the date of the *death* (*f*).

The word "discontinues" is technical. It does not mean mere abandonment of possession, but abandonment followed by adverse possession by another (*g*)—this is of course necessarily the case when the logic of the need for adverse possession is understood.

Secondly, as to *future estates and interests*, such as reversions or remainders. Where the claimant is a person entitled to such an estate or interest, *primâ facie* the right of action for dispossession accrues to him *at the determination* of the preceding estate (*h*). But this will only be so where the person entitled to the preceding estate was himself *in possession* at the time of the determination. If he was *not* then in possession but was dispossessed before the determination of his estate, then the person entitled to the future interest is accorded an alternative: time will run against him *either* within *twelve years* of the time when a right of action accrued to his predecessor *or* within *six years* of the time when he himself became entitled to succeed to his estate, whichever period is the longer (*i*).

It must be added that in cases of fraud and disability (*k*) the statutory period is extended; and also that where the person in possession gives the true owner or possessor or his agent a written and signed acknowledgement of his title, then the owner or possessor's right of action accrues from the *date of such acknowledgement*, and not from the date of the original dispossession (*l*).

Further, the person entitled to the land may prevent the statute

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(*e*) Limitation Act, 1939, s. 5 (1) (italics ours). See also *Leigh* v. *Jack* (1879), 5 Ex. D. 264; *Williams Bros. Direct Supply Stores, Ltd.* v. *Raftery*, [1957] 3 All E. R. 593; [1958] 1 Q. B. 159; *Bligh* v. *Martin*, [1968] 1 All E. R. 1157 (there must, however, be a dispossession or discontinuance of possession).

(*f*) Limitation Act, 1939, s. 5 (2) (13 Halsbury's Statutes (2nd Edn.) 1165).

(*g*) See *Smith* v. *Lloyd* (1854), 9 Exch. 562; *Agency Co., Ltd.* v. *Short* (1888), 13 App. Cas. 793.

(*h*) Limitation Act, 1939, s. 6 (1).

(*i*) *Ibid.*, s. 6 (2).

(*k*) For this see Part III, Chapter 6.

(*l*) Limitation Act, 1939, ss. 23, 24. See *Bouring-Hanbury's Trustee* v. *Bouring-Hanbury*, [1942] 1 All E. R. 516; [1942] Ch. 276; affirmed, [1943] 1 All E. R. 48; [1943] Ch. 104; *Wright* v. *Pepin*, [1954] 2 All E. R. 52.

from running against him by entering and resuming possession, even if he does so only for a short time: but in order to be effective such an entry must be made with full intent to repossess, a merely formal entry will not suffice (*m*). Thus in *Doe d. Baker* v. *Coombes* (*n*) it was held that there was no sufficient resumption of possession where a lord of a manor in the presence of his family went to a hut wrongfully built upon his land and, having directed a stone to be removed from the wall of the hut and part of a fence to be pulled down, went away.

As to what acts may constitute "dispossession" see *Littledale* v. *Liverpool College* (*o*).

ILLUSTRATION 28

Where a person who has been dispossessed of land makes a proper resumption of his possession time will run in favour of the dispossessor from that date, and not before.

Randall *v.* Stevens (1853), 2 E. & B. 641.

Defendant entered his premises of which the plaintiff had wrongfully possessed himself, turned out plaintiff and his family and removed most of the furniture. *Held:* This was a sufficient resumption of possession by defendant and though plaintiff later re-took possession time ran against defendant as from the resumption, and not from plaintiff's original taking of possession.

(*m*) *Ibid.*, s. 13.

(*n*) (1850), 9 C. B. 714. Contrast *Randall* v. *Stevens* (1853), 2 E. & B. 641 (Illustration 28); *Solling* v. *Broughton*, [1893] A. C. 556.

(*o*) [1900] 1 Ch. 19.

CHAPTER 3

TRESPASS TO GOODS, CONVERSION AND DETINUE

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Although these three torts are closely akin, and indeed the same act may often give rise to a claim in all three of them, their essential elements differ; so they must be treated separately. Mention must also be made of the allied topic of recaption.

1. TRESPASS TO GOODS

This tort consists in direct interference with goods which are in the possession of the plaintiff, and it may (though it need not necessarily do so) take the form of a removal of the goods from the plaintiff's possession—indeed, in former times the tort was called "trespass *de bonis asportatis*".

The basis of the plaintiff's right must first be considered, and thereafter the nature of the wrong.

The Basis of the Plaintiff's Right

Possession is the arch-stone of the claim. And the general rule is that the person in possession at the time of the trespass may bring the action, even though he was not the owner of the goods, and that *none but the person in possession* may do so (*a*).

Thus if someone other than the true owner or those claiming under him (*b*), or acting with his authority (*c*), commits a trespass to the goods while they are in the plaintiff's possession he has a right to sue. And the defendant cannot set up the "*jus tertii*", that is to say shield himself by establishing that someone other than the plaintiff is entitled to the ownership; for possession alone grounds the plaintiff's right.

(*a*) *Young* v. *Hichens* (1843), 6 Q. B. 606 (fish near, but not in, net).

(*b*) See *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd., and Schmidt*, [1914] A. C. 197.

(*c*) See *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621.

"The law is that a person possessed of goods as his property has a good title as against every stranger, and that one who takes them from him, having no title in himself, is a wrongdoer, and cannot defend himself by shewing that there was title in some third person, for *against a wrongdoer possession is title*" (*d*).

Thus in the leading case of *Armory* v. *Delamirie* (*e*) a chimney sweep's boy who found a jewel was held entitled to claim against a goldsmith to whose apprentice he had given it in order to ascertain what it was.

So true is it that possession is the foundation of the action that in some circumstances even the owner may be debarred from suing. For example where the goods are in the hands of a carrier or of a bailee at pleasure (as in the case of a gratuitous loan) the owner retains legal possession, and he may sue in respect of them (*f*); but if this right to legal possession is once suspended, as it is if the owner pledges the goods or lets them out on a contract of hiring, or if they are in the possession of someone who has a lien on them as against him, he *cannot* maintain an action of trespass to goods (*g*). The most he can do is to sue for injury done to the goods, and it must be one which damages his interest, and is something in the nature of a permanent injury (*h*).

Likewise a person who is entitled to a reversionary interest in goods, since he is not entitled to the immediate possession of them cannot maintain trespass, but he too may claim in respect of any permanent injury which affects his interest (*i*).

"*Possession*" in this context usually means that the possessor is the person in immediate physical control of the goods. But in its legal sense it also extends to certain other situations (*k*). For example, as a general rule a master is treated as being legally in possession of property which is in the actual physical custody of his servant; the servant is treated as a mere conduit through whom the master exercises his legal right. Though even here there is an exception;

(*d*) *Jeffries* v. *Great Western Rail. Co.* (1856), 5 E. & B. 802, 805; *per* Lord CAMPBELL, C.J.: *Wilson* v. *Lombank, Ltd.*, [1963] 1 All E. R. 740.

(*e*) (1721), 1 Stra. 505—the claim was in trover, but the principles are in this respect the same. See also *The Winkfield*, [1902] P. 42 (Illustration 29). And *Burton* v. *Hughes* (1824), 2 Bing. 173 (hirer of furniture); *Moore* v. *Robinson* (1831), 2 B. & Ad. 817 (master of ship as bailee of ship and fittings).

(*f*) *Lotan* v. *Cross* (1819), 2 Camp. 464.

(*g*) *Gordon* v. *Harper* (1796), 7 Term Rep. 9; *Bradley* v. *Copley* (1845), 1 C. B. 685 (both trover; but principle the same).

(*h*) *Mears* v. *London and South Western Rail. Co.* (1862), 11 C. B. (N. S.) 850.

(*i*) See *Tancred* v. *Allgood* (1859), 4 H. & N. 438.

(*k*) See *Wilson's Case* (n. (*d*), above)—motor car left at garage for repairs: possessor (not the owner) has right to claim and defendant cannot set up "*jus tertii*" of the owner. There being no lien in the particular circumstances in the garage proprietor possession remained in possessor.

for goods received by the servant from third parties are not treated as being in the master's possession until they are actually appropriated to the master's use.

Similarly, as has already been remarked, goods which are in the keeping of a carrier or of a gratuitous bailee are still regarded as being in the owner's possession (*l*). But on the other hand the bailee is *also* (*m*) treated as being in possession for the purpose of bringing a claim. Though where this is the case an action by one of the parties entitled to "possession" will form a bar to a claim by the other; and if the bailee sues he may have to account to the bailor for the damages he recovers (*n*).

Moreover, where between the time of a person's death and the grant of probate or of letters of administration a wrong is done to the personal property of the deceased there is in reality no one who can sue; for no one is in possession of the property. But by a legal fiction when probate or letters of administration have been granted, the executor or administrator is treated as having been at the time of the wrong in *possession by "relation"*; his right notionally being related back to the time of death (*o*).

ILLUSTRATION 29

Possession, without ownership, is sufficient title to maintain an action for trespass to goods.

The Winkfield, [1902] P. 42.

Ship M was sunk due to the negligent management of ship W. In a claim by the Postmaster-General against ship W for loss of mails aboard M. *Held:* That though the Postmaster-General was no more than a bailee of the mails, he could recover. This was none the less the case because he was under no liability for the loss to the people who had entrusted the mails to him for carriage. "As between bailee and stranger *possession gives title* . . . and he is entitled to receive back a complete equivalent of the thing itself" (*p*).

(*l*) *Manders* v. *Williams* (1849), 4 Exch. 339. "Where the bailor can at any moment demand the return of the object bailed, he still has possession": *United States of America and Republic of France* v. *Dollfus Mieg et Compagnie S.A., and Bank of England*, [1952] 1 All E. R. 572, 585; [1952] A. C. 582, 611: *per* Lord PORTER.

(*m*) *Nicolls* v. *Bastard* (1835), 2 Cr. M. & R. 659.

(*n*) *Eastern Construction Co., Ltd.* v. *National Trust Co., Ltd., and Schmidt*, [1914] A. C. 197, 210; *The Joannis Vatis* (No. 1), [1922] P. 92.

(*o*) *Tharpe* v. *Stallwood* (1843), 5 Man. & C. 760.

(*p*) [1902] P. at p. 60; *per* COLLINS, M.R. See also *Midland Bank, Ltd.* v. *Eastcheap Dried Fruit Co.*, [1962] 1 Lloyd's Rep. 359, and cases cited above, n. (*e*).

The Nature of the Wrong

Such being the basis of the plaintiff's right to sue, it remains to consider the elements of the tort.

It consists in doing some act which amounts to a direct and physical disturbance of the plaintiff's right to the possession of the goods, and is really an extension of the protection which the law throws around his person (*q*). Though proof of actual loss sustained will of course be relevant on the question of damages, this like other forms of trespass is actionable "*per se*" (*r*).

Any direct application of force to the goods suffices to ground the claim, and it is not necessary to establish anything more than that they have been wrongfully interfered with. It is therefore a trespass to strike a man's car with a stone or to beat his dog (*s*); and it is also a trespass to drive away his cattle or to move his goods (*t*) from one place to another without justification or lawful authority. But the defendant's act must be direct in its nature and effect; indirect and non-physical injuries fall within the province of other torts, such as negligence or nuisance.

Whatever may have been the rule in former times, it is now clear that a defendant can escape liability for trespass to goods *if he can establish that his act was neither intentional nor negligent* (*u*). But this does not mean that the defendant will be excused on the ground of *mistake*; for a man who makes a mistake may yet intend to do what he does. Thus it is no defence to prove that the defendant took the plaintiff's umbrella because he thought it was his own, or that he mistakenly drove off the plaintiff's sheep among his own herd (*a*). So in *Kirk* v. *Gregory* (*b*) it was held to be a trespass where B, after the death of X, removed some jewellery from his room, and in order to keep it safe locked it away in a cupboard from which it later disappeared.

(*q*) *Rogers* v. *Spence* (1844), 13 M. & W. 571, 581; *per* Lord Denman, C.J.

(*r*) Exemplary damages may be awarded but only in proper cases: see below, p. 372.

(*s*) See *Dand* v. *Sexton* (1789), 3 Term Rep. 37.

(*t*) But acts of this kind will not necessarily amount to *conversion*: see *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540; *Bushel* v. *Miller* (1718), 1 Stra. 128.

(*u*) *National Coal Board* v. *J. E. Evans & Co. (Cardiff), Ltd.*, [1951] 2 All E. R. 310; [1951] 2 K. B. 861 (Illustration 2 (a), Part I, Chapter 1.) Note that the onus lies on the *defendant*; and in this the practical difference between trespass and negligence (which is for the *plaintiff* to establish) is still vital.

(*a*) Compare *R.* v. *Riley* (1853), Dears. C. C. 149.

(*b*) (1876), 1 Ex. D. 55.

On the other hand the finder of a lost chattel does not commit a trespass merely by taking possession of it, since it is proper and reasonable for him to take care of it until the owner can be found (*c*); though it would of course be otherwise if the article were taken with a view to appropriating it if, by taking reasonable steps, the owner could be found.

Trespass to goods may be *justified* if it is done *in defence of person or property* (*d*) or if it is done in the exercise of a *legal right* or *under legal process*.

Thus a man may with immunity interfere with another's chattels in defence of livestock (*e*). So that if A's dog attacks B's sheep, B may sometimes be justified in shooting it. But B must do no more than is reasonable and essential for the protection of the livestock; and *it lies upon him* to justify the steps he takes (*f*). Unreasonable or vindictive measures—such as chasing pigs with a mastiff (*g*) or shooting a dog when it has escaped to another's property *after* worrying the defendant's sheep (*h*)—will destroy the immunity which would otherwise be afforded. Further, it cannot be a justification for shooting a dog that it was chasing animals *ferae naturae* (*i*), at any rate unless they are kept in a preserve (*k*).

Again, since lawful distress for rent or distress damage feasant are recognized rights, it is a defence that the trespass was done in lawful exercise of these rights. And it is also a defence that the trespass was done in the course of legal process, as for example levying execution under a writ of *fieri facias*, provided of course that the execution was regular and lawful (*l*).

The doctrine of trespass *ab initio*, discussed in the last Chapter, also applies in all its essentials to trespass to goods (*m*). But it

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(*c*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757, 766; *per* BLACKBURN, J.

(*d*) The property need not necessarily be the defendant's own (see *Kirk's Case*, *supra*). Nor need it be corporeal property; for instance, a man may remove another's chattels if they obstruct his lawful right of access, provided that he only does what is essential for the purpose: *Bushel* v. *Miller* (1718), 1 Stra. 128; *Slater* v. *Swann* (1730), 2 Stra. 872.

(*e*) Not necessarily his own: see *Workman* v. *Cowper*, [1961] 1 All E. R. 683; [1961] 2 Q. B. 143.

(*f*) *Cresswell* v. *Sirl*, [1947] 2 All E. R. 730; [1948] 1 K. B. 241 (Illustration 30). See also *Hamps* v. *Darby*, [1948] 2 All E. R. 474; [1948] 2 K. 311.B.

(*g*) See *King* v. *Rose* (1673), 1 Freem. K. B. 347: "a man may not set mastiffs upon pigs to kill them, but he may hunt them with a little dog" (Hale, *arg.*).

(*h*) *Wells* v. *Head* (1831), 4 C. & P. 568.

(*i*) *Vere* v. *Earl Cawdor* (1809), 11 East 568; *Gott* v. *Measures*, [1947] 2 All E. R. 609; [1948] 1 K. B. 234.

(*k*) *Read* v. *Edwards* (1864), 17 C. B. (N. S.) 245.

(*l*) *Clissold* v. *Cratchley*, [1910] 2 K. B. 244.

