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footing that the claimant is being compensated for the whole of his interest in the goods,[71] payment of the assessed damages under all heads, or the taking out of the defendant's payment into court of an amount to meet the claimant's whole claim, or the payment of what is due under a settlement or compromise, in or out of court, of his claim for damages under all heads, extinguishes the claimant's title.[72] Despite this negative wording the property is thereby changed as from the date of the wrongful act and vested in the defendant,[73] and the claimant will consequently lose all right of action against any subsequent wrongdoer.[74]

21–117 **Part satisfaction.** Recovery of less than the full value does not transmute the property or affect any other right of action,[75] but it cannot be doubted that no plaintiff will be allowed to recover twice over, and therefore any damages which he may have actually received in one action will have to be taken into consideration in the other.[76]

(f) *Limitation of Actions*

21–118 **Limitation of actions.** The right of action and the title of any person in whose favour a cause of action for conversion of a chattel has accrued will normally be extinguished on the expiration of six years from the time of the conversion, unless he recovers possession within that period.[77] But if, before he recovers possession of it, the same chattel is again converted, whether by the same or another converter, the six-year limitation period runs from the date of the original conversion.[78] If, however, the defendant has deliberately concealed from the plaintiff any fact relevant to his right of action, the period does not begin to run, except in favour of a subsequent purchaser for value who was neither party to, nor actually or constructively aware of the concealment, until the plaintiff has, or should have, discovered the concealment.[79] Further, a person from whom a chattel is stolen or obtained by deception or blackmail, or

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[71] Subject, where relevant, to a reduction for contributory negligence in the case of forms of wrongful interference other than conversion and intentional trespass, to which contributory negligence is by s. 11 (1) no defence. But see *ante*, § 21–69, n. 53.

[72] 1977 Act, s. 5 (1), (2). This does not apply where the damages are so assessed but the damages actually paid are limited to some lesser amount by virtue of any enactment or rule of law: s. 5 (3); and the provisions of s. 5 may be varied by agreement or by court order: s. 5 (5). The right of a third party to whom the claimant actually accounts over under s. 7 (3) for the whole value of that party's interest under all heads is similarly extinguished thereby: s. 5 (4), and see *ante*, § 21–82.

[73] If the defendant has previously sold the chattel, then the title goes to whomever derives title from the defendant.

[74] *cf. Brinsmead* v. *Harrison* (1871) L.R. 6 C.P. 584.

[75] *Morris* v. *Robinson* (1824) 3 B. & C. 196; *Ellis* v. *Stenning* [1932] 2 Ch. 81; see *Holmes* v. *Wilson* (1839) 10 A. & E. 503, 511.

[76] "If, indeed, the plaintiffs were to recover the full value of the goods in each action, a Court of Equity would interfere to prevent them having double satisfaction": *per* Bayley J., *Morris* v. *Robinson* (1824) 3 B. & C. 196, 205. The 1977 Act does not implement the Law Reform Committee's recommendation (18th Report, Cmnd. 4774, § 96) that part satisfaction "should be taken into account in assessing the plaintiff's loss in any further proceedings between the parties"; but s. 9 is in terms wide enough to permit two or more actions for wrongful interference with the same goods against successive wrongdoers to be heard together in the same court, provided they are concurrent. As to waiver, see *ante*, §§ 9–02 *et seq.*

[77] Limitation Act 1980, ss. 2, 3 (2).

[78] *Ibid.* s. 3 (1). *cf. R. B. Policies at Lloyds* v. *Butler* [1950] 1 K.B. 76, but see now n. 80, *infra.*

[79] *Ibid.* s. 32. *cf. Beaman* v. *A.R.T.S. Ltd.* [1949] 1 K.B. 550.

anyone claiming through him, may sue without limit of time the thief or obtainer or anyone who subsequently converts the chattel before he recovers possession. But as against a subsequent purchaser in good faith of the stolen chattel his title will be extinguished six years after the innocent purchase; yet even thereafter he may sue the thief or obtainer and any subsequent converter whose wrong preceded the innocent purchase.[80]

10.—TRESPASS

The nature of trespass. By section 1 (*b*) of the 1977 Act the second form of "wrongful interference with goods" is "trespass to goods." The action of trespass to goods, *de bonis asportatis,* has always been concerned with the direct, immediate interference with the plaintiff's possession of a chattel. Though asportation suggests what is perhaps the most common feature of this form of trespass, that is, the taking away or removal out of the plaintiff's possession, the wrong of trespass includes any unpermitted contact with or impact upon another's chattel. 21–119

The interference must be of a *direct* nature, and this requirement reflects the history of the forms of action *more* than any rational difference. It has been said that "such distinctions as that between giving poisoned meat to a dog (trespass) and leaving poisoned meat for a dog (case) do not seem to have any place in a rational system of law."[81] "Thus, to lock the room in which the plaintiff has his goods is not a trespass to them,[82] though it may be a detinue."[83] A mere touching is enough if damage is caused.[84] A more difficult question is whether a touching can be trespass even if no damage is caused, in other words, whether trespass to chattels is, in all circumstances, actionable *per se*.

