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Intentional Invasion of Land

Trespass

[3.10] From earliest times the common law protected the possessory rights of landlords against unauthorised entry by an action of trespass, known as quare clausum fregit. The remedy was not, as its name might suggest, confined to intrusions upon enclosed lands because, says Blackstone, "every man's land is in the eye of the law inclosed and set apart from his neighbour's." [1]

In the course of its history, this action of trespass came to be used for a number of different purposes which have left their mark on its conditions of liability. In origin, trespass was a remedy for forcible breach of the King's peace, aimed against acts of intentional aggression. This early association with the maintenance of public order explains why the action lies only for interference with an occupier's *actual* possession. Its proprietary aspect became more dominant when it was later used for the purpose of settling boundary disputes, quieting title and preventing the acquisition of easements by prescriptive user. [2] These latter functions account for the rule that the plaintiff is not required to prove material loss, [3] and that a mistaken belief by the defendant that the land was his affords no excuse. [4] The temptation for the occupier to resort to violence in defence of his boundary and privacy was not lessened by the absence of pecuniary loss, while in less serious cases nominal damages were justified to vindicate his rights against adverse claims. Likewise, if mistake as to title had been admitted as a defence, trespass would have been a less suitable remedy for settling claims to disputed land.

In addition, the action of trespass also came to serve the wholly distinct function of an ordinary tort remedy for material damage sustained by an occupier as the direct result of another's activity involving an entry, whether personal or by means of animate [5] or inanimate objects. Such cases call for a different appraisal. In particular, those aspects of strict liability which are meaningful in relation to its earlier-mentioned functions are here opposed by the modern policy of confining liability to intended and negligent harm.

1 *Blackstone*, 3 Comm 209; *Wuta-Ofei v Danquah* [1961] 1 WLR 1238.

2 The last-mentioned function is noted in *Lemmon v Webb* [1894] 3 Ch 1 at 24.

3 *Ashby v White* (1703) 2 Ld Raym 938; 92 ER 126 at 955 (Ld Raym), 137 (ER); *Embrey v Owen* (1851) 6 Ex 353; 155 ER 579 at 368 (Ex), 585 (ER).

4 *Basely v Clarkson* (1681) 3 Lev 37; 83 ER 565.

5 Cattle-trespass.

Basis of liability

[3.20] The old strict liability associated with the early action of trespass is therefore no longer a safe guide for allocating responsibility in modern law. The contemporary trend, already noted in connection with trespass to the person, [6] is to deny recovery for harm caused without fault unless resulting from an ultra-hazardous activity. Hence, consideration of the defendant's conduct–intentional, negligent or faultless–can no longer be safely avoided by simply tagging the problem as trespass.

Intentional invasions are actionable whether resulting in harm or not. [7] Neither the intruder's motive, nor the fact that his entry actually benefited the occupier, is material. [8] The requisite intent is present if the defendant desires to make an entry, although unaware that he is thereby interfering with another's rights. Thus it makes no difference whether the intruder knows his entry to be unauthorised or honestly and reasonably believes the land to be his. It may, however, affect the quantum of damages. A deliberate trespass is no trifling matter, [9] but in cases of mistake where no perceptible damage is done, only nominal damages are awarded; yet the verdict against the defendant is justified in order to defeat his adverse claim to the land. If, on the other hand, actual damage has occurred, as when A believing B's land to be his cuts a stand of timber or works a seam of coal, the award no more than compensates the plaintiff for the loss he has suffered as the result of the unauthorised entry. [10] Viewed realistically, therefore, trespass as a remedy against dispossession is a tort of strict liability, vindicating a proprietary interest rather than a tort obligation.

Moreover, according to the traditional view, an intentional trespasser is strictly liable for all damage "directly and immediately" [11] caused by his presence on the land, even if it resulted from conduct that would not otherwise have incurred liability; for example, if he were to collide with the occupier in the dark, though without the least fault. [12] At least where trespass to land has become a tort based on fault (intentional or negligent), should liability not also be limited to foreseeable consequences? [13] At any rate, where the trespass merely provided the occasion rather than increased the risk of the damage, a defendant was excused when his car, parked without permission (and therefore trespassing), unexpectedly caught fire and did unforeseeable damage to the garage. [14]

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6 See above, [2.xxx]-[2.xxx].