(*m*) *Oxley* v. *Watts* (1785), 1 Term Rep. 12 (taking horse as estray—lawful—then working it—unlawful misfeasance).

must be remembered that it only applies where the abuse of authority is an authority given by *law* and where the excess of authority is a *misfeasance*, as opposed to a passive omission (*n*).

ILLUSTRATION 30

A trespass to goods may be justified by proof that the trespass was necessary in order to avert immediate danger to person or property.

Cresswell *v.* Sirl, [1947] 2 All E. R. 730; [1948] 1 K. B. 241.

On defendant's instructions, defendant's son shot and killed plaintiff's dog. The shooting took place on defendant's farm at night, the dog—having just desisted from worrying defendant's sheep (some of which later aborted)—being in the act of running towards defendant's son, looking "fierce and wild". In an action for trespass to goods. *Held:* (1) The onus of justifying the trespass lay upon defendant; (2) defendant might justify it by establishing that, at the time the dog was actually attacking the sheep or that if left at large it would renew the attack, which would subject them to real and imminent danger, *and* that shooting was the only practicable means of preventing a renewal *or* that the defendant was reasonable in regarding shooting as necessary for the protection of the sheep.

2. CONVERSION

The tort of conversion (*o*) has been judicially defined as

> "Dealing with goods in a manner inconsistent with the right of the owner . . . provided that it is also established that there is also an intention on the part of the defendant to assert a right which is inconsistent with the owner's right" (*p*).

Examples of acts which may amount to conversion are taking the goods away, detaining them, destroying them, delivering them to a third party, or otherwise dealing with them in a manner adverse to the plaintiff and inconsistent with his right to the use and possession of them.

Here again, it will be best to consider first the basis of the plaintiff's right, then the nature of the wrong.

(*n*) See also *Harvey* v. *Pocock* (1843), 11 M. & W. 740, approved in *Canadian Pacific Wine Co., Ltd.* v. *Tuley*, [1921] 2 A. C. 417.

(*o*) Formerly called "trover", the name of the appropriate form of action—an action upon the case which rested upon a fictitious allegation of finding the goods (French: *trouver*). See *Burroughes* v. *Bayne* (1860), 5 H. & N. 296, 300; *per* MARTIN, B., and Fifoot, *History and Sources of the Common Law*, Chapter 6.

(*p*) See *Lancashire and Yorkshire Rail. Co.* v. *MacNicoll* (1919), 88 L. J. K. B. 601, 605; *per* ATKIN, J., (approved *Oakley* v. *Lyster*, [1931] 1 K. B. 148, 153; *per* SCRUTTON, L.J.).

THE BASIS OF THE PLAINTIFF'S RIGHT

In an action for conversion the cardinal rule is that, *at the time of the conversion* the plaintiff must be *entitled to immediate possession of the goods* (*q*). This right is essential to his claim; so that if he has never had it or if, having had it, he loses it (*r*) his action must fail. But it is the right that matters, not actual possession; thus for instance a hire purchase owner usually reacquires the right to possession of the thing hired by operation of law (*s*) upon the hirer's defaulting in payment of an instalment and he may therefore (without having retaken actual possession) claim against anyone who converts the article after default (*t*).

In cases where the act of conversion consists in *taking the goods out of the plaintiff's possession*, or—which as has already been seen is treated as the same—in taking them out of the possession of a carrier or bailee at pleasure (*u*), all the plaintiff need establish as against the wrongdoer is the *fact of his possession*; for in this case in conversion as in trespass, as against a wrongdoer possession is title (*a*). Thus where B takes goods from A it is of no avail for B to set up the "*jus tertii*", *i.e.* to show that X, and not A was entitled to the goods (*b*); (though, of course, B may successfully prove that *he* or someone under whom *he* claims had the better right).

But as will be seen, conversion differs from trespass in this, that it *may* be committed *in other ways than by direct interference with the plaintiff's possession*: it is not, like trespass, solely a wrong to the plaintiff's personality as manifested in his possession but also, and indeed in essence, a wrong to his goods. Thus for example, where C obtains goods from X who has stolen them from B, X will of course be guilty of theft, trespass and conversion as against B,

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(*q*) *Commercial Banking Co. of Sydney, Ltd.* v. *Mann*, [1960] 3 All E. R. 482; [1961] A. C. 1. He need not necessarily be the owner: see *Marquess of Bute* v. *Barclays Bank, Ltd.*, [1954] 3 All E. R. 365; [1955] 1 Q. B. 202.

(*r*) As where a magistrates' court makes an order under the Police (Property) Act, 1897, s. 1 (18 Halsbury's Statutes (2nd Edn.) 110), vesting property in goods in someone other than the possessor: see *Irving* v. *National Provincial Bank, Ltd.*, [1962] 1 All E. R. 157; [1962] 2 Q. B. 73.

(*s*) See *North Central Wagon and Finance Co., Ltd.* v. *Graham*, [1950] 1 All E. R. 780, 782–783; [1950] 2 K. B. 7, 13–14: *per* ASQUITH, L.J.

(*t*) *Moorgate Mercantile Co., Ltd.* v. *Finch*, [1962] 2 All E. R. 467; [1962] 1 Q. B. 701.

(*u*) *Manders* v. *Williams* (1849), 4 Exch. 339.

(*a*) The reason for this rule was explained by Lord CAMPBELL, C.J., in *Jeffries* v. *G. W. Ry. Co.* (1856), 5 E. & B. 802, 805: "I think it most reasonable, and essential for the interests of society, that peaceable possession should not be disturbed by wrongdoers".

(*b*) See *Jeffries' Case*—last note—(Illustration 31 (a)).

but C if liable at all can only be liable in conversion (or detinue), not in trespass. And in circumstances such as these, where the goods are not taken by the defendant out of the plaintiff's possession, the latter, in an action in conversion against the former, must rely upon his *title* to possess. He *may* therefore quite logically be defeated if the defendant can show that someone else was in fact the person entitled at the relevant time; if the defendant succeeds in establishing this, the plaintiff having neither possession nor the title to it can have no claim (*c*).

Since therefore the plaintiff must have either immediate possession (*d*) or the title to it, it follows that if—as where goods are hired to another—the owner's rights are suspended, the hirer having the right to possession to the exclusion of the owner, then the hirer and *not* the owner will have the right to sue in respect of them. Thus in *Gordon* v. *Harper* (*e*) it was held that where a landlord hired furniture to his tenant the landlord was not entitled to sue a third party for the conversion of them committed during the continuance of the hiring.

But as a general rule (*f*) where a person in possession of goods under a bailment wrongfully determines the bailment, as where a carrier (*g*) or a hirer (*h*) wrongfully disposes of them to a third party, the owner's right to immediate possession automatically revives and he may sue both the bailee himself (*i*) and the third party or anyone deriving title from him. Though in the case of pledge, where the pledgee wrongfully disposes of the goods the owner's right will not revive unless he has paid or tendered the amount of his debt (*j*).

(*c*) *I.e.* in these circumstances, in effect, the defendant may set up the "*jus tertii*". See *Leake* v. *Loveday* (1842), 4 Man. & G. 972 (Illustration 31 (b)).

(*d*) As to the rights of trustees, see *Barker* v. *Furlong*, [1891] 2 Ch. 172, and of beneficiaries, *Healey* v. *Healey*, [1915] 1 K. B. 938.

(*e*) (1796), 7 Term Rep. 9.

(*f*) Though there are important exceptions in favour of innocent third parties. *E.g.* sales by factors (Factors Act, 1889 (1 Halsbury's Statutes (2nd Edn.) 29)), sales by seller or buyer in possession (Sale of Goods Act, 1893, s. 25 (22 Halsbury's Statutes (2nd Edn.) 1002)), sales in market overt (Sale of Goods Act, 1893, s. 22).

(*g*) *Wyld* v. *Pickford* (1841), 8 M. & W. 443.

(*h*) *Gooper* v. *Willomatt* (1845), 1 C. B. 672.

(*i*) The bailee is in a peculiarly weak position, since he is estopped from disputing his bailor's title. And although *ex hypothesi* the bailor is not in possession of the goods, by way of exception to the rule explained above, the bailee cannot normally set up the "*jus tertii*". See *Betteley* v. *Reed* (1843), 4 Q. B. 511, contrast *Biddle* v. *Bond* (1865), 6 B. & S. 225; *Rogers* v. *Lambert*, [1891] 1 Q. B. D. 318.

(*j*) *Donald* v. *Suckling* (1886), L. R. 1 Q. B. 585; *Halliday* v. *Holgate* (1868), L. R. 3 Ex. 299.

In conversion as in trespass the legal meaning to be attached to the concept of possession has proved a thorny problem. "Possession" primarily denotes the immediate power of physical control by a person over a thing; and thus, as has been seen, there is no difficulty in attributing legal possession to the *finder* of a lost article, who may generally sue in conversion or trespass (*k*). But as between rival claimants, the courts have often found it hard to define the *degree* of control requisite to ground the right; and it is clear that the answer to this question must sometimes depend upon all the circumstances and the common-sense of the thing. Thus for instance it has been held that where something is found on *private* land (as opposed to being found in a public place or in a shop open to the public (*l*)), the owner of the land or, as in the case of a lessee, the person entitled to the immediate possession of the land is the person entitled to the thing found—for the right to control of the land carries with it control of things in it or upon it (*m*). But even this rule may be relaxed in favour of the finder where the owner has never been in occupation of the land; thus in *Hannah* v. *Peel* (*n*) a soldier who found a brooch concealed in a house which had been requisitioned during war-time was held entitled to the brooch as against the owner of the house who had never been at liberty to enter into possession.

ILLUSTRATION 31

(a) *Where the plaintiff is in possession of the goods at the time of the conversion the defendant cannot escape liability by establishing that some third party was in fact entitled to them.*

Jeffries *v.* Great Western Rail. Co. (1856), 5 E. & B. 802.

Defendants converted certain railway trucks which were then in plaintiff's possession. These trucks having been previously assigned to plaintiff by one Owen, defendants sought to establish that Owen was not entitled to assign them because, he being bankrupt at the time, they had vested in his trustee in bankruptcy who was therefore entitled

(*k*) *Armory* v. *Delamirie* (1722), 1 Stra. 505.

(*l*) See *Bridges* v. *Hawkesworth* (1851), 21 L. J. Q. B. 75. And on this case and the perplexing question of the right to possession of things on or under the land generally, Goodhart, *Essays in Jurisprudence and the Common Law*, Chapter 4.

(*m*) *Elwes* v. *Brigg Gas Co.* (1886), 33 Ch. D. 562 (prehistoric boat discovered under surface by lessee: lessor entitled); *South Staffordshire Water Co.* v. *Sharman*, [1896] 2 Q. B. 44 (workman finds ring embedded in mud: owners of land entitled); *Hibbert* v. *McKiernan*, [1948] 1 All E. R. 860; [1948] 2 K. B. 142 (golf club entitled to possession of lost balls—a case, however, of larceny); *London Corporation* v. *Appleyard*, [1963] 2 All E. R. 834.

(*n*) [1945] 2 All E. R. 288; [1945] K. B. 509.

to them as against the plaintiff. *Held:* Such evidence was not admissible, for it could not avail defendants. "They seek to defeat an action for (conversion) by shewing title, not in themselves, or in anyone under whom they acted, but title in a stranger against whom they would be wrongdoers; and they ask, by doing this, to defeat the *primâ facie* right arising from possession. . . . *But I find no case where the person in actual possession has been defeated in an action of trover because the defendant was permitted to set up the jus tertii*" (*o*).

(b) *But where the plaintiff is not in possession at the time of conversion he may be defeated by evidence which establishes that someone else was then entitled to the goods.*

Leake *v.* Loveday (1842), 4 Man. & G. 972.

One Cox assigned certain goods by bill of sale to the plaintiff who left them in Cox's possession and never took possession himself. Thereafter Cox became bankrupt, with the effect that the goods became vested in his assignees in bankruptcy. The Sheriff of Oxford (the defendant) mistakenly seized these goods in execution of a judgment against Cox, and the assignees then claiming the proceeds, delivered the proceeds to them. In an action for conversion by plaintiff against defendant. *Held:* Defendant was entitled to escape liability by establishing that the title to the goods was (as from the time of bankruptcy) in the assignees. Since the plaintiff was not in possession of the goods at the time of the conversion, the defendant was not a wrongdoer as against him, but as against the assignees; and therefore proof of their title—he having neither possession nor the right to it—disposed of his claim.

The Nature of the Wrong

The essence of the tort of conversion lies in some dealing by the defendant with the plaintiff's goods which is adverse to the plaintiff's right to the use and possession of them (*p*).

Such adverse dealing *may* take the simple form of taking the goods out of the plaintiff's possession; and such a taking will often amount to a conversion. But it will not necessarily always be one, it will not always constitute either expressly or by implication a denial of the plaintiff's right to the possession and use of the goods. Thus to steal is to convert, but mere removal of the goods from one place to another will not necessarily be an assertion of right adverse to the plaintiff's and though it may well be a *trespass* to the goods, it need not be a conversion (*q*). In this

(*o*) (1856), 5 E. & B. at pp. 806–7; *per* Wightman, J. (italics ours).

(*p*) Or, as Lord Ellenborough, C.J., put it in *Stephens* v. *Elwall* (1815), 4 M. & S. 259, 261—"A person is guilty of a conversion who intermeddles with my property."

(*q*) *Bushel* v. *Miller* (1718), 1 Stra. 128; *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540 (Illustration 32).

respect the ambit of conversion is therefore narrower than that of trespass. On the other hand an act may amount to an adverse assertion of right—and thus to conversion—where though it will not *necessarily* lead to a denial of the plaintiff's title there is a probability that it will. Thus in *Moorgate Mercantile Co., Ltd.* v. *Finch* (*r*) there was held to have been a conversion where a man placed uncustomed watches in another man's car and drove it home, and upon arrival the car, along with the watches, was seized by customs officials and forfeited under statutory powers. The act of putting the watches in the car amounted to a conversion since its natural and probable consequence was the ultimate forfeiture.

But adverse dealing being the essence of the wrong it may also take a variety of less obvious forms (*s*).

Thus it may be conversion, without any initial taking of the goods from the owner, to detain them from him when he demands their return. For example, a finder of lost property commits conversion if, upon full proof of his right, the owner requests him to return it and he refuses (*t*). And indeed conversion is commonly proved by evidence of a *demand* for the return of the goods by the plaintiff followed by a *refusal* on the part of the defendant to deliver them up; for such refusal forms the necessary element of an adverse claim. Though of course where the defendant is not at the time of the demand in possession of the goods this method of proof cannot be used, and some other method must therefore be resorted to; as by establishing that the defendant wrongfully took the goods or wrongfully disposed of them to another.

Again *destruction* (*u*) of the goods of another will clearly amount to a conversion of them—though mere damage of them as opposed to destruction will not (*a*). For instance in *Richardson* v. *Atkinson* (*b*) the defendant, who drew part of the plaintiff's liquor out of his vessel and filled up the deficiency with water, was held to have destroyed the identity of the whole of the liquor and therefore to have committed a conversion.

Further, conversion may consist in wrongful *delivery* of goods to

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(*r*) [1962] 2 All E. R. 467; [1962] 1 Q. B. 701.

(*s*) Consequently no definition of the tort is really satisfactory. In *National Mercantile Bank* v. *Rymill* (1881), 44 L. T. 767, even BRAMWELL, L.J., admits that "I am never very confident as to what is or is not conversion".

(*t*) Though the finder is entitled to retain the goods until the owner furnishes reasonable evidence of his right: *Alexander* v. *Southey* (1821), 5 B. & Ald. 247; *Vaughan* v. *Watt* (1840), 6 M. & W. 492, 497; *Clayton* v. *Le Roy*, [1911] 2 K. B. 1031, 1051–2.