It has been judicially asserted that even an intentional interference without an asportation is not actionable unless some harm ensues.[85] But textbook writers generally argue the contrary,[86] mainly on the ground that otherwise objects such as pictures or other exhibits in a museum or art collection could be fingered or handled with impunity. Probably the courts will hold that direct and deliberate interference is trespass even if no damage ensues, but where the interference is by way of negligent or inadvertent contact, the general

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[80] *Ibid.* s. 4; and see *ante*, § 9–43.

[81] Law Reform Committee, 18th Report, Cmnd. 4774, § 21. But *Quaere*, whether the act is trespass unless the food is placed in the animal's mouth, and not put before him. Street, *Torts* (6th ed.), p. 30; Winfield, *Tort* (11th ed.), p. 446. The fact that such problems can be raised on the modern law show that differences in causation are a nonsensical method of settling substantive categories of liability which should depend on the nature of the defendant's conduct and its effect upon the plaintiff. Causation is relevant to link the two and in appropriate cases to assist in measuring the quantum of recoverable compensation. See *Letang* v. *Cooper* [1965] 1 Q.B. 232, 239, *per* Lord Denning M.R.

[82] *Hartley* v. *Moxham* (1842) 3 Q.B. 701.

[83] Street, *Torts* (6th ed.), p. 30, but for "detinue" now substitute "conversion" and see *ante*, § 21–33.

[84] *Fouldes* v. *Willoughby* (1841) 8 M. & W. 540, 549, *per* Alderson B.: "Scratching the panel of a carriage would be a trespass."

[85] *Everitt* v. *Martin* [1953] N.Z.L.R. 298, 302–303, *per* Adams J. But English authority is singularly lacking. *Slater* v. *Swann* (1730) 2 Stra. 872 rules a requirement of special damage where an animal is beaten.

[86] Salmond, *Torts* (17th ed.), p. 92; Street, *Torts* (6th ed.), p. 31; Winfield, *Tort* (11th ed.), pp. 446–447.

CHAPTER 22

TRESPASS TO LAND AND DISPOSSESSION

1.—THE NATURE OF TRESPASS

22–01 **Definition of trespass.** Trespass to land consists in any unjustifiable intrusion by one person upon land in the possession of another.

"Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.* For every man's land is in the eye of the law enclosed and set apart from his neighbour's; and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field."[1] The slightest crossing of the boundary is sufficient. "If the defendant place a part of his foot on the plaintiff's land unlawfully, it is in law as much a trespass as if he had walked half a mile on it."[2]

It is a trespass to remove any part of the soil of land in the possession of another or any part of a building or other erection which is attached to the soil so as to form part of the realty. So a landlord who removes the doors and windows of a house in the possession of his tenant commits a trespass,[3] but there is no trespass if he has the supply of gas and electricity cut off so as to compel the tenant to leave the house.[4]

It is also a trespass to place anything on or in land in the possession of another, as by driving a nail into his wall,[5] placing rubbish against his wall,[6] growing a creeper up his wall,[7] propping a ladder against his wall.[8] While

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[1] Bl. Com., Vol. 3, p. 209, and see *Hegan* v. *Carolan* [1916] 2 Ir.R. 27.

[2] *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10, *per* Coleridge C.J. at p. 12.

[3] *Lavender* v. *Betts* [1942] 2 All E.R. 72. Unlawful eviction or re-entry may attract exemplary or aggravated damages: *Drane* v. *Evangelou* [1978] 1 W.L.R. 455 (C.A). *post,* § 22–46.

[4] *Perera* v. *Vandiyar* [1953] 1 W.L.R. 672. By the Protection from Eviction Act, s. 1 (formerly Rent Act 1965, s. 30) it is an offence unlawfully to evict or harass residential occupiers or to re-enter leasehold premises without court order. But breach of duty under the Act does not give rise to an action for compensation: *McCall* v. *Abelesz* [1976] Q.B. 585 (C.A.). Criminal compensation may be available: *R.* v. *Bokhari* (1974) Cr. App. R. 303. An injunction is available for breach of s. 3 of the Act (formerly Rent Act 1965, s. 32) as a tort: *Warder* v. *Cooper* [1970] Ch. 495.

[5] *Lawrence* v. *Obee* (1815) 1 Stark. 22; *Simpson* v. *Weber* (1925) 41 T.L.R. 302.

[6] *Gregory* v. *Piper* (1829) 9 B. & C. 591; *Kynoch Ltd.* v. *Rowlands* [1912] 1 Ch. 527.

[7] *Simpson* v. *Weber* (1925) 41 T.L.R. 302.