7 Cf Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, 2007), p 39 (intentional is merely a synonym for voluntary).

8 *Rest 2d*, s 163, cmt d. In the *Case of Thorns* (1466) YB 6 Ed IV, 7, pl 18 the defendant was held liable for entering the plaintiff's land to retrieve cuttings accidentally dropped by him.

9 *Plenty v Dillon* (1991) 171 CLR 635 at 654.

10 *Gilchrist v Logan* [1927] St R Qd 185.

11 This is also the discrimen between trespass and case.

12 *Wormald v Cole* [1954] 1 QB 614 at 625; *Turner v Thorne* (1959) 21 DLR (2d) 29; *Rest 2d*, s 162.

13 See *The Wagon Mound (No 2)* [1967] 1 AC 617, below, [9.xxx]ff; Williams, "The Wagon Mound" (1961) 77 LQR 202 at 204. Consequential damage was foreseeable in *Hogan v Wright* [1963] Tas SR 44; *Svingos v Deacon* (1971) 2 SASR 126.

14 *Mayfair v Pears* [1987] 1 NZLR 459 (CA). Cf below, [18.xxx] (cattle-trespass).

Accidental injury

[3.30] Accidental trespassory *harm*, at any rate, must today meet the modern conditions of liability for unintended injury stemming from the competing action on the case.

All vestiges of the older strict liability were progressively discarded as it became established that claims for unintended injury, whether formulated in trespass or case, had to conform to the conditions of liability postulated by the latter form of action. Proof of negligence became essential: first, in cases of highway accidents causing damage to adjacent property (such as a car veering off the road [15] or a bull disporting himself into a china shop [16]); and eventually, as the development in the analogous cases of personal injury [17] and damage to chattels [18] bears out, in all residuary situations which would formerly have fallen within the purview of trespass to land. Strict liability is thus exorcised except where the injury resulted–not, as once upon a time, directly rather than consequentially from *whatever* the defendant happened to be doing–but from extra-hazardous activities alone, such as blasting within the principle of *Rylands v Fletcher*. [19]

Defendant's conduct

[3.40] here must be physical entry upon the possessor's territory. Mere interference with his amenities, such as emitting noxious fumes or noise, may amount to nuisance but not trespass. Indeed, some forms of annoyance, however objectionable, may not be actionable torts at all, like cutting off a tenant's gas [20] or electricity supply. [21] Moreover, to be actionable as trespass, the defendant's conduct must have consisted of a voluntary *and* affirmative act. If A has a seizure and falls [22] or is pushed against his will by B upon the plaintiff's land, [23] A is not liable, though B may be. Cutting down a tree so that it falls on neighbouring land is trespassory harm; failing to remove a decayed branch before it falls will at best support an action on the case, being mere non-feasance. [24] This corresponds with the traditional reluctance of the common law to demand duties of affirmative action.

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15 *ANA v Phillips* [1953] SASR 278; *Nickells v Melbourne Corp* (1938) 59 CLR 219. This goes back to Lord Blackburn's dicta in *Rylands v Fletcher* (1866) LR 1 Ex 265 at 286 and *River Wear Comm v Adamson* (1877) 2 App Cas 743 at 767.

16 *Tillett v Ward* (1882) 10 QBD 17.

17 See above, [x.xxx].

18 See below, [4.xxx]. But just as in the case of personal injury it remains clouded on whom the burden of proof lies: *Bell Canada v Bannermount* (1973) 35 DLR (3d) 367 (Ont CA) still left it on the defendant.

19 *Rylands v Fletcher* (1868) LR 3 HL 330. This is the view taken by *Rest 2d*, s 166 and accords with the famous *Nitro-Glycerine Case* 15 Wall 524 (1872) which had the approval of *Pollock*, p 99ff. In Australia (unlike England) even the *Rylands v Fletcher* principle has now been "absorbed by the principles of ordinary negligence": see *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 556, see also below, Chapter xx. The surviving strict liability for cattle-trespass, modified only by the highway rule (see below, [18.xxx]), is based on wholly different considerations: it originated in the requirements of a predominantly agricultural society and is based on the notion of control of a dangerous agency.

20 *Anglian Water Services Ltd v Crawshaw Robins Co Ltd* [2001] BLR 173.

21 Cf *Perera v Vandiyar* [1953] 1 WLR 672 ("no tort of eviction").

22 *Public Transport Comm v Perry* (1977) 137 CLR 107.