(*u*) See *Fouldes* v. *Willoughby* (1841), 8 M. & W. 540, 548; *per* ALDERSON, B.

(*a*) Trespass or negligence may of course lie in this case.

(*b*) (1723), 1 Stra. 576.

someone other than the owner. As where an auctioneer delivers to a buyer possession of goods which do not belong to the person who entrusts them to the auctioneer for sale (*c*). For this delivery by the auctioneer is a dealing with the goods adverse to the title of the owner.

And indeed any dealing with the goods of another in a way adverse to his title may be a conversion. As where a bailee, without authority, pledges goods entrusted to him or where a buyer takes delivery of goods sold to him by one who is not the owner. For

> "According to Lord HOLT . . . the very assuming to oneself the property and right of disposing of another man's goods is a conversion: and certainly a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting the other in carrying his wrongful act into effect" (*d*).

Further although almost certainly (*e*) it is not a conversion (*f*) merely to deny the owner's title to goods *any* kind of dealing with them in a way adverse to it is; and thus even though the defendant is never himself in possession of the goods he may in exceptional circumstances convert them, as by purporting to make an effective sale and delivery of them when they are in the custody of a third party (*g*).

Moreover in general (*h*) a man who deals in the property to

(*c*) *Consolidated Co.* v. *Curtis & Son*, [1892] 1 Q. B. 495 (Illustration 33 (a)). But merely to sell the goods, without delivering them, is not, it seems, a conversion: *Lancashire Waggon Co., Ltd.* v. *Fitzhugh* (1861), 6 H. & N. 502; *Fowler* v. *Hollins* (1872), L. R. 7 Q. B. 616, 627.

(*d*) *McCombie* v. *Davies* (1805), 6 East 538, 540; *per* Lord ELLENBOROUGH, C.J. But there is authority for the proposition that mere receipt of goods by way of *deposit* is not a conversion until demand and refusal: *Spackman* v. *Foster* (1883), 11 Q. B. D. 99; *Miller* v. *Dell*, [1891] 1 Q. B. 468. Though in *Beaman* v. *A.R.T.S.*, [1948] 2 All E. R. 89, 93 DENNING, J., without giving a reason, regarded these decisions as reversed by the Limitation Act, 1939, s. 3 (13 Halsbury's Statutes (2nd Edn.) 1163).

(*e*) *Oakley* v. *Lyster*, [1931] 1 K. B. 148, is sometimes thought to be opposed to this proposition.

(*f*) But of course it may be some other tort, such as malicious falsehood.

(*g*) *Hiort* v. *Bott* (1874), L. R. 9 Ex. 86; *Van Oppen* v. *Tredegars, Ltd.* (1921), 37 T. L. R. 504 (Illustration 33 (b)); *Oakley* v. *Lyster* (above, n. (*e*)); *Douglas Valley Finance Co., Ltd.* v. *S. Hughes (Hirers), Ltd.*, [1966] 3 All E. R. 214.

(*h*) Though there are important exceptions, *e.g.* Sale of Goods Act, 1893 (22 Halsbury's Statutes (2nd Edn.) 985), s. 22 (market overt), s. 25 (*bona fide* purchases from buyer or seller in possession); the special protection accorded to banks in respect of the collecting of cheques and other instruments if they act in good faith and without negligence by the Bills of Exchange Act, 1882, s. 82 (2 Halsbury's Statutes (2nd Edn.) 547), the Revenue Act, 1883, s. 17 (21 Halsbury's Statutes (2nd Edn.) 532) and the Cheques Act, 1957, ss. 4 (2) (b) and

goods acts at his peril, and the fact that he acted innocently (*i*) with no knowledge of the owner's rights is *no defence*. For

> "conversion consists in an act intentionally done inconsistent with the owner's right, though the doer may not know of, or intend to challenge, the property or possession of the true owner" (*k*).

Thus in the leading case of *Hollins* v. *Fowler* (*l*) a cotton broker who, in complete ignorance of the facts, bought goods from one who had obtained them from the plaintiff by fraud and then sold them to another, obtaining only a commission for the transaction, was held liable.

Although the object of the tort of conversion is to protect the plaintiff's proprietary right to the use and possession of his goods, the action was in origin and still is tortious in its nature, and based upon the wrong done to the plaintiff by the defendant's intermeddling; hence the judgment is a judgment for *damages* to compensate the plaintiff for the loss he has sustained and the amount to be awarded is based upon the value of the goods of which he has been deprived (*m*). If the defendant satisfies the judgment he thereby, in effect, pays for the goods and the property in them vests in him as if he had bought them (*n*).

ILLUSTRATION 32

To constitute conversion there must be an intent on the part of the defendant to exercise a right adverse to or inconsistent with the plaintiff's rights over the property in dispute; hence the mere removal of the property from one place to another is no conversion.

Fouldes *v.* Willoughby (1841), 8 M. & W. 540.

The defendant, who was manager of a Mersey ferry boat, after a dispute with the plaintiff who had embarked his horses upon the boat, and in order to induce the plaintiff to leave it, turned the horses off onto the highway. The plaintiff remained on the boat and crossed to

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5 (37 Halsbury's Statutes (2nd Edn.) 54). See *Orbit Mining and Trading Co., Ltd.* v. *Westminster Bank, Ltd.*, [1962] 3 All E. R. 565; [1963] 1 Q. B. 794.

(*i*) Thus a servant may be guilty of conversion in dealing with property upon his master's directions, though he is innocent of any knowledge which might lead him to suppose that he is committing a wrong: *Stephens* v. *Elwall* (1815), 4 M. & S. 259.

(*k*) *Caxton Publishing Co., Ltd.* v. *Sutherland Publishing Co., Ltd.*, [1938] 4 All E. R. 389, 404; [1939] A. C. 178, 202; *per* Lord PORTER. And see *Garnham, Harris & Elton, Ltd.* v. *Alfred W. Ellis (Transport), Ltd.*, [1967] 2 All E. R. 940.

(*l*) (1875), L. R. 7 H. L. 757.

(*m*) On the question of damages in conversion see Part III, Chapter 2.

(*n*) *Cooper* v. *Shepherd* (1846), 3 C. B. 266. But judgment without satisfaction does not change the property in the goods: *Brinsmead* v. *Harrison* (1871), L. R. 6 C. P. 584; *Ellis* v. *John Stenning & Son*, [1932] 2 Ch. 81.

the other side. He later sought to establish that what the defendant had done amounted to a conversion. *Held:* Though the defendant might have been liable in trespass there was no conversion. "It is a proposition familiar to all lawyers that a simple asportation of a chattel, without any intention of making any further use of it, although it may be a sufficient foundation for an action of trespass, is not sufficient to establish a conversion" (*o*).

ILLUSTRATION 33

(a) *Knowingly to deliver the goods of another to someone who is not entitled to receive them as part of a transaction affecting their title is a conversion, even though the defendant has neither knowledge nor the means of knowledge of the owner's rights.*

Consolidated Co. *v.* Curtis & Son, [1892] 1 Q. B. 495.

A assigned some furniture to plaintiffs by bill of sale and then sold it by auction. Defendants were the auctioneers. Having no notice of the bill of sale, they effected the sale and delivered the furniture to a purchaser. *Held:* Defendants liable (*p*).

But it should be noted that here defendants knowingly dealt in the title to the goods. Had they acted as mere passive agents "without any actual intention with regard to, or any consideration of, the property in the goods being in one person more than another" (*q*) . . . they would not have been liable. Thus in *National Mercantile Bank Ltd.* v. *Rymill* (1881), 44 L.T. 767, where an auctioneer at whose premises goods had been deposited by the grantor of a bill of sale delivered the goods to a purchaser *from the grantor* at the request of the grantor, he was held *not* liable; for he had *not claimed to transfer the title*, "all the dominion he exercised over the chattels was to re-deliver them to the person to whom the man from whom he had received them had told him to re-deliver them" (*r*).

(b) *And a dealing in the title to goods may sometimes be a conversion even though the defendant never has physical possession of them.*

Van Oppen & Co. Ltd. *v.* Tredegars, Ltd. (1921), 37 T. L. R. 504.

Plaintiffs, who were carriers, delivered goods by mistake to a wrong firm. Defendants' managing director saw the goods at the place of delivery, claimed them as defendants', and purported to sell them to the firm. *Held:* Plaintiffs had a good cause of action (*s*).

3. DETINUE

Regarded as a wrong detinue consists in withholding ("detinue", from Latin "*detinet*") the immediate possession of goods from one

(*o*) (1841), 8 M. & W. at p. 544; *per* Lord ABINGER, C.B.
(*p*) See also *Cochrane* v. *Rymill* (1879), 40 L. T. 744.
(*q*) *Fowler* v. *Hollins* (1872), L. R. 7 Q. B. 616, 626; *per* BRETT, J.
(*r*) (1881), 44 L. T. at p. 767; *per* BRAMWELL, L.J.
(*s*) And see cases cited at n. (*g*), p. 108 above.

who is entitled to it (*t*). It thus differs from *trespass to goods* in that the element of detention is essential to it; whereas one may commit a trespass by merely striking, moving or damaging goods which remain in the plaintiff's possession.

In most ways, however, this tort is similar to conversion; and like conversion its commission is commonly established by proof of demand and refusal. But it *differs* from conversion in three main respects. *First*, conversion necessitates a denial of title, nothing less. Hence where a bailee damages (*u*) or carelessly loses (*a*) goods entrusted to him detinue or negligence are available, but not conversion. *Secondly*, it has long been established that where a bailee is in possession of goods refusal to surrender (*b*) them on demand may constitute detinue *or* conversion, since the refusal is a denial of title. And here there is no distinction between the two kinds of claim. But where the bailee has parted with the goods a distinction appears: for though where there is a denial of title—as opposed to negligent loss—either conversion or, as will appear below, detinue may lie, yet the conversion (as by selling) consists of a single act whereas the claim in detinue rests upon a continuing wrong to property only terminating with return of the property or judgment (*c*). And this may affect the damages awarded (*d*) according to which kind of claim is brought. *Thirdly*, regarded as a remedy, detinue is, and from the earliest times has always been, proprietary rather than tortious in nature. It is therefore the appropriate remedy to be resorted to where the plaintiff seeks the *return* of specific goods (such as a car or a picture) rather than damages to compensate him for an affront to his right to possession.

In conversion the plaintiff claims damages; in detinue he claims either the *return of his property* or damages in default of return,

(*t*) Where the plaintiff originally obtains possession of goods from another by means of an illegal contract and that other takes unlawful possession of them the plaintiff is not debarred from suing in trespass or detinue since he does not have to rely upon the illegal contract, but upon the fact of possession, for success: *Bowmakers, Ltd.* v. *Barnet Instruments, Ltd.*, [1944] 2 All E. R. 579; [1945] K. B. 65: *Singh* v. *Ali*, [1960] 1 All E. R. 269; [1960] A. C. 167. Contrast *Chettiar* v. *Chettiar*, [1962] 1 All E. R. 494; [1962] A. C. 294.

(*u*) *Rushworth* v. *Taylor* (1842), 3 Q. B. 699.

(*a*) *Williams* v. *Geese* (1837), 3 Bing. (N. C.) 849; *Houghland* v. *R. R. Low* (*Luxury Coaches*), *Ltd.*, [1962] 2 All E. R. 159; [1962] 1 Q. B. 694.

(*b*) "Return" or "redeliver" are not the right words because the wrong lies in preventing the owner from repossessing himself of the goods, not in refusing to take them back to him; since apart from contract there is no positive obligation to take them back: *Clements* v. *Flight* (1846), 16 M. & W. 42; *Capital Finance Co., Ltd.* v. *Bray*, [1964] 1 All E. R. 603.

(*c*) See *General and Finance Facilities, Ltd.* v. *Cooks Cars* (*Romford*), *Ltd.*, [1963] 2 All E. R. 314, 317–319.

(*d*) As to damages see below, p. 415.

with damages for detention in either event. Moreover, since the Common Law Procedure Act, 1854 (*e*), the court has been endowed with a *discretionary* (*f*) power to *order* the defendant to return the property. But this power will only be exercised where (as in the case of articles of peculiar value) damages will not afford an adequate remedy. The effect of a judgment to determine is therefore somewhat complicated, but it was clearly explained by DANKWERTS, L.J., in *Metal & Ropes Co., Ltd.* v. *Tattersall* (*g*):—

> "The effect is that, if the defendant *chooses to return the goods, that is satisfaction of the judgment* and the plaintiff is not in a position to exercise the alternative remedy of recovering the value; but if the defendant . . . fails to return the goods . . ., then the plaintiff has the alternative remedy of getting *a specific order for the return . . . of the goods* in question, or he can decide to enforce by an order for execution the *amount which is due* in respect of the value of the goods."

It need only be added that—though in cases where the plaintiff has an alternative claim in conversion or detinue the object of claiming in the latter is usually to seek the return of the goods—it is no defence to a claim in detinue that the defendant, having previously detained the goods, has not got possession of them at the time of action brought, as where he has sold them to another.

> "Detinue does not lie against him who never had possession of the chattel, but it does against him who once had, but has improperly parted with possession of it" (*h*).

It is also no defence that the defendant is unable to return the goods because he has lost possession of them through some fault of his own. But it is a defence that the loss was accidental or through the fault of some third person to which the defendant in no way contributed—as where, through no fault on his part, the goods are stolen (*i*). Though once a bailment by him to the defendant and the defendant's failure to retain the goods has been established by the plaintiff the defendant will lose the action unless he can establish affirmatively that he was not at fault (*k*).

(*e*) See *Whiteley, Ltd.* v. *Hilt*, [1918] 2 K. B. 808, 819, 824.

(*f*) (18 Halsbury's Statutes (2nd Edn.) 435). The discretionary power was formerly exercised by the Court of Chancery: see *Re Scarth* (1874), 10 Ch. App. 234, 235.

(*g*) [1966] 3 All E. R. 401.

(*h*) *Jones* v. *Dowle* (1841), 9 M. & W. 19, 20; *per* PARKE, B. See also *Reeve* v. *Palmer* (1858), 5 C. B. N. S. 84.

(*i*) See *Coldman* v. *Hill*, [1919] 1 K. B. 443, where the question of burden of proof is fully discussed.

(*k*) *Houghland* v. *R. R. Low* (*Luxury Coaches*), *Ltd.*, [1962] 2 All E. R. 159; [1962] 1 Q. B. 694. Where a bailee delivers the goods to an artificer for repairs which are necessary for the fulfilment of the object of the bailment —as delivery of a car for repairs—the artificer may assert his lien as against a claim in detinue by the bailor: *Tappenden* v. *Artus*, [1963] 3 All E. R. 213.

4. RECAPTION AND REPLEVIN

As a general rule the common law permits a person who has been wrongfully deprived of his goods (*l*) to retake them, and it is lawful for him to use force for the purpose provided that he uses no more force than is reasonable and necessary (*m*).

It is also established that where B, by some wrongful act, takes A's goods and keeps them on his (B's) land, A may make a peaceable entry upon the land to retake them (*n*); though if the goods are placed upon the land of someone other than the wrongdoer the position as to A's right of entry is doubtful (*o*).

The ancient remedy of *replevin* is available to a person who alleges that his goods have been wrongfully taken from him (*p*) (and not returned on demand), whether by way of distress for rent or damage feasant, or otherwise (*q*). The purpose of this remedy is to secure the return of the goods (upon security given) to the claimant pending the trial of an action between him and the alleged wrongdoer. If the claimant (replevisor) establishes at the subsequent trial that the taking was wrongful he will keep the goods and may recover damages and costs in respect of the wrong done; if it appears at the trial that the other party was in the right costs and damages, together with the return of the goods (or in cases of distress for rent payment of the rent due), will be awarded to him.