[8] *Westripp* v. *Baldock* [1938] 2 All E.R. 779; affirmed [1939] 1 All E.R. 279.

dumping rubbish on another's land is trespass, it has been said by some judges that causing land to become fouled by a discharge of oil in a navigable river is not a trespass.[9] One who has a right of entry upon another's land and acts in excess of his right or after his right has expired, is a trespasser.[10]

Every continuance of a trespass is a fresh trespass, in respect of which a new cause of action arises from day to day as long as the trespass continues. One who built on the plaintiff's land some buttresses to support a road and paid damages in an action for trespass was held liable in damages in a second action for not removing the buttresses after notice.[11] Again, a builder who in demolishing a building left rubbish on the roof of an adjoining building, as a result of which a gully became choked and the adjoining building was flooded, was held liable to the tenant of that building, although the tenancy had only commenced after the building operations had finished.[12]

Trespass in the air-space above land. It may be a trespass to invade the air-space above land. Intrusion into air-space at any height however high is not automatically wrongful, but it is clear that it is a wrong where such air-space is necessary for the full use of land below. The earlier authorities have been reviewed in the leading case of *Kelsen* v. *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.*[13] There an advertising sign erected by the defendants projected some four inches into the air-space of a neighbouring occupier and McNair J. held this to be a trespass, and not a nuisance,[14] granting a mandatory injunction for removal. This decision accords with principle but its limits should be noticed. It is not a trespass to fly over private property at a reasonable and safe height. In *Berstein* v. *Skyviews and General Ltd.*[15] the defendant flew some hundreds of feet over the plaintiff's country property and took photographs of it. Griffiths J. dismissed a claim for damages, holding that no right of exclusive possession had been infringed. This does not mean that any intrusion by low-flying aircraft is justifiable. For a helicopter to hover noisily and unnecessarily at a low height might well be an intrusion for which appropriate remedies could be obtained. 22–02

An alternative reason for dismissing Lord Berstein's claim was the Civil Aviation Act 1949, s. 40 (1)[16] which provides that no action shall lie in respect of trespass by reason only of the flight of aircraft over any property at a height 22–03

[9] *Southport Corp.* v. *Esso Petroleum Co.* [1954] 2 Q.B. 182, *per* Denning L.J., at p. 195 and [1956] A.C. 218, *per* Lord Radcliffe at p. 242, and *per* Lord Tucker at p. 244. And see generally *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* [1961] A.C. 388, P.C., where such a cause of action was treated as sounding in negligence. See *post*, §§ 22–06, 23–22, for difference between trespass and nuisance.

[10] *Hillen* v. *I.C.I. (Alkali) Ltd.* [1936] A.C. 65.

[11] *Holmes* v. *Wilson* (1839) 10 A. & E. 503. Also *Bowyer* v. *Cooke* (1847) 4 C.B. 236. And see *ante*, § 9–19.

[12] *Konskier* v. *Goodman Ltd.* [1928] 1 K.B. 421. Also *Hudson* v. *Nicholson* (1839) 5 M. & W. 437.

[13] [1957] 2 Q.B. 334. Also *Woollerton and Wilson Ltd.* v. *Richard Costain (Ltd.)* [1970] 1 W.L.R. 411.

[14] If damage and interference with user be proved, the wrong may be an actionable nuisance. In certain circumstances damage may be presumed and a nuisance may be abated before actual damage accrues.

[15] [1978] Q.B. 479.

[16] Lord Berstein contended that the Act confirmed as lawful only a general right of aerial passage analogous with right of passage over a land highway. The court refused the argument. It is not wrongful, for example, to pause on the highway to take photographs.

CHAPTER 23

NUISANCE

1.—THE NATURE OF NUISANCE

23–01 **Nuisance defined.** The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. In common parlance, stenches and smoke and a variety of different things may amount to a nuisance *in fact* but whether they are *actionable* as the *tort* of nuisance will depend upon a variety of considerations and a balancing of conflicting interests. An actionable nuisance is incapable of exact definition,[1] and it may overlap with some other heading of liability in tort such as negligence or the rule in *Rylands* v. *Fletcher*.[2] Nuisance is an act or omission which is an interference with, disturbance of or annoyance to a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land, when it is a private nuisance.

23–02 **Public nuisance.** A public nuisance is a criminal offence, and is "an unlawful act or omission to discharge a legal duty, which act or omission endangers the lives, safety, health, property, or comfort of the public, or by which the public

[1] *Bamford* v. *Turnley* (1862) 3 B. & S. 62, 66, 79, 83–88; *Harrison* v. *Good* (1871) L.R. 11 Eq. 338, 351; *Pwllbach Colliery Co. Ltd.* v. *Woodman* [1915] A.C. 634, 638–639.

[2] *Graff Brothers Estates Ltd.* v. *Rimrose, etc. Sewerage Board* [1953] 2 Q.B. 318 (a claim for damages for wrongfully removing the support of land and houses may cover claims in negligence, trespass and nuisance); *Southport Corp.* v. *Esso Petroleum Co. Ltd.* v. *Southport Corp.* [1956] A.C. 218 (relation between nuisance, negligence and trespass discussed); *Read* v. *Lyons & Co. Ltd.* [1947] A.C. 156, 183. "The law of nuisance and the rule in *Rylands* v. *Fletcher* might in most cases be invoked indifferently": *per* Lord Simonds. *Halsey* v. *Esso Petroleum Co. Ltd.* [1961] 1 W.L.R. 683 (liability for escape of noxious acid smuts under *Rylands* v. *Fletcher* and in nuisance for damage caused to plaintiff's motor-car on the public highway and to clothing on his land; for a public nuisance in respect of the motor-car and for a private nuisance in respect of the clothing).