23 *Smith v Stone* (1647) Style 65; 82 ER 533; cf *Braithwaite v S Durham Steel* [1958] 1 WLR 986 (inadvertent).

24 See *Star v Rookesby* (1711) 1 Salk 335; 91 ER 295.

Trespass may be committed not only by an entry in person, but equally by propelling an object or a third person onto the plaintiff's land. [25] Indeed, most cases of trespass involving actual damage deal with situations where there has been no personal entry but the defendant has initiated a force which directly causes rubbish, stones or other projectiles to be cast on or over another's property. [26] Here again, the old distinction between direct and indirect invasion looms large. The discharge of water may be trespass or case according to whether it is immediately poured upon or only ultimately flows onto the plaintiff's property, as by being first discharged on somebody else's land and later carried down to the plaintiff's. [27] In many American blasting cases it has been held that damage from flying rocks is trespass, but from vibration or concussion at most nuisance. [28] This proposition, which was long ago castigated as a marriage of legal technicality with scientific ignorance, [29] is nonetheless commendable because any encroachment of trespass on the traditional province of nuisance would lead to undesirable restrictions on user of land. [30]

Trespass may be committed not only by an initial unprivileged entry, but also by failing to leave the possessor's land after a *licence* to enter has terminated or the purpose for which the privilege was given has been accomplished. [31] Thus a lodger or theatre patron becomes a trespasser if he misbehaves and then does not heed a request to get out. [32] Not so, however, a person lawfully in *possession* of land who omits or refuses to give it up at the termination of his interest: a lessee, for example, who holds over may be liable in an action of ejectment, but not trespass. [33]

Authority to enter the land may have been limited to a particular purpose. Entry for a different purpose would then become trespassory, as when a neighbour entered for the purpose of stealing instead of looking after the house in the owner's absence, [34] or when a television crew invaded a property with cameras rolling. [35] Even a subsequent abuse of privilege by one who enters under authority of law may convert that entry into a trespass ab initio, under a somewhat archaic doctrine justifiable at best as a constitutional safeguard

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25 *League against Cruel Sports v Scott* [1986] QB 240 (inevitable that hounds accompanying a hunt would enter the plaintiffs' land).

26 For example, *Rigby v Chief Constable* [1985] 1 WLR 1242 (gas canister fired by police).

27 *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84 at 86-87; *Fletcher v Rylands* (1865) 3 H & C 774; 159 ER 737 at 792 (H & C), 744 (ER); *Southport Corp v Esso* [1954] 2 QB 182 (petroleum washed ashore).

28 See Gregory, "Trespass to Negligence to Absolute Liability" (1951) 37 Va L Rev 359.

29 Smith, "Liability for Substantial Physical Damage to Land by Blasting" (1920) 33 Harv L Rev 542 at 667; *Prosser & Keeton*, p 553.

30 Nuisance, unlike trespass, makes allowance for reasonable use. Again, abnormal sensitivity of the plaintiff's user of land is a defence in nuisance, but not in trespass: see below, [21.xxx].

31 This applies to police as well as anyone else: *Plenty v Dillon* (1991) 171 CLR 635; *Halliday v Nevill* (1984) 155 CLR 1 (implied license to enter property). An implied license to enter strata title land cannot be revoked by only one proprietor: *Pitt v Baxter* (2007) 34 WAR 102 (special leave to appeal to HCA refused). A licence may be implied on the basis of reasonableness: *R v Frazer* [2005] 2 NZLR 109; a licence may also be impliedly withdrawn: *R v Ratima and Warren* [1999] NZCA 307.

32 *Wood v Leadbitter* (1845) 13 M & W 838; 153 ER 351; *Cowell v Rosehill Racecourse* (1937) 56 CLR 605; *Duffield v Police* [1971] NZLR 378.

33 *Hey v Moorehouse* (1839) 6 Bing NC 52; 133 ER 20. Unless the landlord first regained possession: *Haniotis v Dimitriou* [1983] 1 VR 498.