Replevin only lies where the defendant has wrongfully taken the goods out of the claimant's possession; and it will therefore not lie against someone who merely detains the goods after the claimant has knowingly parted with possession (*r*), though in such a case detinue or conversion may lie.

(*l*) But a swarm of bees, being animals *ferae naturae*, once they leave the owner's hive, become *res nullius* and cannot therefore be retaken from someone who has appropriated them; *Kearry* v. *Pattinson*, [1939] 1 All E. R. 65; [1939] 1 K. B. 471.

(*m*) The decision in *Blades* v. *Higgs* (1865), 11 H. L. Cas. 621, is based upon this assumption.

(*n*) *Patrick* v. *Colerick* (1838), 3 M. & W. 483.

(*o*) See Salmond, *Law of Torts* (13th Edn.) 805, note 11.

(*p*) The remedy is available to a bailee: *Swaffer* v. *Mulcahy*, [1934] 1 K. B. 608.

(*q*) It is emphatically not limited to cases of alleged wrongful distress (though these are the commonest instances which give rise to it in so far as it is now used at all): *Mellor* v. *Leather* (1853), 1 E. & B. 619. It can even be used where goods are improperly taken under an invalid warrant of a court of justice: *George* v. *Chambers* (1843), 11 M. & W. 149.

(*r*) *Mennie* v. *Blake* (1856), 6 E. & B. 842.

The procedure in replevin is now governed by the County Courts Act, 1959 (*s*), which vests jurisdiction in the registrar of the appropriate county court district, though in certain circumstances (*t*) the case may be removed to the High Court.

(*s*) Sections 104–106.
(*t*) Section 106.

CHAPTER 4

PRIVATE NUISANCES

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1. INTRODUCTORY

The word "nuisance" (Latin, "*nocumentum*") in its legal sense means simply "annoyance" or "harm"; and indeed the element of unlawful annoyance is the only thing common to all nuisances. Nuisance takes two main forms, private and public; nuisances of the former kind derive from the common law, while nuisances of the latter kind derive either from common law or from statute.

In very general terms, a *private nuisance* is an unlawful annoyance which interferes with a person's use or enjoyment of land, or with his enjoyment of certain incorporeal rights; and a private nuisance is a tort and nothing else. A *public nuisance* is an annoyance which affects not merely an individual, but the public at large, or some section of it, and since it affects the public it is primarily a *crime*, and not a tort; but as will be seen an action in tort may in some circumstances be based upon the commission of a public nuisance.

For the sake of clarity (*a*) the exposition of nuisances may therefore be divided into three parts. This Chapter will be devoted to private nuisances in general, the next to private nuisances in respect of incorporeal property, and the following Chapter to public nuisances insofar as they come within the province of the law of torts.

As regards private nuisances in general, we must consider first the elements of liability, and secondly the parties to the action.

(*a*) Nuisance, whether public or private, being in essence no more than "annoyance", and the boundary between the two kinds of nuisance being only a matter of degree, they are governed by very similar rules and arise from very similar facts: see *Soltau* v. *De Held* (1851), 2 Sim. (N. S.) 133, 143. Indeed it is often both convenient and proper to cite decisions in respect of the one kind of nuisance as authorities upon the other.

2. THE ELEMENTS OF LIABILITY

It has been well said that

> "Private nuisances *at least in the vast majority of cases* (*b*) are interferences for a substantial length of time by owners or occupiers of property with the use or enjoyment of neighbouring land" (*c*).

The essence of this tort is therefore that it is an *unlawful interference or annoyance* which causes *damage* to an occupier or an owner of land in respect of his *enjoyment of the land*. These elements of liability must be examined separately.

(a) THE INTERFERENCE

The kinds of interferences or annoyances that may constitute actionable nuisances are limitless (*d*);

> "The forms which nuisances may take are protean. Certain classifications are possible, but many reported cases are no more than illustrations of particular matters of fact which have been held to be nuisances" (*e*).

Thus for example it is a nuisance to permit things such as cornices (*f*) or gutters, or the roots (*g*) or branches (*h*) of trees to project over or encroach upon neighbouring land. Nuisance may

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(*b*) This definition has often been adopted, and as a general statement it is unexceptionable. But, as was pointed out by DEVLIN, J. in *Southport Corporation* v. *Esso Petroleum Co., Ltd.*, [1953] 2 All E. R. 1204, 1207 (reversed by the Court of Appeal, [1954] 2 All E. R. 561), there is no reason on principle why the act causing the nuisance to the plaintiffs' land should necessarily be done upon the defendant's land. See *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145, 157–158.

(*c*) *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551, 557; *per* TALBOT, J. (Italics ours).

(*d*) Bracton pronounced the unpalatable truth as early as the thirteenth century: "*noncumenta infinita sunt*" (Bracton, ed. Woodbine: f. 231 b). Disturbances of franchises—as the right to hold a fair—were originally remedied by nuisance actions: but these disturbances are now perhaps better treated as an independent form of tort; see Clerk and Lindsell, *Torts*, (12th Edn.), Chapter 27. Such claims are now rare: but see *Wyld* v. *Silver*, [1962] 3 All E. R. 309; [1963] 1 Q. B. 169: *Scottish Co-operative Wholesale Society, Ltd.* v. *Ulster Farmers' Mart, Co., Ltd.*, [1959] 2 All E. R. 486; [1960] A. C. 63.

(*e*) *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E. R. 349, 364; [1940] A. C. 880, 903; *per* Lord WRIGHT.

(*f*) *Fay* v. *Prentice* (1845), 1 C. B. 828 (Illustration 38).

(*g*) *Butler* v. *Standard Telephones and Cables, Ltd.*, [1940] 1 All E. R. 121; [1940] 1 K. B. 399; *McCombe* v. *Read*, [1955] 2 All E. R. 458; [1955] 2 Q. B. 429; *Davey* v. *Harrow Corporation*, [1957] 2 All E. R. 305; [1958] 1 Q. B. 60; *Morgan* v. *Khyatt*, [1964] 1 W. L. R. 475.

(*h*) *Lemmon* v. *Webb*, [1895] A. C. 1; *Smith* v. *Giddy*, [1904] 2 K. B. 448.

arise from the discharge of smoke (*i*), fumes (*k*), scents and smells (*l*), or filth (*m*) over or upon the plaintiff's land; or by causing destructive (*n*) or annoying (*o*) animals to come upon it; or by disturbing its amenity by making unreasonable noise (*p*) or vibration (*q*).

ILLUSTRATION 34

William Aldred's Case (1610), 9 Co. Rep. 57b.

The defendant erected a pig-stye (a "house for hogs", as the report reads) so close to the plaintiff's house that the "foeted and insalubrious" stench rendered the house practically uninhabitable. *Held:* This was a nuisance.

(b) THE UNLAWFULNESS

Clearly no act or omission which is authorized by statute (*r*) or sanctioned by some positive rule of law (*s*) can be a nuisance. But assuming that the defendant's act is not thus sanctioned by law, it must not be thought that every kind of interference with one's neighbour's enjoyment of his land must necessarily be a nuisance, even if it takes the form of one of the kinds of annoyance which have just been mentioned as examples of activities which *may* be nuisances. The reason for this is that the law of nuisance is of necessity governed by the homely rule of "give and take" (*t*). It has been said that "neighbours everywhere ought not to be extreme" (*u*), and therefore some annoyances must be borne without complaint. For example our law does not afford a householder an immunity from having his garden overlooked (*a*); and

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(*i*) *Crump* v. *Lambert* (1867), L. R. 3 Eq. 409.
(*k*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66; *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642; *Manchester Corporation* v. *Farnworth* [1930] A. C. 171.
(*l*) See *Halsey's Case*, n. (*b*), above.
(*m*) *Tenant* v. *Goldwin* (1704), 2 Ld. Raym. 1089.
(*n*) *Farrer* v. *Nelson* (1885), 15 Q. B. D. 258 (Illustration 35).
(*o*) *O'Gorman* v. *O'Gorman*, [1903] 2 I. R. 573 (bees).
(*p*) *Christie* v. *Davey*, [1893] 1 Ch. 316; *Leeman* v. *Montague*, [1936] 2 All E. R. 1677; *Newman* v. *Real Estate Debenture Corporation*, [1940] 1 All E. R. 131; *Halsey's Case*, n. (*b*), above.
(*q*) *Hoare & Co.* v. *McAlpine*, [1923] 1 Ch. 167.
(*r*) The general immunity arising from statutory authority has been discussed in Part I, Chapter 2.
(*s*) See, *e.g. Bradford Corporation* v. *Pickles*, [1895] A. C. 587.
(*t*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 84; *per* BRAMWELL, B.
(*u*) *Gaunt* v. *Fynney* (1872), 8 Ch. App. 8, 11; *per* Lord SELBORNE, L.C.
(*a*) See *Turner* v. *Spooner* (1861), 30 L. J. Ch. 801, 803; *Tapling* v. *Jones* (1865), 11 H. L. Cas. 290; 305, 311, 317.

"for prospect no action lies" (*b*), apart from contract and the right to light, there is no general right to retain an unspoilt view. Similarly everyone must put up with such necessary noise as accompanies the ordinary occupation of neighbouring land (*c*); for instance no cause of action lies in respect of the usual and reasonable sounds which accompany building operations. And it has recently been held (though *obiter*) in *Bridlington Relay, Ltd.* v. *Yorkshire Electricity Board* (*d*) that interference with the enjoyment of a purely recreational facility, such as the use of television, cannot amount to a nuisance. Whether the decision was correct on this point—which was not directly in issue—may be open to doubt, for it was based upon the premise that "according to the plain and sober and simple notions" (*e*) of the British people such interference would not, anyhow at the present time, be regarded as "detracting from the beneficial use and enjoyment by neighbouring owners of their properties". (*f*) We may perhaps legitimately wonder what the "plain sober and simple" people would have to say to this.

It therefore falls to the courts to determine when a particular form of interference or annoyance will amount to a nuisance. And it is sometimes said (*g*) that in reaching their decisions they seek the guidance of the maxim "*sic utere tuo ut alienum non laedas*". But in fact like other maxims this one affords no guidance, for the very question to be answered is whether in law the plaintiff has been "injured". In practice, while acting upon the more intelligible principle "*de minimis non curat lex*" (*h*), the courts take into account a number of different factors.

> "I do not think that the nuisance for which an action will lie is capable of any legal definition. . . . The question so entirely depends on the surrounding circumstances—the place where, the times when, the alleged nuisance, what, the mode of committing it, how, and

(*b*) *William Aldred's Case* (1610), 9 Co. Rep. 57b, 58b (citing *Bland* v. *Moseley* (1587)). To similar effect *Dalton* v. *Angus* (1881), 6 App. Cas. 740, 842; *per* Lord BLACKBURN. And see *Phipps* v. *Pears*, [1964] 2 All E. R. 35, 37. The Romans seem to have taken a different view: *Digest* 8.2, 17 pr; 8.2.15.

(*c*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 83.

(*d*) [1965] 1 All E. R. 264; [1965] Ch. 436.

(*e*) See *Walter* v. *Selfe*, cited in n. (*h*) below.

(*f*) *Bridlington Case* (above, n. (*d*)) at pp. 271 and *per* BUCKLEY, J.

(*g*) See, *e.g. Farrer* v. *Nelson* (1885), 15 Q. B. D. 258, 260; *per* POLLOCK, C.B. For criticism see Lord WRIGHT in *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E. R. 349, 364; [1940] A. C. 880, 903.

(*h*) The interference must be *substantial*, not merely "fanciful . . . according to elegant or dainty modes and habits of living:" *Walter* v. *Selfe* (1851), 4 De G. & Sm. 315, 322; *per* KNIGHT BRUCE, V.-C. It must also be *actual*; not merely contingent—*Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705, unless the claim is for an interlocutory injunction, *quia timet*; see *Torquay Hotel Co., Ltd.* v. *Cousins*, [1968] 3 All E. R. 43.

the duration of it, whether temporary or permanent, occasional or continual—as to make it impossible to lay down any rule of law applicable to every case . . . it must at all times be a question of fact with reference to all the circumstances of the case" (*i*).

The following factors require notice:—

(i) *The Unusualness or excessiveness of the Act complained of.*

Thus if unnecessary or *excessive* noise, dust or vibration are created during the erection of a building an action *may* lie (*k*). And the same applies in respect of excessive noise coming from any other source (*l*). Similarly although there is no rule which requires a landowner to prevent animal pests, such as rabbits (*m*), from escaping from his land and damaging his neighbour's crops, yet he may be liable if he does some positive act (*n*) to encourage their propagation in large numbers. Yet in respect of excessive vegetable matter (*o*) and fires (*p*), (even though accidentally *begun* (*q*)), allowed to burn on land there may be liability based upon failure to take positive action to prevent their escape.

The distinction between what is or is not unusual or excessive is necessarily one of fact and degree.

(*i*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 77; *per* POLLOCK, C.B.

(*k*) *Andreae* v. *Selfridge & Co.*, [1937] 3 All E. R. 255; [1938] Ch. 1; where, however, Sir WILFRID GREEN, M.R., points out that the use of noisy modern equipment, such as a pneumatic drill, is not in itself a cause of complaint. The amount of noise that one must endure may change with time and invention.

(*l*) *Vanderpant* v. *Mayfair Hotel Co.*, [1930] 1 Ch. 138 (noise from kitchens); *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145 (noise of oil tankers).

(*m*) *Boulston's Case* (1597), 5 Co. Rep. 104b. See also *Brady* v. *Warren*, [1900] 2 I. R. 632; *Bland* v. *Yates* (1914), 58 Sol. Jo. 612; *Stearn* v. *Prentice Bros., Ltd.*, [1919] 1 K. B. 394. The position will, of course, be different if the animals concerned fall within the rule in *Rylands* v. *Fletcher*.

(*n*) In the case of *animals*, at any rate, this seems to be necessary: *Seligman* v. *Docker*, [1948] 2 All E. R. 887; [1949] Ch. 53 (pheasants excessive due to exceptional weather: defendant not liable).

(*o*) See *Davey* v. *Harrow Corporation*, [1957] 2 All E. R. 305; [1958] 1 Q. B. 60 (tree roots) and *Goldman* v. *Hargrave*, [1966] 2 All E. R. 989; [1967] 1 A. C. 645. The older view that a landowner need do nothing to prevent the escape of excessive weeds—*Giles* v. *Walker* (1890), 24 Q. B. D. 656 (thistles)—may now be taken to have been abandoned. See also the Weeds Act, 1959, which empowers the Ministry of Agriculture and Fisheries to require or force occupiers to prevent the spread of certain kinds of weeds. The problem is a homely one. A (up-prevailing wind), B, . . . Z (down-prevailing wind) are neighbours, none have gardeners, all have excessive weeds. On preponderance of votes among these neighbours we suspect that A . . . Y would express —on the principle of "give and take"—a preference for *Giles* v. *Walker*; Z perhaps *dissentiente*. But *Davey's Case* expresses the current fad which favours interference with everyone for everyone else's good. The change of attitude is described in Lord DENNING, M.R.'s illuminating judgment in *Chic Fashions (West Wales), Ltd.* v. *Jones*, [1968] 1 All E. R. 229.

(*p*) See *Goldman's Case* (last note). (*q*) See below, p. 222.

ILLUSTRATION 35

The propagation of animal pests in excessive numbers may be a nuisance.

Farrer *v.* Nelson (1885), 15 Q. B. D. 258.

The defendant seriously overstocked his land with pheasants which damaged the plaintiff's crops. *Held:* This was an actionable nuisance. "The moment the defendant brings on game *to an unreasonable amount* . . . he is doing that which is unlawful" (*r*).

(ii) *Continuity.*

It has been said that the very concept of nuisance connotes some degree of continuity (*s*). And, although there are age-old instances to the contrary, and the proposition only applies in the case of private (as opposed to public (*t*)) nuisances, there is strong judicial authority to the effect that a private nuisance must be something continuous or repetitive (*u*). Thus if B once hits a ball onto A's land this is a trespass, but it may not be a nuisance; if on the other hand B perseveres in his aggravating pastime over a period of time (*a*) it will become a nuisance.

(iii) *Intention and Lack of Care.*

Intent to injure or annoy may be taken into account as a relevant factor in deciding whether the defendant's conduct amounts to a nuisance (*b*).

The same applies to *lack of care* on the part of the defendant. For although nuisance and negligence are not the same thing and lack of care in the circumstances "is *not* necessarily an element in nuisance" (*c*), yet in respect of many kinds of nuisances it may be

(*r*) (1885), 15 Q. B. D. at p. 260; *per* POLLOCK, C.B. Some *dicta* in this judgment are, however, clearly too wide.

(*s*) See, *e.g. Stone* v. *Bolton*, [1949] 1 All E. R. 237, 238; *per* OLIVER, J.

(*t*) A single explosion may constitute a *public* nuisance: *Midwood & Co., Ltd.* v. *Manchester Corporation*, [1905] 2 K. B. 597.

(*u*) *Stone* v. *Bolton*, [1949] 2 All E. R. 851, 855; [1950] 1 K. B. 201, 208; *per* JENKINS, L.J.; *A.G. (on the relation of Glamorgan County Council and Pontardawe Rural District Council)* v. *P.Y.A. Quarries, Ltd.*, [1957] 1 All E. R. 894; [1957] 2 Q. B. 169, 192, *per* DENNING, L.J.

(*a*) *Castle* v. *St. Augustine's Links, Ltd.* (1922), 38 T. L. R. 615 (golf balls hit *frequently* onto highway), and see *Stone* v. *Bolton* (last note). Both cases of public nuisance; but there also the question of continuity may be a *relevant* factor. The continuity need not necessarily be for a *long* period: *Metropolitan Properties, Ltd.* v. *Jones*, [1939] 2 All E. R. 202 (noise for three weeks).

(*b*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 82. And see Illustration 36 (a).

(*c*) *Jacobs* v. *L.C.C.*, [1950] 1 All E. R. 737, 744; [1950] A. C. 361, 374; *per* Lord SIMMONDS, L.C. See, *e.g. Jones* v. *Festiniog Ry. Co.* (1868), L. R. 3 Q. B. 733, where the company were held liable for a fire caused by a spark from an engine, although all possible care—as the state of knowledge then was—had been taken in the construction of the fire-box.

essential to (*d*). Thus in the case of nuisance by noise and vibration the defendant's activities may sometimes be treated as unreasonable or excessive precisely because he has not taken due care to moderate them (*e*). Further in cases where the nuisance is not created by the defendant himself but, for instance, arises on his property as the result of someone else's act, the question of liability may turn upon whether, when he came to know of the nuisance (or ought to have known of it), he took reasonable care to abate it (*f*).

ILLUSTRATION 36

(a) *The defendant's intent to injure or annoy may be a relevant factor in determining liability.*

Christie *v.* Davey, [1893] 1 Ch. 316.

Plaintiff and defendant were neighbours. Plaintiff and his family were musically inclined and often made a considerable noise by singing and playing various instruments. This annoyed defendant; so he retaliated in kind by, amongst other things, banging trays. *Held:* Defendant was liable in nuisance. "If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case. But I am persuaded that what was done by the defendant was done for the purpose of annoyance" (*g*).

This case must be distinguished from *Bradford Corporation* v. *Pickles*, [1895] A.C. 587 (Part I, Chapter 1, Illustration 6). It will be explained in the next Chapter, that a man has a legal right to extract percolating water, as opposed to water which flows in a defined stream. This was what Pickles did, and therefore no amount of malice could make a nuisance of it. The position in *Christie* v. *Davey* was different because the defendant was not exercising any specific right: the "right" to enjoy one's own property in one's own way is really only a privilege to do so as long as one refrains from acts which cause unlawful annoyance to one's neighbours. There is no reason why the element of intent or malice should not be taken into account in determining whether such acts are lawful or unlawful.

(b) *An annoyance may become an actionable nuisance because the defendant does not take proper care to prevent it from becoming excessive.*

Andreae *v.* Selfridge & Co., [1937] 3 All E. R. 255; [1938] Ch. 1.

In demolishing property close to the plaintiff's hotel, the defendants caused unnecessary noise and created unnecessary dust. *Held:*

(*d*) *Longhurst* v. *Metropolitan Water Board*, [1948] 2 All E. R. 834, 839; *per* Lord PORTER; *The Wagon Mound* (*No. 2*), *Overseas Tankship* (*U.K.*), *Ltd.* v. *Miller Steamship Co., Pty., Ltd.*; [1966] 2 All E. R. 709; [1967] 1 A.C. 617.

(*e*) See *Moy* v. *Stoop* (1909), 25 T. L. R. 262, and Illustration 36 (b).

(*f*) *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E. R. 349; [1940] A.C. 880.

(*g*) [1893] 1 Ch. pp. 326–7; *per* NORTH, J. See also *Hollywood Silver Fox Farm, Ltd.* v. *Emmett*, [1936] 1 All E. R. 825; [1936] 2 K. B. 468 (intentional firing of gun to cause injury to vixen).

Although no cause of action arises in respect of inconvenience *reasonably* created by noise, etc. during building operations, since in this case the defendants had taken no care to prevent *unnecessary* noise and dust, they had created a nuisance (*h*).

(iv) *The Locality.*

In the case of nuisances which involve interference with *personal comfort or convenience* some account must necessarily be taken of the general character of the locality concerned (*i*): "That may be a nuisance in Grosvenor Square which would be none in Smithfield Market" (*k*). Those who live in the latter must tolerate sounds and scents that would not be tolerable in the former.

In the case of annoyances of this kind the law therefore fits the standard of actionable nuisance to the locality. But on the other hand, even less salubrious neighbourhoods are accorded a local standard of their own, and "it does not follow that because I live, say, in the manufacturing part of Sheffield I cannot complain if a steam-hammer is introduced next-door" (*l*).

ILLUSTRATION 37

Even in a noisy locality it may be a nuisance to create more than average noise.

Polsue and Alfieri, Ltd. *v.* Rushmer, [1907] A. C. 121.

The plaintiff who resided in Gough Square, *Fleet Street*, sought an injunction against the defendant company who had installed some *printing* machinery next-door, which kept the plaintiff and his family awake at night. *Held:* Injunction granted; for even taking into account the noisiness of the locality, the defendants had made a serious addition to it.

(v) *Sensitivity.*

Where injury is attributable, not to the defendant's activities, but to abnormal sensitivity on the part of the plaintiff himself or of his property, no action lies. Thus in *Robinson* v. *Kilvert* (*m*) where the

(*h*) See also *Manchester Corporation* v. *Farnworth*, [1930] A. C. 171; especially pp. 201–2; *per* Lord SUMNER.

(*i*) But where *physical* damage is inflicted, such as destruction of crops or trees by fumes, the character of the neighbourhood is irrelevant: *St. Helen's Smelting Co.* v. *Tipping* (1865), 11 H. L. Cas. 642.

(*k*) *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 79; *per* POLLOCK, C.B. And excessive noise at night from assembled vehicles may be tolerable near the Great North Road, but not in a quiet part of Fulham: see *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145, 158.

(*l*) *Rushmer* v. *Polsue and Alfieri, Ltd.*, [1906] 1 Ch. 234, 250; *per* COZENS HARDY, L.J.

(*m*) (1889), 41 Ch. D. 88. See also *Heath* v. *Brighton Corporation* (1908) 24 T. L. R. 414. Contrast *Cooke* v. *Forbes* (1867), L. R. 5 Eq. 166 (sulphuretted hydrogen—noxious whatever the nature of the plaintiff's property).

plaintiff's stock of brown paper was damaged by heat from the defendant's premises, the claim failed because the damage was found to have been due rather to the special sensitiveness of the paper than to the heat. And in *Bridlington Relay, Ltd.* v. *Yorkshire Electricity Board* (*n*) it was held that a company owning a relay television aerial for local rediffusion could not claim in respect of interference caused by the Board's high-powered cables. For the only difference between them and ordinary users of television (*o*) was that they had erected their aerial for purposes of gain rather than of private enjoyment.

Amongst other factors the five just noted are, to a greater or lesser degree, taken into account in determining what is and what is not a nuisance. Mention must now be made of two factors which cannot affect the issue. First, it is no defence that it is in the *public interest* that a nuisance should be committed (*p*). For example, in *R.* v. *Train* (*q*) it was held to be no defence to an indictment for public nuisance by laying dangerous tram lines in the street that the trams would be a convenience to the public. Secondly, it has now long been established that it is no defence that the plaintiff *comes to the nuisance* (*r*). Thus, if B has a noisy factory adjoining a piece of vacant land, and A buys the land and builds a house upon it, A may complain of nuisance by noise even though he knew of the noise before he bought the land. To this extent *"volenti non fit injuria"* does not apply in actions for nuisance.

(c) Damage

The form of action from which the modern law of Nuisance was immediately derived was an action on the case, consequently proof of special damage (*s*) is a prerequisite to success in a claim based upon nuisances of the kind which are now under consideration. But, in cases where the nuisance concerns something other than physical damage to property (*t*), damage will sometimes be presumed without

(*n*) [1965] 1 All E. R. 264; [1965] Ch. 436. And see *Amphitheatres Inc.* v. *Portland Meadows* (1948), 198 Pacific Reports 847 (U.S.A.)—open air cinema complains of floodlighting at adjacent premises.

(*o*) See above, p. 118.

(*p*) *R.* v. *Ward* (1836), 4 Ad. & El. 384; *Bamford* v. *Turnley* (1862), 3 B. & S. 66, 84–5; *Adams* v. *Ursell*, [1913] 1 Ch. 269.

(*q*) (1862), 2 B. & S. 640.

(*r*) *Elliotson* v. *Feetham* (1835). 2 Bing. (N. C.) 134: *Bliss* v. *Hall* (1838), 4 Bing. (N. C.) 183; *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852.

(*s*) This may sometimes arise long after the creation of the cause of the nuisance: *Pemberton* v. *Bright*, [1960] 1 All E. R. 792 (flood from ill-designed culvert).

(*t*) See *Salvin* v. *North Brancepeth Coal Co.* (1874), 9 Ch. App. 705.

imposing upon the plaintiff the difficult task of furnishing strict proof of it.

ILLUSTRATION 38

Fay *v.* Prentice (1845), 1 C. B. 828 (*u*).

The cornice of defendant's house projected over plaintiff's garden. *Held:* This was a nuisance and plaintiff need not establish that rain had actually fallen from the cornice and damaged the garden: the fact that the cornice did project must be presumed to occasion damage of some kind (*a*).

(d) Injury to Land

It seems (*b*) that (probably for historical reasons) private nuisance is confined in its scope to injury caused in respect of the use or enjoyment of *land* (*c*). Though the annoyance need not affect this use or enjoyment in a physical way (*d*), it must, nevertheless, affect it as such. It follows that although damages may be obtained for personal injury in an action for private nuisance where the injury results from an interference affecting the land which also gives rise to such injury—as where the plaintiff's health is impaired by a nuisance which renders his home unhealthy to live in—yet if personal injury is the sole ground of the claim it will lie in trespass or negligence, but not in nuisance (*e*).

It should also be added that in most cases the interference arises from something that is done on *neighbouring land*: but, though there

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(*u*) See also *Baten's Case* (1610), 9 Co. Rep. 53b; but contrast *Smith* v. *Giddy*, [1904] 2 K. B. 448, 451.

(*a*) For the vexed question whether, in such a case, the plaintiff might also claim in trespass, see *Davey* v. *Harrow Corporation*, [1958] 1 Q. B. 60 (and authorities there cited) and contrast *Kelsen* v. *Imperial Tobacco Co.*, [1957] 2 Q. B. 334 (and authorities there cited).

(*b*) *Miller Steamship Co., Pty., Ltd.* v. *Overseas Tankship (U.K.), Ltd.* (*The "Wagon Mound" (No. 2)*), [1963] 1 Lloyd's Rep. 402, 427. But see Pollock on *Law of Torts* (15th Edn.) 302.

(*c*) This is one of the many differences between private nuisance and negligence. Although the same facts may often give rise to alternative claims in either tort, there are also the following, amongst other, differences:—(i) As has already been remarked, lack of care is by no means always a necessary element of liability in nuisance; (ii) A claim in private nuisance cannot be based solely upon personal injury.

(*d*) Thus it may be a nuisance to harbour prostitutes near the plaintiff's house, for this affects its amenity: *Thompson-Schwab* v. *Costaki*, [1956] 1 All E. R. 652; see p. 656; *per* Romer, L.J.

(*e*) *Cunard* v. *Antifyre, Ltd.*, [1933] 1 K. B. 551. Historically private nuisances were restricted to claims between neighbouring landowners: see *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E. R. 349, 364; [1940] A. C. 880, 903; *per* Lord Wright.

are *dicta* to the contrary (*f*), it is not believed that this second requirement is essential to constitute the tort, and on principle there seems no good reason why it should be (*g*).

Prescription

It is clear that where the annoyance or interference which constitutes a nuisance is capable of forming the subject-matter of an easement (*h*), a right to continue it as against neighbouring property may be acquired if it has been acquiesced in for the period of prescription (*i*), and if its commission has been open (*k*) and uninterrupted. Whether similar acquiescence in the commission of other forms of nuisances—such as noise, smoke (otherwise than through a defined aperture), or vibration—will endow them with legality *vis-à-vis* a servient property is doubtful (*l*).

3. THE PARTIES

Most actions for private nuisance are actions between neighbouring occupiers; but, since this is not *always* the case, the law relating to the parties to the action and to the conditions of the defendant's liability must now be examined.

The Plaintiff

Since private nuisance is primarily a wrong to the enjoyment of land, the general rule is that whereas a person who is in actual occupation of the land can usually sue (*m*) neither an owner who is not in occupation nor anyone whose interest in the land is something less direct than actual occupation normally can. Thus for example, a tenant in occupation is in most cases (*n*) a competent

(*f*) See *Southport Corporation* v. *Esso Petroleum Co., Ltd.*, [1954] 2 All E.R. 561, 571; [1954] 2 Q. B. 182, 196; *per* DENNING, L.J.

(*g*) See *Bartlett* v. *Marshall* (1896), 60 J. P. 104: *Vanderpant* v. *Mayfair Hotel Co., Ltd.*, [1929] All E. R. Rep. 296; [1930] 1 Ch. 138: *Southport Corporation* v. *Esso Petroleum Co., Ltd.*, [1953] 2 All E. R. 1204, 1207; *Halsey* v. *Esso Petroleum Co., Ltd.*, [1961] 2 All E. R. 145, 157–158; *The "Wagon Mound"* (*No.* 2), n. (*b*), above.

(*h*) For the general nature of easements and the rules which govern prescription—matters beyond the scope of this book—see Cheshire, *Modern Real Property*.

(*i*) *I.e.* normally twenty years: see Cheshire (last note). *Sturges* v. *Bridgman* (1879), 11 Ch. D. 852.

(*k*) *Liverpool Corporation* v. *H. Coghill & Son, Ltd.*, [1918] 1 Ch. 307.

(*l*) But there is no doubt that a prescriptive right for trees or roots to encroach cannot be acquired: *Lemmon* v. *Webb*, [1895] A. C. 1.

(*m*) *Foster* v. *Warblington U.D.C.*, [1906] 1 K. B. 648; *Newcastle-under-Lyme Corporation* v. *Wolstanton, Ltd.*, [1947] Ch. 92 (reversed, C.A., [1947] Ch. 427, but on another point).