34 See *Barker v R* (1983) 153 CLR 338.

35 *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457; *TV3 v BSA* [1995] 2 NZLR 720 at 732.

against abuse of governmental authority. [36] The public highway in England is primarily for passing and repassing and use for a different purpose can constitute trespass, [37] but a peaceful assembly on the highway which does not obstruct it will not constitute a trespass. [38]

If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue [39] and a purchaser of the offending chattel or structure be liable, [40] because the wrong gives rise to actions de die in diem until the condition is abated. Likewise, if the chattel was initially placed on the land with the possessor's consent, termination of the licence creates a duty to remove it; and it seems that, according to modern authority, [41] a continuing trespass is committed by failure to do so within a reasonable time. In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss. [42]

The doctrine of "continuing trespass" applies only to omissions to remove something brought on the land and wrongfully left there; not where a defendant fails to restore the land to the same condition in which he found it, as where he digs a pit in his neighbour's garden and fails to fill it up. Here the plaintiff can only treat the initial entry as trespass and must content himself with one action in which damages are recoverable for both past and future loss. [43]

Plaintiff's title

[3.50] The action of trespass vindicates only violations of actual possession, and is not concerned with protecting the interests of persons out of possession at the time of the intrusion. Thus, a purchaser cannot sue for a trespass occurring before title passed [44] nor a landlord during the subsistence of a lease. [45] By the

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36 The doctrine, now obsolete in the US (*Rest 2d*, s 214(2)), was described by Lord Denning as *"a by-product of the old forms of action. Now that they are buried, it can be interred with their bones"* (*Chic Fashions v Jones* [1968] 2 QB 299 at 313). When police entered a woman's house and unlawfully arrested her son, general aggravated and exemplary damages were awarded to her for trespass: *NSW v Ibbett* (2006) 229 CLR 638, see also *Kuru v NSW* (2008) 236 CLR 1; [2008] HCA 26.

37 *Harrison v Duke of Rutland* [1893] 1 QB 142; *Hickman v Maisey* [1900] 1 QB 142.

38 *Director of Public Prosecutions v Jones* [1999] 2 AC 240.

39 *Hudson v Nicholson* (1839) 5 M & W 437; 151 ER 185; *Break Fast Investments Pty Ltd v PCH Melbourne Ltd* (2007) ATR 81-930.

40 *Rest 2d*, s 161, cmt f; *Prosser & Keeton*, p 83.

41 *Konskier v Goodman* [1928] 1 KB 421; *Rest 2d*, s 160.

42 For the court's power alternatively to sanction the wrong in futuro, subject to compensation, see below, [21.xxx].

43 *Clegg v Deardon* (1848) 12 QB 576; 116 ER 986. But if the neighbour actually falls into the pit, he may apparently sue on a trespass theory: see *Kopka v Bell Telephone Co* 91 A 2d 232 (Pa 1952). See *Break Fast Investments Pty Ltd v PCH Melbourne Ltd* (2007) ATR 81-930 for a discussion of the assessment of damages for continuing trespass.

44 *Cousins v Wilson* [1994] 1 NZLR 463.

45 *Lockwood Bdgs v Trust Bank* [1995] 1 NZLR 22 (CA). But he may recover for injury to his reversionary interest on proof of permanent injury to the land: *Rodrigues v Ufton* (1894) 20 VLR 539; *Loxton v Waterhouse* (1891) 7 WN (NSW) 98.

same token, the mere use of land without exclusive possession is insufficient. [46] Thus, a plaintiff who had a concession from a canal company to the exclusive right of keeping pleasure-boats for hire, being a mere licence, failed against a stranger who interfered with his monopoly. [47] On the other hand, the grantee of a legal (or equitable?) [48] interest in land in the nature of an easement or profit aprendre, like a fishery [49] or right to cut timber, [50] can sue in trespass for direct interference [51] by strangers.

Possession of land may be in a person who has no legal title to it and is himself in wrongful occupation as regards another. [52] A disseisor is nonetheless a possessor although, as between himself and the rightful owner, he has no *right* to possession until his adverse possession has ripened into ownership by lapse of time. [53] But, just as legal title to land without possession does not support an action of trespass against third parties, so possession without legal title thereto is sufficient. [54] Hence, a defendant cannot set up the right of the true owner in order to justify his infringement of the plaintiff's de facto possession: he cannot plead the so-called jus tertii, that is, assert that another has a better right to possession than the plaintiff, unless he committed the entry by his authority. [55] The reason is that it is more conducive to the maintenance of order to protect de facto and even wrongful possession against disturbance by all and sundry than to deny legal aid to a disseisor merely because of the flaw in his title.