(*n*) But see *Metropolitan Properties, Ltd.* v. *Jones*, [1939] 2 All E. R. 202.

plaintiff (*o*); but a guest, a lodger, or a member of an occupier's family (*p*) living in his house, are not competent.

But on the other hand, in keeping with the principle that it is the effect of the nuisance upon the plaintiff's use and enjoyment of the land that must be considered, an owner or anyone else who has a lawful interest in the land will have a right of action, even if he is not in occupation, where the nuisance happens to be such that it does affect his interest. Thus for example, a reversioner may sue in respect of a nuisance which does *permanent* damage to the land—such as serious vibration (*q*), or fumes that injure trees—but he cannot sue in respect of, say, smoke (*r*), which only causes temporary inconvenience to the occupier.

ILLUSTRATION 39

A member of an occupier's family has no right of action in private nuisance.

Malone *v.* Laskey, [1907] 2 K. B. 141.

The plaintiff, who was the wife of the tenant of a house, was injured when a cistern which was unseated by vibration from the defendant's electric generator next-door fell upon her. *Held:* No claim in nuisance (*s*). "It was a matter entirely for the tenant, and a person who is merely present in the house cannot complain of a nuisance which has no element of public nuisance" (*t*).

The Defendant

Just as the person who is in actual occupation of the land affected is usually the person entitled to sue in respect of a private nuisance, so the person who is in occupation of the neighbouring land upon which the nuisance arises will normally be the person liable (*u*). But obviously *liability* is not limited to the occupier, for he will not necessarily be the person who is responsible for starting the nuisance.

(*o*) *Inchbald* v. *Robinson* (1869), 4 Ch. App. 388 (yearly tenant); *Jones* v. *Chappell* (1875), L. R. 20 Eq. 539, 544 (weekly tenant). But, in the case of short tenancies, an *injunction* will usually be refused.

(*p*) See Illustration 39.

(*q*) *Colwell* v. *St. Pancras B.C.*, [1904] 1 Ch. 707. It seems that the fact that the nuisance may depreciate the selling value of the property is not, however, a sufficient ground: *s.c.* at p. 711, and *Simpson* v. *Savage* (1856), 1 C. B. (N. S.) 347.

(*r*) *Simpson's Case* (*supra*).

(*s*) The defendant was also held not liable in negligence: but *Malone's Case* is now over-ruled on this point, see *A. C. Billings & Sons, Ltd.* v. *Riden*, [1957] 3 All E. R. 1; [1958] A. C. 240.

(*t*) [1907] 2 K. B. at p. 154; *per* Fletcher Moulton, L.J.

(*u*) *Russell* v. *Shenton* (1842), 3 Q. B. 449; *Chauntler* v. *Robinson* (1849) 4 Exch. 163.

Consequently, although the matter is not entirely free from doubt, it seems that the law will hold responsible anyone who creates, or authorizes the creation of, the nuisance; and it will also hold liable anyone who, having knowledge, or the means of knowledge (*a*) of it, permits the existence, upon premises over which he has control, of a state of affairs which gives rise to a nuisance. Further, under certain conditions, a landlord who has let his premises, and is not himself in occupation, will also be held responsible.

(i) *Liability for Creation or Authorization.*

Anyone who, by some positive act, *creates* a nuisance will be liable for it; even though having once created it he is powerless to prevent its continuance. And upon the ordinary principles of vicarious responsibility, anyone who *authorizes* another to create a nuisance (or who is presumed by law to have done so), and anyone whose servants create one while acting within the scope of their employment, will also be liable. Moreover an occupier will be held responsible for nuisances created by people, such as guests and other visitors, who lawfully come upon his premises: for it has been well said that

> "Injuries" done upon land and buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises. The use of the premises is confined by law to himself, and he should take care not to bring persons there who do any mischief to others" (*b*).

So too, a lessor who leases his land to another to be used for a purpose which must necessarily give rise to a nuisance will be treated as having authorized it, and will therefore be held responsible (*c*).

Liability for the creation of a nuisance is "strict", in the sense that unless lack of reasonable care happens to be a necessary factor in constituting liability in the case of the particular form of nuisance concerned, it is no defence that in doing what he did the defendant took reasonable precautions to prevent the nuisance from arising (*d*).

(*a*) This requirement does not, however, seem to apply in its entirety where the nuisance arises from disrepair. See below.

(*b*) *Laugher* v. *Pointer* (1826), 5 B. & C. 547, 560; *per* LITTLEDALE, J. See *A.-G.* v. *Stone* (1895), 12 T. L. R. 76; *Dollman* v. *A. & S. Hillman, Ltd.*, [1941] 1 All E. R. 355.

(*c*) See Illustration 41.

(*d*) See Illustration 42.

ILLUSTRATION 40

Liability for the creation of a nuisance does not cease when the power to prevent its continuance is lost.

Roswell *v.* Prior (1701), 12 Mod. Rep. 635.

Defendant built a house which obstructed plaintiff's ancient lights. Defendant having assigned his lease, plaintiff sued him. *Held:* Defendant liable. "This action is well brought against the erector, for before his assignment over he was liable for all consequential damages: and it shall not be in his power to discharge himself by granting it over" (*e*).

ILLUSTRATION 41

A lessor is liable if he lets land for some purpose which necessarily tends to the creation of a nuisance.

Metropolitan Properties, Ltd. *v.* Jones, [1939] 2 All E. R. 202.

Landlords having installed a noisy electric motor in a flat, tenant used it and it caused a nuisance to flat below. *Held:* Since, by using the motor in the only way it could be used, the tenant inevitably created a nuisance, the landlords would be liable (*f*).

But contrast *Rich* v. *Basterfield* (1847), 4 C. B. 783: where a landlord was held not liable for nuisance by smoke because his tenant burnt coal when he could have prevented the nuisance by burning coke (*g*).

ILLUSTRATION 42

It is normally no defence that the creator of a nuisance used reasonable care.

Rapier *v.* London Tramways Co., [1893] 2 Ch. 588.

Under statutory powers, the defendant company set up stables for 200 horses to draw their trams. This created a considerable stench, which amounted to a nuisance. *Held:* Defendants liable; it was no defence that they had done all they could to prevent the nuisance.

(ii) *Liability for Permitting a State of Affairs which gives rise to a Nuisance.*

Liability is also imposed upon those who, having power to prevent it, permit a nuisance to arise by allowing upon property over which they have control the existence of a state of affairs which

(*e*) (1701), 12 Mod. at p. 639; *per curiam:* it seems also that the creator of a nuisance will also continue to be liable even if he *sells* the property (*s.c.* at p. 639). See also *Thompson* v. *Gibson* (1841), 7 M. & W. 456.

(*f*) See also *R.* v. *Pedly* (1834), 1 Ad. & El. 822; *Harris* v. *James* (1876), 45 L. J. Q. B. 545 (field let for purpose of quarry and burning lime).

(*g*) This case was, however, criticized in *Harris* v. *James* (*supra*), as a decision of "excessive refinement".

causes the nuisance complained of. In the leading case of *Sedleigh-Denfield* v. *O'Callaghan* (*h*). Viscount MAUGHAM described the basis of this liability as resting upon a "continuance" or "adoption" of the nuisance; though he was careful to add that this was not an all-embracing description of it (*i*).

An occupier may therefore be liable if he comes into occupation of property with an existing nuisance upon it (*k*), where a trespasser does something on his land which creates a nuisance ( ), where a nuisance arises upon the land by natural causes (*m*), or where his premises become dangerous by reason of disrepair (*n*).

This liability is not however, save in a single instance about to be noted, "strict"; for the defendant will not be liable unless "he had knowledge or means of knowledge" of the state of affairs, "or knew or should have known of the nuisance in time to correct it and obviate its mischievous effects" (*o*). Thus for example a man will not be liable for a nuisance caused by the fall of a rotten tree which happens to be upon his premises unless its dangerous condition was such that an ordinary, prudent, landowner ought to have become aware of it (*p*). Further, liability for "continuance" or "adoption" depends upon the occupier's power of control over the cause of the nuisance; and he will not therefore be liable if it can be established that he had no power to prevent it (*q*). Thus, for instance, in *Hall* v. *Beckenham Corporation* (*r*) where a nuisance

(*h*) [1940] 3 All E. R. 349; [1940] A. C. 880 (Illustration 43).

(*i*) [1940] 3 All E. R. at p. 356; [1940] A. C. at p. 894; see also pp. 375, 920, respectively; *per* Lord PORTER.

(*k*) *Coupland* v. *Hardingham* (1813), 3 Camp. 398.

(*l*) *A.-G.* v. *Tod-Heatley*, [1897] 1 Ch. 560; *Sedleigh-Denfield's Case: Leanse* v. *Egerton*, [1943] 1 All E. R. 489; [1943] K. B. 323, but contrast with this *Cushing* v. *Peter Walker & Son*, [1941] 2 All E. R. 693, where the defendants were in no way to blame.

(*m*) *Slater* v. *Worthington's Cash Stores* (1930), *Ltd.*, [1941] 3 All E. R. 28; [1941] 1 K. B. 488 (snow on roof). For comment on this decision see *Radstock Co-operative and Industrial Society, Ltd.* v. *Norton-Radstock U.D.C.*, [1968] 2 All E. R. 59, 66.

(*n*) *Tarry* v. *Ashton* (1876), 1 Q. B. D. 314.

(*o*) *Sedleigh-Denfield* v. *O'Callaghan*, [1940] 3 All E. R. 349, 365; [1940 A. C. 880, 904; *per* Lord WRIGHT. See also *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 140 L. T. 1; *Wilkins* v. *Leighton*, [1932] 2 Ch. 106; *Goldman* v. *Hargrave*, [1966] 2 All E. R. 989; [1967] 1 A. C. 645.

(*p*) *Caminer* v. *Northern and London Investment Trust, Ltd.*, [1950] 2 All E. R. 486; [1951] A. C. 88. And see *Noble* v. *Harrison*, [1926] 2 K. B. 332; *Ilford U.D.C.* v. *Beal*, [1925] 1 K. B. 671; *Cunliffe* v. *Bankes*, [1945] 1 All E. R. 459; *British Road Services, Ltd.* v. *Slater*, [1964] 1 All E. R. 816; *Quinn* v. *Scott*, [1965] 2 All E. R. 588. Contrast *Brown* v. *Harrison* (1947), 177 L. T. 281.

(*q*) See *Cushing* v. *Peter Walker & Son*, [1941] 2 All E. R. 693 (slate dislodged by enemy action).

(*r*) [1949] 1 All E. R. 423; [1949] 1 K. B. 716. And see *Smeaton* v. *Ilford Corporation*, [1954] 1 All E. R. 923; [1954] 1 Ch. 450; *Dunne* v. *North Western Gas Board*, [1963] 3 All E. R. 916.

by noise was caused by the flying of model aircraft in a public park belonging to the defendants, they were held not liable for the acts of the members of the public who flew the aircraft, because this was an activity that they were powerless to prevent.

In one exceptional class of case, however, liability for "continuance" or adoption appears to be imposed without any requirement of knowledge on the part of the defendant; this is where the nuisance arises from disrepair of premises abutting upon a highway (*s*). The reason for making this exception is not clear.

ILLUSTRATION 43

Where a nuisance arises upon premises over which the defendant has the power of control he will be liable, even though he did not create it, if he has knowledge or the means of knowledge of its existence and also the power to prevent it.

Sedleigh-Denfield *v.* O'Callaghan, [1940] A. C. 880 (*t*).

Trespassers laid a drainage pipe upon respondents' land, but provided it with no effective grating; consequently the pipe became blocked and appellants' land was flooded. During the three years that elapsed between the laying of the pipe and the flooding, respondents employed a servant who not only observed the laying of the pipe (though he failed to report it), but also, from time to time cleaned out the ditch in which it lay. *Held:* Respondents must be presumed to have knowledge of the danger, and since they had done nothing (by providing effective grating or otherwise) to prevent the flooding, they were liable.

ILLUSTRATION 44

But the defendant will not be liable if he does not know of the dangerous state of affairs, nor ought reasonably to have done so.

Barker *v.* Herbert, [1911] 2 K. B. 633.

Three days before the infant plaintiff (appellant) received injuries by falling into respondent's area, a trespasser had made a gap in the railings which fenced the area off from the street. Respondent did not

(*s*) *Wringe* v. *Cohen*, [1939] 4 All E. R. 241; [1940] 1 K. B. 229 (Illustration 45); *Heap* v. *Ind Coope & Allsopp, Ltd.*, [1940] 3 All E. R. 634; [1940] 2 K. B. 476. Both are Court of Appeal decisions, though they seem to be at variance with the principles laid down in *Sedleigh-Denfield's Case*. This strict rule only applies, however, where the nuisance arises from want of reasonable repair; it would not apply for example, where disrepair arises from the act of a trespasser or from some unobservable act of nature, such as latent subsidence: see *Wringe's Case* at pp. 233, 243, respectively, and *Spicer* v. *Smee*, [1946] 1 All E. R. 489, 494 (ATKINSON, J.).

(*t*) Contrast *Radstock Co-operative and Industrial Society, Ltd.* v. *Norton-Radstock U.D.C.*, [1968] 2 All E. R. 59 where, by the natural action of a river defendants' sewer became exposed in the river bed, the river thus damaging plaintiff's bank. The flow of the river, not the sewer, caused the harm.

know of the gap because, although he made weekly inspections, none had been made during the three days in question. *Held:* Respondent not liable. "It is not the law that there is an absolute duty where the possessor of the land has neither created the nuisance, nor suffered it to continue" (*u*).

ILLUSTRATION 45

Where the defendant's premises abut upon a highway and damage is caused to adjoining property by reason of their disrepair, the defendant will be liable whether or not he had knowledge or means of knowledge of the danger.

Wringe *v.* Cohen, [1939] 4 All E. R. 241; [1940] 1 K. B. 229.

Due to want of repair, the gable of the respondent's house collapsed and damaged the appellant's adjoining shop. The respondent was not himself in occupation, but he was responsible for repairs. *Held:* Respondent liable even though he neither knew nor ought to have known of the danger.

(iii) *Liability of Landlord.*

Where a nuisance arises upon premises which are subject to a ease, it might be thought that the tenant—and the tenant alone (*a*)—would be liable; for he is the occupier. But this is not so, for in certain circumstances liability will also be imposed upon the *landlord.*

It has already been explained that the landlord will be liable where, by some positive act (as by building so as to obstruct ancient lights), he creates the cause of the nuisance (*b*); and that he will also be liable if he lets the premises for some purpose which must necessarily create a nuisance. But unless they arise from disrepair, and the tenant has covenanted to repair (*c*), the landlord will also be liable for nuisances the cause of which exists upon the premises at the time of the letting (*d*) provided that he knew or ought to have known of the existence of the nuisance in question (*e*). And further, even though the cause of the nuisance arises after the letting, he will also be liable if it is due to want of repair and:—(i) he has covenanted to repair (*f*), *or* (ii) he has reserved a right of

(*u*) [1911] 2 K. B. at p. 637; *per* VAUGHAN WILLIAMS, L.J.

(*a*) The tenant will, of course, usually be liable, either solely or concurrently with the landlord. See *Wilchick* v. *Marks and Silverstone*, [1934] 2 K. B. 56, 68–9; *per* GODDARD, J.

(*b*) *Roswell* v. *Prior* (1701), 12 Mod. Rep. 635.

(*c*) Here the landlord is exempt from liability even if he knows of the nuisance; see Illustration 46 (b). In *Mint* v. *Good*, [1950] 2 All E. R. 1159; [1951] 1 K. B. 517, however, DENNING, L.J., had doubts.