He who has a right to immediate possession is deemed, on entry, to have been in possession ever since his right to entry accrued, and may sue for trespass committed since that time. [56] This fiction, known as the doctrine of *trespass by relation*, partially corrects the balance which the older law tilted so heavily in favour of, actual possession to the prejudice of bare title. Thus, a disseisee has his remedy after re-entry against anyone who intruded on his land during the

46 *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51; *Moreland Timber Co v Reid* [1946] VLR 237 at 249-250; contra, *Vaughan v Benalla S* (1891) 17 VLR 129 (not cited in *Reid's case*); *Nuttall v Bracewell* (1866) LR 2 Ex 1 at 11, allowing a claim for actual damage.

47 *Hill v Tupper* (1863) 2 H & C 121; 159 ER 51. See also *Georgeski v Owners Corporation SP 49833* [2004] NSWSC 1096 in which a licence to access the foreshore, along with a jetty and slipway, did not confer sufficient title to enable the plaintiff to sue in trespass.

48 This seems to have been assumed without argument in *Mason v Clarke* [1955] AC 778; contra: *Moreland Timber Co v Reid* [1946] VLR 237; *Cousins v Wilson* [1994] 1 NZLR 463.

49 *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84; *Fitzgerald v Firbank* [1897] 2 Ch 96.

50 See *Moreland Timber Co v Reid* [1946] VLR 237.

51 And in nuisance for indirect invasion.

52 *Newington v Windeyer* (1985) 3 NSWLR 555.

53 On the nature of the intention required by the disseisor in England to acquire title, see *J A Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

54 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175; (wife with no proprietary interest in matrimonial home); *Markisic v Department of Community Services of NSW* [2005] NSWSC 1373 (son living in his mother's home).

55 *Graham v Peat* (1801) 1 East 244; 102 ER 95; *Nicholls v Ely Beet Sugar Factory* [1931] 2 Ch 84; *Mt Bischoff Tin Mining Co v Mt Bischoff Extended Tin Mining Co* (1913) 15 CLR 549; *Hansard v Tame* [1957] NZLR 542.

56 *Ocean Accident Co v Ilford Gas Co* [1905] 2 KB 493; *Ebbels v Rewell* [1908] VLR 261; *Wynne v Green* (1901) 1 SR (NSW) 40.

period of his dispossession, just as a tenant has for any trespass committed between the granting of the lease and his entry. [57]

Trespass beneath and above the surface

[3.60] The interest in exclusive possession of land is not confined to the surface; it extends both below and above, but the boundaries of the claim to possession of vertical strata are not as yet precisely defined. Ordinarily, entry underneath the surface at any depth is trespass, unless possession of the surface has been severed from that of the subsoil, as by a grant of mining rights. Thus, it is actionable to tunnel into adjoining land for the purpose of exploiting a coal seam [58] or to slant-drill into a neighbouring oil zone. [59] But it is questionable whether the surface owner is protected with respect to claims over subterranean areas which he is unable to subject to his dominion. The old sophistry, that the owner of the surface is the owner of everything from zenith to nadir, is correct in its application to mining rights, but has been rarely tested with respect to claims to an area he cannot use but which may be of benefit to others. The problem arose in a Kentucky case [60] where the defendant owned land with the entrance to a cave which he developed into a tourist attraction. The cave at some point passed 350 feet below the surface of the land owned by the plaintiff, who claimed an account of receipts. This he was granted, but over a strong dissent expressing the more commendable view that the surface owner owns only those substances upon, above or under it which he can subject to his control: "No man can bring up from the depth of the earth the Stygian darkness and make it serve his purposes, unless he has the entrance to it." [61]

The extent of ownership and possession of superincumbent airspace became a topic of controversy with the advent of flying. Much play has been made of the maxim "cuius est solum ejus est utque ad coelum" (he who owns the surface owns up to the sky), but this "fanciful phrase" [62] of dubious ancestry [63] has never been accepted in its literal meaning of conferring unlimited rights into the infinity of space over land. The cases in which it has been invoked establish no wider proposition than that the air above the surface is subject to dominion in so far as the use of space is necessary for the proper enjoyment of the surface. [64] Thus, building restrictions apart, the owner has the right to erect structures to

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57 In England, and in those States and Territory where the doctrine of interesse termini has been abolished (New South Wales, Victoria, Northern Territory, Queensland, South Australia and Western Australia), it is probably no longer necessary to rely on the principle of trespass by relation in such a case, because a lease now takes effect from the commencement of the term without actual entry.