(*d*) *Todd* v. *Flight* (1860), 9 C. B. (N. S.) 377 (Illustration 46 (a)).

(*e*) *St. Anne's Well Brewery Co.* v. *Roberts* (1928), 44 T. L. R. 703.

(*f*) *Payne* v. *Rogers* (1794), 2 Hy. Bl. 350.

entry for the purpose of executing repairs (*g*), *or* (iii) the terms of the tenancy are such that he has an implied right to do so (*h*).

ILLUSTRATION 46

(a) *A landlord will be liable for nuisances the cause of which exists upon the premises at the time of the letting.*

Todd *v.* Flight (1860), 9 C. B. (N. S.) 377.

The defendant knew that a chimney was in a dangerous condition at the time of the letting. Subsequently it fell through the roof of the plaintiff's chapel. *Held:* Defendant liable.

(b) *Where the tenant has covenanted to repair, and the nuisance arises from disrepair, he alone will be liable.*

Pretty *v.* Bickmore (1873), L. R. 8 C. P. 401.

The plaintiff was injured by falling through the defendant's cellar-plate. The defendant had let the house, knowing that the plate was in a dangerous condition. *Held:* Since the tenant had covenanted to repair, defendant not liable (*i*).

(iv) *Liability for Independent Contractors.*

It will be explained below (*k*) that as a general rule although a man will be held tortiously responsible for the acts of his servants done within the scope of their employment, he will not be liable for the acts of independent contractors. This applies in the case of nuisances; but, whether they be private or public, by way of exception, the employer will be held responsible even for the acts of an independent contractor if "he could reasonably have foreseen that the work he had instructed the independent contractor to do was likely to result in a nuisance" (*l*).

ILLUSTRATION 47

Where an independent contractor is employed to do work likely to result in a nuisance, and a nuisance is caused by his performance of what he is employed to do, the employer may be liable.

Matania *v.* National and Provincial Bank, Ltd., and the Elevenist Syndicate, Ltd., [1936] 2 All E. R. 633.

Defendants employed an independent contractor to make alterations in the first floor of a building; this operation necessarily involved some

(*g*) *Wilchick* v. *Marks and Silverstone*, [1934] 2 K. B. 56; *Heap* v. *Ind Coope and Allsopp*, [1940] 3 All E. R. 634; [1940] 2 K. B. 476.

(*h*) *Mint* v. *Good*, [1950] 2 All E. R. 1159; [1951] 1 K. B. 517. (The right is usually implied in weekly tenancies.)

(*i*) See also *Gwinnell* v. *Eamer* (1875), L. R. 10 C. P. 658.

(*k*) Part III, Chapter 1.

(*l*) *Bower* v. *Peate* (1876), 1 Q. B. D. 321, 326; *per* COCKBURN, C.J.

interference with plaintiff's occupation of the second floor, by creation of noise and dust. *Held:* Defendants were liable. "This is not a case of a mere ordinary building operation; it is a case . . . where there was a great and obvious danger that nuisance would be caused as indeed it was caused" (*m*).

(*m*) [1936] 2 All E. R. at p. 651, *per* FINLAY, J.

CHAPTER 5

PRIVATE NUISANCE IN RELATION TO INCORPOREAL PROPERTY

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Actions for private nuisance also lie in respect of interferences with easements (*a*), profits-à-prendre and certain rights which are now usually called "natural rights" (*b*); that is to say, rights such as the right to support of one's land by one's neighbour's land, which are inherent in the occupation or ownership of the land concerned, and which, unlike easements and similar incorporeal hereditaments, do not need to be *acquired* by grant or prescription (*c*).

Unlike ordinary private nuisances, the *general* rule in the case of nuisances of this kind is that they are actionable without proof of actual damage (*d*).

Some examples of these nuisances must now be considered.

1. INTERFERENCE WITH THE RIGHT TO SUPPORT

The nature of this right differs according to whether the thing sought to be supported is land on the one hand or buildings on the other.

(*a*) But an interference with a mere *licence* is not a nuisance: *Hill* v. *Tupper* (1863), 2 H. & C. 121. See Salmond, *Law of Torts* (13th Edn.) 211–220.

(*b*) As a matter of history actions for nuisance also lay in respect of interferences with rights of franchise (see Fifoot, *History and Sources of the Common Law*, p. 7)—but although actions of this kind are still possible the matter is not now of sufficient practical importance to deserve attention here.

(*c*) As to acquisition by grant or prescription and the nature of easements, profits and quasi-easements generally, see Cheshire, *Modern Real Property* (9th Edn.), Book II, Part III, Chapter II.

(*d*) *Nicholls* v. *Ely Beet Sugar Factory, Ltd.*, [1936] 1 Ch. 343, 350; *per* Lord WRIGHT. *Smith* v. *Thackerah* (1866), L. R. 1 C. P. 564, seems to argue the contrary; but see comments on that case *A.-G.* v. *Conduit Colliery Co.*, [1895] 1 Q. B. 301, 313, *per* COLLINS, J.

(a) Support for Land

The right to have one's land supported by one's neighbour's is a "natural" right (*e*); and a nuisance will be committed if such support is removed either laterally (where the support is from the side) or, where the ownership of the topsoil—as in a mining district—is different from the ownership of the subsoil, from beneath.

The actual subsidence of the plaintiff's land is however the essence of his claim; not just the withdrawal without effect. It follows that where a series of subsidences separated by intervals of time are caused by a series of excavations, each new subsidence grounds a fresh cause of action (*f*): the nuisance arises when the support ceases to do its work, not when the excavation is made.

As a general rule it is not important to consider how the withdrawal of support is caused, but in one exceptional instance it is. For it has been decided that no claim in respect of subsidence can be founded upon a withdrawal which is caused by the removal of subterranean *percolating* water (*g*), so that a man who conducts drainage operations need not usually fear an action by his neighbours whose land he causes to subside (*h*).

It must be added that although there is no "*natural*" right to the support of *buildings* (although as will next be explained there is an *acquired* right for such support), yet consequential damages may sometimes be obtained in an action for the withdrawal of support to land if the effect of the withdrawal is to cause damage to buildings as well; but this will only be so if the subsidence would have occurred in any event, had there been no buildings creating additional weight (*i*).

Although the right to support for land is a natural right, it is not inalienable. The right to *withdrawal* may, therefore, be granted (*k*)

(*e*) See *Humphries* v. *Brogden* (1850), 12 Q. B. 739, 744; *per* Lord Campbell, C.J.

(*f*) *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127.

(*g*) *Popplewell* v. *Hodkinson* (1869), L. R. 4 Exch. 248. The principle is really no more than a special application of *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349 (*infra*). Some doubt was, however, cast upon the validity of it in *Jordeson* v. *Sutton Southcoates and Drypool Gas Co.*, [1899] 2 Ch. 217; 239, 242–3.

(*h*) But this exemption from liability has no place where what is removed is a *partially* liquid substance, such as quicksand: see *Jordeson's Case* (*supra*). See also *Trinidad Asphalt Co.* v. *Ambard*, [1899] A.C. 594 (pitch): *Fletcher* v. *Birkenhead Corporation*, [1907] 1 K. B. 205 (silt).

(*i*) *Brown* v. *Robins* (1859), 4 H. & N. 186: *Stroyan* v. *Knowles* (1861), 6 H. & N. 454 (Illustration 48).

(*k*) See *Rowbotham* v. *Wilson* (1860), 8 H. L. Cas. 348; *Hargreaves, Ltd.'s Executors* v. *Burnley Corporation*, [1936] 3 All E. R. 959.

to another or may be reserved to himself by a grantor (*l*). Where the right to complain of withdrawal has thus been negated, no action will of course lie in respect of it.

ILLUSTRATION 48

Disturbance of the natural right to support for land may sometimes give rise to a claim for consequential damages in respect of injury to buildings.

Stroyan *v.* Knowles (1861), 6 H. & N. 454.

Defendant's mining operations caused plaintiff's land to subside, and this damaged plaintiff's *factory*. *Held:* That although the support for the *factory*, not having continued for the requisite period, had not been acquired by prescription, yet, since *its* weight did not contribute to the causing of the subsidence the plaintiff was entitled to consequential damages for the loss.

(b) SUPPORT FOR BUILDINGS

Clearly, "A man has no right to load his own soil, so as to make it require the support of that of his neighbour" (*m*).

So that this right, unlike the last, is not a "natural" right, inherent in the ownership of land with buildings upon it. But it may be acquired by grant or prescription (*n*); and where it has been acquired, a nuisance will be committed if the support is withdrawn. It should also be noted that this right if properly acquired may, and commonly will, be a right not only to support by neighbouring land but also by neighbouring *buildings* (*o*).

ILLUSTRATION 49

A right to support for buildings may be acquired by grant or prescription.

Dalton *v.* Angus (1881), 6 App. Cas. 740.

Plaintiff and defendant owned adjoining properties. Each had a house which, though not touching the other, was supported laterally by the neighbouring land. Plaintiff converted his house into a factory; the building thus became heavier than it was before and required stronger lateral support than previously. More than twenty years later (the relevant period of prescription), defendant demolished his

(*l*) *Aspden* v. *Seddon* (1875), 10 Ch. App. 394.
(*m*) *Partridge* v. *Scott* (1838), 3 M. & W. 220, 229; *per* ALDERSON, B.
(*n*) For details see Cheshire, *Modern Real Property*.
(*o*) *Lemaitre* v. *Davis* (1881), 19 Ch. D. 281. There is, however, no right, apart from special covenant (which will not give rise to a claim in nuisance for its breach) to have the wall of one's home protected by one's neighbour's against the ravages of wind and weather: *Phipps* v. *Pears*, [1964] 2 All E. R. 35.

house and made excavations upon the site. In consequence plaintiff's factory subsided. *Held:* After the lapse of twenty years from the building of the factory, plaintiff had, by prescription, acquired a right not merely to the support of the original house (a right which on the facts he had *acquired* at the time of the building of the factory), but also to the support of the building as converted into a factory. Plaintiff's claim therefore succeeded (*p*).

2. INTERFERENCE WITH THE RIGHT TO LIGHT

The right to light (*q*) is not a natural right, but a right in the nature of an easement; it must therefore be *acquired* by grant or prescription (*r*). But once it has been so acquired any substantial interference with it—as by building so as to diminish the light—will be an actionable nuisance.

This right is not one to the enjoyment of a good view, for as has been explained, our law does not recognize a right of "prospect" nor is it a right to the access of light to the plaintiff's land as a whole (*s*) nor is it even a right to the access of light to a building (*t*), as such, but rather to a particular window or windows (*u*).

Where the right is acquired by grant the terms of the grant may of course vary; but where it is acquired by prescription it is now established that the amount of light to which the plaintiff will be entitled is such as is required for the ordinary comfortable occupation of the room or rooms concerned, and (in the case of business premises) for the ordinary carrying on of business (*a*). Concrete tests have been put forward from time to time for determining the standard of "ordinariness" in this respect (*b*); but the issue is

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(*p*) See also *Cory* v. *Davies*, [1923] 2 Ch. 95.

(*q*) Popularly called the right to "ancient lights"—"ancient" because acquired by prescription.

(*r*) As to the prescriptive period and the methods of preventing prescription, see Cheshire, *Modern Real Property*.

(*s*) See *Potts* v. *Smith* (1868), L. R. 6 Eq. 311, 318.

(*t*) *Harris* v. *De Pinna* (1886), 33 Ch. D. 238 (timber stack not a building).

(*u*) Or, perhaps, more strictly, to particular apertures made for the purpose of letting in light. But there can be no right in respect of apertures intended to *exclude* it: *Levet* v. *Gas, Light & Coke Co.*, [1919] 1 Ch. 24 (a door).

(*a*) *Colls* v. *Home and Colonial Stores, Ltd.*, [1904] A. C. 179 (Illustration 50).

(*b*) A common test is the "forty-five degree" test: *i.e.* the interference will not be considered a nuisance if light can still flow to the window at an angle of forty-five degrees to the horizontal. See *Kine* v. *Jolly*, [1905] 1 Ch. 480; *Fishenden* v. *Higgs and Hill*, [1935] All E. R. Rep. 435; (1935), 153 L. T. 128. This is a useful working rule, and it may be that if the angle of obstruction does exceed forty-five degrees a *prima facie* case will have been made out—see *City of London Brewery Co.* v. *Tennant* (1873), 9 Ch. App. 212, 220. But it was rejected as a definitive test in *Colls' Case*, [1904] A. C. 179, at pp. 182, 210.

really one of fact. Although, as has been explained, some forms of nuisance may be actionable in one locality which would not be in another, the standard of light, if not fixed, is one which "the question of locality has very much less to do with than in cases relating to other nuisances" (*c*). And in *Ough* v. *King* (*d*), beside rejecting a supposed test to the effect that there will be no obstruction of the right to light if half of a relevant room remains unaffected, the Court of Appeal again stressed that under modern conditions, locality may be taken into account.

The right being a right to the 'ordinary" amount of light, it follows that (at least by prescription) no more than this can be acquired; thus, for example, an artist or an architect who may need an exceptional amount of light for their work are not entitled to claim more than other people (*e*).

Difficulty has sometimes arisen where light to the plaintiff's room comes from more directions than one. Suppose for instance that a man has a room with a north as well as a west window, and suppose that the north window has, for the full prescriptive period, received light from across B's land, and the west window from across C's. Can B build in such a way that if no light were coming from C's land the light to the room would be less than the "ordinary" standard, and then excuse himself by showing that there is still in fact enough light coming across C's land to the west window? The answer to this problem is that B may only build to such a height that were C to build to a similar height A would still receive the "ordinary" standard of light (*f*).

Where substantial interference with the right to light is established the plaintiff will be entitled to an injunction enjoining the removal of the source of the interference (*g*).

(*c*) *Fishenden's Case* (1935), 153 L. T. 128, at p. 140; *per* ROMER, L.J. who points out that a *dictum* of RUSSELL, J.'s in *Horton's Estate* v. *James Beattie, Ltd.*, [1927] 1 Ch. 75, 78, to the effect that the standard is "absolute" is too wide.

(*d*) [1967] 3 All E. R. 859.

(*e*) *Ambler* v. *Gordon*, [1905] 1 K. B. 417. Conversely, the fact that, during the period of prescription, the plaintiff uses the room for a purpose—*e.g.* a box-room—that demands little light, cannot deprive him of the right to claim the "ordinary" standard: *Price* v. *Hilditch*, [1930] 1 Ch. 500. As to plaintiff's own alteration of windows, see *Ankerson* v. *Connelly*, [1907] 1 Ch. 678; *Smith* v. *Evangelization Society*, [1933] All E. R. Rep. 527; [1932] 1 Ch. 515.

(*f*) *Sheffield Masonic Hall* v. *Sheffield Corporation*, [1932] 2 Ch. 17.

(*g*) But where the injury to the plaintiff is small and it would be oppressive to grant an injunction, damages may be awarded in lieu, provided that the injury is capable of being estimated in money: *Shelfer* v. *City of London Electric Lighting Co.*, [1895] 1 Ch. 287. Damages may also be granted in lieu of injunction where the obstruction is merely threatened: *Slack* v. *Leeds Industrial Co-operative Society, Ltd.*, [1924] A. C. 851.

ILLUSTRATION 50

In order to succeed in an action for obstruction of the right to light the plaintiff must establish that there has been a substantial diminution in the light coming to his premises which makes them at least inconvenient for ordinary purposes.

Colls *v.* Home and Colonial Stores, Ltd., [1904] A. C. 179.

A building erected by defendants made a material diminution of light to only two ground floor windows in plaintiff's premises: these windows gave onto a room which was used as an office, and in which electric light had always been needed. *Held:* The claim failed. It was "not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before . . . in order to give a right of action there must be a substantial privation of light" (*h*).

3. INTERFERENCE WITH THE RIGHT TO AIR

It is also possible to *acquire* a right to the access of *air* by grant or prescription; and infringement of such a right, once acquired, will be a nuisance.

As in the case of the right to light this right only appertains to access through a *defined* aperture, not to the access of air to the plaintiff's land generally. Thus in *Webb* v. *Bird* (*i*), where the defendants built a school-house which blocked the passage of air to the plaintiff's windmill it was held that there was no cause of action.

ILLUSTRATION 51

It is a nuisance to obstruct an acquired right of access for air, through some defined channel, to the plaintiff's premises.

Bass *v.* Gregory (1890), 25 Q. B. D. 481.

For forty years the cellar of the plaintiff's public house had received ventilation by means of a shaft which terminated in a well on the defendants' premises. The defendants blocked this shaft. *Held:* This was a nuisance (*k*).

4. INTERFERENCE WITH WATER RIGHTS

"Every riparian proprietor is entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality" (*l*).

(*h*) [1904] A. C. at p. 187; *per* Lord MACNAGHTEN (citing BEST, C.J.: *Back* v. *Stacey* (1826), 2 C. & P. 465).

(*i*) (1861), 10 C. B. (N. S.) 268. See also *Bryant* v. *Lefever* (1879), 4 C. P. D. 172; *Harris* v. *De Pinna* (1886), 33 Ch. D. 238.

(*k*) See also *Hall* v. *Lichfield Brewery Co.* (1880), 49 L. J. Ch. 655; *Cable* v. *Bryant*, [1908] 1 Ch. 259.

(*l*) *John Young and Co.* v. *Bankier Distillery Co.*, [1893] A. C. 691, 698; *per* Lord MACNAGHTEN.

A "riparian" proprietor is the owner of land abutting upon a stream, and as this *dictum* indicates, the ownership of such land carries with it certain natural (*m*) rights to the water of a natural (*n*) stream. Interference with these rights is a nuisance and it may take various forms, of which the principal are abstraction, interference with the flow of the stream, and pollution.

These matters will now be discussed; but it must first be made plain that water rights may only be claimed in respect of "streams" (*o*), that is to say, watercourses which run in known (*p*) and defined channels whether above or below the ground. It is therefore no wrong to abstract or divert water which merely percolates in undefined channels, whether upon (*q*) or below (*r*), the surface of the soil (*s*).

ILLUSTRATION 52

It is not a nuisance to abstract percolating water.

Chasemore *v.* Richards (1859), 7 H. L. Cas. 349 (*t*).

Plaintiff owned a water mill beside a river. Some distance away defendants dug a well; this diverted water which was percolating underground and which would otherwise have reached the plaintiff's mill. *Held:* It is no nuisance to intercept *percolating* water, as opposed to intercepting the water of a stream. Lord CHELMSFORD pointed out that if a landowner has no right to absract percolating water it would by parity of reasoning also be a tort for him to collect rainwater which might otherwise find its way to another person's land.

(*m*) *I.e.* rights inherent in the ownership of the land which do not need to be acquired by grant or prescription.

(*n*) But similar rights in respect of artificial streams must be *acquired*: *Sutcliffe* v. *Booth* (1863), 32 L. J. Q. B. 136; *Whitmores (Edenbridge), Ltd.* v. *Stanford*, [1909] 1 Ch. 427.

(*o*) Except in the case of *pollution*: see below.

(*p*) As to the effect of discovery of a stream subsequent to issue of writ, see *Bleachers' Association, Ltd.* v. *Chapel-en-le-Frith R.D.C.*, [1933] Ch. 356.

(*q*) *Rawstron* v. *Taylor* (1855), 11 Exch. 369; *Rugby Joint Water Board* v. *Walters*, [1966] 3 All E. R. 497; [1967] Ch. 397.

(*r*) See Illustration 52.

(*s*) But it seems that it is a nuisance to abstract water from a spring which feeds a stream, even though the spring itself does not as yet flow in a defined channel: *Dudden* v. *Clutton Union Guardians* (1857), 1 H. & N. 627; *Mostyn* v. *Atherton*, [1899] 2 Ch. 360.

(*t*) See also *Acton* v. *Blundell* (1843), 12 M. & W. 324. The bearing of the decision in *Chasemore* v. *Richards* on the later decision in *Bradford Corporation* v. *Pickles*, [1895] A. C. 587, has been discussed in the last Chapter.

ABSTRACTION

Subject to the rights of other riparian proprietors higher up a stream (*u*), every riparian proprietor has a natural right to the undiminished flow of water from a natural stream; and anyone who abstracts the water of such a stream commits a nuisance which is actionable without proof of special damage (*a*).

The following points must be noted.

First, "abstraction" is not the same thing as diversion; so that if the water which is taken from the stream is returned to it before it passes to the plaintiff's land undiminished in quality and unaffected in quantity, he will have no claim (*b*).

Secondly, every riparian proprietor has a right to take water from a stream for what have been called "ordinary or primary purposes", that is, "domestic purposes and the wants of cattle" (*c*); and he may do this without regard to the effect it may have upon proprietors lower down the stream (*d*).

Thirdly, a riparian proprietor may also abstract water for "extraordinary or secondary" (*e*) purposes, such as irrigation (*f*) or manufacture (*g*); but he may only do this if his use of the water is reasonable, if it is connected with his use of the riparian land, and provided that it does not inflict sensible injury (*h*) upon riparian proprietors lower down the stream.

The rights of a "riparian owner" are, however, confined to "riparian uses"; clearly a person whose land happens to cross a stream and to extend (even though, as in the case of a railway, it be only a narrow strip) for miles or hundreds of miles on either side cannot claim to exercise such rights beyond a reasonable distance from the stream.

(*u*) The Water Resources Acts, 1963 and 1968, prohibits all major extraction of water, save for certain defined purposes, without licence from a relevant river authority. This, however, does not affect private rights in tort.

(*a*) *Sampson* v. *Hoddinott* (1857), 1 C. B. (N. S.) 590.

(*b*) *Kensit* v. *Great Eastern Rail. Co.* (1884), 27 Ch. D. 122.

(*c*) *McCartney* v. *Londonderry and Lough Swilly Rail. Co.*, [1904] A. C. 301 (Illustration 53), at p. 306; *per* Lord MACNAGHTEN.

(*d*) *Miner* v. *Gilmour* (1858), 12 Moo. P. C. C. 131, 156.

(*e*) *McCartney's Case*, *ibid.*

(*f*) *Embrey* v. *Owen* (1851), 6 Exch. 353.

(*g*) See *John Young & Co.* v. *Bankier Distillery Co.*, [1893] A. C. 691.

(*h*) The riparian proprietor is bound to restore water so used "substantially undiminished and unaltered in quality" (*McCartney's Case*, [1904] A. C. 301, p. 307; *per* Lord MACNAGHTEN): see also *Young's Case*, [1893] A. C. 691, at p. 696, *per* Lord WATSON. And see *Rugby Joint Water Board* v. *Walters*, [1966] 3 All E. R. 497; [1967] Ch. 397.

ILLUSTRATION 53

The rights of a riparian proprietor are restricted to riparian uses.

McCartney *v.* Londonderry and Lough Swilly Rail. Co., [1904] A. C. 301.

For the purposes of its railway, the respondent company owned a narrow strip of land which crossed a stream and ran for over forty miles on either side. It claimed the right to abstract water from the stream in order to supply its locomotives along its line. The appellant (a lower riparian owner) maintained that this amounted to unlawful abstraction. *Held:* In view of the distance involved, the company's abstraction was not a riparian use; and it was therefore unlawful and a nuisance (*i*).

Interference with the Flow of a Stream

Since all riparian proprietors have a natural right to the substantially undiminished flow of stream water past their land it is a nuisance to obstruct or otherwise interfere with the course of a stream so that upper, lower, or opposite proprietors suffer by withdrawal of water or flooding (*k*).

Thus it is a nuisance to deprive a lower proprietor of water for his mill by removing artificially (*l*) collected *débris* from the bed of a stream and thus lowering its level (*m*), to place obstructions on the bank which cause the stream to flood the opposite side (*n*), or to cause an obstruction in the flood-bed which produces a similar result (*o*).

But if the obstruction takes the form of a sewer, sound in itself, which having been constructed below the bed of a river becomes exposed by the natural flow of the water and eddies are thus caused which damage the property of a riparian owner, the sewer owner will not be liable. In such a case there is no nuisance; for it is the

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(*i*) See also *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.* (1875), L. R. 7 H. L. 697 (abstraction for town water supply).

(*k*) No action will of course lie unless the defendant's act does substantially affect the flow of water: see *Orr-Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, 856; *per* Lord Blackburn.

(*l*) On the other hand, the defendant will not be held responsible for flooding caused by the collection of boulders or other material which accumulates in his stream in the course of *nature*: see *Neath R.D.C.* v. *Williams*, [1950] 2 All E. R. 625; [1951] 1 K. B. 115.

(*m*) *Fear* v. *Vickers* (*No.* 1) (1911), 27 T. L. R. 558.

(*n*) *Marriage* v. *East Norfolk Catchment Board*, [1949] 2 All E. R. 50; [1949] 2 K. B. 456 (actual decision on another point).

(*o*) *Menzies* v. *Breadalbane* (1828), 3 Bli. (N. S.) 414, 418.

flow of the water rather than any obstruction caused by the sewer that brings about the damage (*p*).

But, in keeping with general principles, where a riparian proprietor's own land is in danger from flooding it is not a nuisance for him to build up his banks even if the effect of doing so is to divert the water to his neighbour's land (*q*).

POLLUTION

Pollution of a natural stream is actionable at the suit of a riparian proprietor or of the owner of fishing rights (*r*) without proof of actual damage (*s*). Further, unlike the case of abstraction, all pollution is actionable (*t*); there is no right of reasonable pollution.

Besides bearing its ordinary sense of contaminating water, as by putting chemicals into it, in law "pollution" also has a wider meaning, for it includes any act which renders the water less fit for any purpose for which it might have been used in its natural state. Thus it may be pollution to alter the temperature (*u*) of a stream or to make the water "hard" if it was previously "soft" (*a*); for this change may well affect industrial processes.

It should be added that the right to sue for pollution, unlike the other water rights that have been discussed, is not confined to riparian proprietors. Thus for example a man has been held entitled to sue his neighbour for contaminating water which merely percolates in no defined channel from the neighbour's land to his well (*b*).

ILLUSTRATION 54

In law, "pollution" means causing any alteration in the quality of water which renders it materially less serviceable than it would have been in its natural state.

John Young & Co. *v.* Bankier Distillery Co., [1893] A. C. 691.

Plaintiffs, who were riparian owners, used the stream water for distillation. Higher up the stream, defendants discharged water from

(*p*) *Radstock Industrial Co-operative and Industrial Society, Ltd.* v. *Norton-Radstock U.D.C.*, [1968] 2 All E. R. 59.

(*q*) *Nield* v. *London and North Western Rail. Co.* (1874), L. R. 10 Exch. 4; *Gerrard* v. *Crowe*, [1921] 1 A. C. 395. And see *Gibbons* v. *Lenfestey* (1915), 84 L. J. P. C. 158.

(*r*) See *Pride of Derbyshire Angling Association, Ltd.*, v. *British Celanese*, [1953] 1 All E. R. 179; [1953] Ch. 149.

(*s*) *Wood* v. *Waud* (1849), 3 Exch. 748; *Crossley & Sons, Ltd.* v. *Lightowler* (1867), 2 Ch. App. 478, 483.

(*t*) Though a right to pollute may be acquired by grant or prescription (see authorities cited in last note).

(*u*) *Ormerod* v. *Todmorden Joint Stock Mill Co.* (1883), 11 Q. B. D. 155.

(*a*) See Illustration 54.

(*b*) *Ballard* v. *Tomlinson* (1885), 29 Ch. D. 115. Contrast *Chasemore* v. *Richards* (1859), 7 H. L. Cas. 349, which has already been discussed.

their mine; this water was hard and the effect of discharging it was to harden the stream water lower down. The change rendered it useless to the plaintiffs. *Held:* This was pollution.

5. INTERFERENCE WITH PRIVATE RIGHTS OF WAY

Private rights of way may be acquired by grant or prescription (*c*) and interference with them is a nuisance actionable at the suit of those entitled to exercise them.

The commonest form of interference is by obstruction. This will be actionable even though it is not permanent provided that it is substantial. Thus in *Thorpe* v. *Brumfitt* (*d*) the defendants were held to have committed a nuisance when from time to time they permitted carts to load and unload in a passage in respect of which the plaintiff had a private right of way to his inn; for, it was said, "nothing can be more injurious to the owner of an inn than that the way to his yard should be constantly obstructed" (*e*). Where the obstruction is of a permanent nature it will, in accordance with general principles, give rise to a cause of action at the suit of a reversioner (*f*).

But obstruction is not the only possible method of interference. For example, damage to the surface of the road may be actionable; but it was recently held in *Weston* v. *Lawrence Weaver, Ltd.* (*g*) that the owner of a right of way (as opposed to the owner of the soil) over a private road can have no action in respect of damage to the road surface provided that it does not impede his right, since this damage is damage to the owner of the soil and not to him. Excessive user of an existing right of way so as to interfere with the enjoyment of others jointly entitled may also amount to a nuisance. Thus in *Jelbert* v. *Davis* (*h*), the plaintiff and the defendants being jointly entitled to the use of a private way, the former sought to open it for use by people coming with caravans to a park for two hundred such vehicles which he had constructed. The number of vehicles which could be expected to use the road daily if this were allowed was regarded as an excessive interference with the defendants' reciprocal rights and the Court of Appeal granted an injunction to restrain the plaintiff.

(*c*) They may take the form of easements or of customary rights, such as the right to use a church way: *Brocklebank* v. *Thompson*, [1903] 2 Ch. 344.
(*d*) (1873), 8 Ch. App. 650.
(*e*) *Ibid.*, at p. 656; *per* JAMES, L.J.
(*f*) *Kidgill* v. *Moor* (1850), 9 C. B. 364 (locking gate).
(*g*) [1961] 1 All E. R. 478; [1961] 1 Q. B. 402.
(*h*) [1968] 1 All E. R. 1182.

6. INTERFERENCE WITH PRIVATE RIGHT OF ACCESS TO HIGHWAY

This is a natural right, and interference with it constitutes a private nuisance (*i*). But its scope is extremely limited: it is available only to occupiers of premises abutting upon the highway and accords them only freedom of *access* to it and to any part of their frontage from it (*k*). Thus the occupier whose gateway is obstructed will have a right of action, but he will have no claim (*l*) in respect of obstructions which prevent him from doing things upon the highway itself. For instance, in *W. H. Chaplain & Co. Ltd.* v. *Westminster Corporation* (*m*), the defendant corporation erected a lamp standard in a public street, opposite the plaintiff's business premises. This naturally caused the plaintiffs inconvenience in loading and unloading their vans, but their claim that it was an interference with their right of *access* failed, for though it was true that the process of loading and unloading might have been impeded, the plaintiffs' freedom to go from the pavement to his premises was in no way interfered with.

A similar right of access is also available to occupiers of land beside navigable rivers (*n*).

(*i*) *Fritz* v. *Hobson* (1880), 14 Ch. D. 542; *Marshall* v. *Blackpool Corporation*, [1934] All E. R. Rep. 437; [1935] A. C. 16 (where Lord ATKIN examines the nature of the right).

(*k*) *Cobb* v. *Saxby*, [1914] 3 K. B. 822 (frontager entitled to access to wall of house for purpose of affixing advertisements).

(*l*) Though he may in proper cases have a private right of action based upon *public* nuisance.

(*m*) [1901] 2 Ch. 329.

(*n*) *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662.