58 For example, *Bulli Coal Mining Co v Osborne* [1899] AC 351.

59 See Note, (1939) 27 Cal L Rev 192. Unauthorised drilling must be distinguished from draining a neighbouring zone with a drill kept within the lateral confines of the surface occupied by the defendant–a practice permitted in the US: (1920) 5 ALR 421.

60 *Edwards v Sims* 24 SW 2d 619 (Ky 1929); see also *Stoneman v Lyons* (1975) 133 CLR 550; *Di Napoli v new Beach Apartments Pty Ltd* (2004) ATR 81-728.

61 The judgment by Logan J is a fine piece of literature. *Prosser & Keeton*, p 82 has called the majority opinion "dog-in-the-manger law". The "effective control" theory was adopted in *Boehringer v Montalto* 254 NYS 276 (1931) (sewer commission permitted to maintain sewer 150 ft below surface).

62 *Wandsworth Bd of Works v United Telephone Co* (1884) 13 QBD 904 at 915 (Brett MR).

63 Its origin is traced by Bouve, "Private Ownership of Airspace" (1930) 1 Air L Rev 232; Hackley, "Trespassers in the Sky" (1937) 21 Minn L Rev 773.

64 *Bernstein v Skyviews* [1978] QB 479; Butt, "The Limits of Application of the Maxim *Cuius est Solum Eius est Usque ad Coelum*" (1978) 52 ALJ 160; *ACQ Pty Ltd v Cook* [2008] NSWCA 161.

any height [65] and for any purpose. [66] Most of the case law has been concerned with competing claims by adjacent occupiers with respect to overhanging parts of buildings and branches of trees. Here, the weight of authority clearly favours the view that direct invasion by artificial projections, like a swinging crane, [67] advertising signs, [68] electric cables, [69] or the overlap of a wall, [70] constitutes trespass actionable per se and, in suitable cases, warranting a mandatory injunction to compel removal. In contrast, protruding branches, even of artificially-planted trees, are treated as consequential, not direct, encroachments for which the remedy lies in nuisance, [71] requiring proof of damage or actual inconvenience except in support of the privilege to abate by cutting back the offending branch. [72]

As regards transient incursions, authority is quite inconclusive. Some support for a theory of unlimited ownership over airspace has been claimed from an older case [73] where a horse on one side of a fence having bitten and kicked a mare on the other, recovery was allowed without a showing of negligence on the ground that the intrusion into space over the plaintiff's land constituted trespass. But this decision affords scant guidance for momentary and harmless intrusions into airspace beyond the reach of the surface owner. Legislation allowing courts to create easements for the purpose of allowing building development exists in some jurisdictions. [74] More pertinent is a group of decisions dealing with the firing of guns across adjacent land. Lord Ellenborough once suggested a distinction between a shot striking the soil and firing in vacuo without touching anything: the former being trespass, while the latter was not actionable unless as nuisance. [75] But in a later case, [76] holding a defendant liable for shooting a cat perched on an adjacent shed, the court regarded all entry into airspace as trespassory, at any rate at that particular height, though admitting

65 *Corbett v Hill* (1870) LR 9 Eq 671; *Atlantic Aviation v NS Light & Power* (1965) 55 DLR (2d) 554.

66 *Victoria Park Racing Co v Taylor* (1937) 58 CLR 479.

67 *Anchor Brewhouse Developments v Berkeley House* [1987] 2 EGLR 173 (injunction without suspension); *Graham v Morris* [1974] Qd R 1.

68 *Kelsen v Imperial Tobacco* [1957] 2 QB 334.

69 *Barker v Adelaide C* [1900] SALR 29; *Wandsworth Bd of Works v United Telephone Co* (1884) 13 QBD 904.

70 *Williamson v Friend* (1901) 1 SR (NSW) (Eq) 23 at 27; *Lawlor v Johnston* [1905] VLR 714 (ventilation pipe). Otherwise, if a fence encroaches due to action of the weather: *Mann v Saulnier* (1959) 19 DLR (2d) 130 (comment, (1960) 23 Mod L Rev 188).

71 *Lemmon v Webb* [1894] 3 Ch 1; [1895] AC 1; *Davey v Harrow Corp* [1958] 1 QB 60; contra, *Simpson v Weber* (1925) 41 TLR 302 at 304 (Virginia creeper treated as trespass). See below, [21.xxx].

72 *Lemmon v Webb* [1894] 3 Ch 1. This is affected by statute in New South Wales, see *Trees (Disputes Between Neighbours) Act 2006*.

73 *Ellis v Loftus Iron Co* (1874) LR 10 CP 10.

74 NSW: *Conveyancing Act 1919*, s 88K; NT: *Property Law Act*, ss 163 – 164; Qld: *Property Law Act 1975*, s 180; Tas: *Conveyancing and Law of Property Act 1884*, s 84J; *Land Titles Act 1980* (Tas), ss 110(4) – (12). Courts also have power to make an order permitting entry to adjoining premises to repair, demolish etc buildings on the applicant's land, see, for example, NSW: *Access to Neighbouring Land Act 2000*; NZ: *Property Law Act 2007*, ss 319, 320.

75 *Pickering v Rudd* (1815) 4 Camp 219; 171 ER 70; followed in *Clifton v Bury* (1887) 4 TLR 8 where, however, the firing of bullets at 75 ft was held to be an unreasonable interference with the enjoyment of land and thus a nuisance, as in *Evans v Finn* (1904) 4 SR (NSW) 297. See also *Big Point Club v Lozon* [1943] 4 DLR 136.

76 *Davies v Bennison* (1927) 22 Tas LR 52. Cf *Bridges v Forest Protection* (1976) 72 DLR (3d) 335 at 361 (aerial spray causing direct damage may be trespass).

the difficulty of "how far the rights of a landowner ad coelum will have to be reduced to permit the free use of" aircraft.

Aircraft

[3.70] Flying has become so important that it is idle to speculate whether courts might inhibit it by an extravagant application of the ad coelum maxim. The question is rather how to adjust, with the least friction, the conflict between the competing claims of aircraft operators to reasonable scope for their activities and of landowners to unimpeded enjoyment of their property. The only modern case to have considered the problem [77] held that an owner's rights in airspace above his land were restricted to such height as was necessary for the ordinary enjoyment of the land and structures thereon, but that above that height he had no greater rights than any other member of the public. Thus he could not object to overflights even when these had the purpose, not of "innocent passage" analogous to the public's right of using the highway, but to take aerial photographs of his property. However, flights which interfere with the use and enjoyment of the land beneath, for example by polluting the air, causing excessive noise or vibrations, [78] or harassing the occupier by persistent surveillance, may constitute actionable nuisance. [79]

Legislation occasionally reinforces this position. Following a British statute, [80] several Australian States [81] and New Zealand [82] have enacted that "no action shall lie in respect of trespass or 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, so long as the provisions of the Air Navigation Regulations are duly complied with". This statute has also been construed expansively to include flights for whatever purpose, even aerial photography. [83] It is balanced, however, by imposing strict liability (irrespective of fault) on the

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77 *Bernstein v Skyviews* [1978] QB 479; earlier: *LaCroix v R* [1954] 4 DLR 470; accord: *Rest 2d*, s 159(2) and the *Uniform Aeronautics Act 1922*, adopted in over 20 States in the US.

78 There is no Australian legislation on aircraft noise. Exposed to liability are not only aircraft operators but also the Commonwealth as owner and operator of practically all airports. But according to the prevailing view, there is no constitutional requirement to compensate on just terms (*Constitution*, s 51(xxxi)) for diminution in the value of adjacent land due to aircraft noise at aerodromes any more than for a prohibition or limitation on the use of such land imposed by a regulation, like reg 92 of the *Air Navigation Regulations 1947*. In the US, "legislation" has been more liberally interpreted so as to facilitate compensation for aircraft noise: *US v Causby* 328 US 256 (1946); *Griggs v Allegheny County* 369 US 84 (1962). In Britain and New Zealand (*Civil Aviation Acts of 1982*, s 77, and , s 91(1)) compliance with regulations confers immunity for nuisance "by reason only of the noise and vibration caused by aircraft *on* an aerodrome" (see McNair, "Law of Air" (3rd ed, 1964), pp 123-125; [1968] NZLJ 372-373). This does not apply to aircraft *in flight*.

79 A case argued solely on the basis of negligence was *Nova Mink v TCA* [1951] 2 DLR 241 (noise damage to mink farm).

80 *Civil Aviation Act 1982* (UK), s 76(1).

81 The Damage by Aircraft Acts: NSW: *Damage by Aircraft Act 1952*, s 2; SA: *Civil Liability Act 1936*, s 62; WA: *Damage by Aircraft Act 1964*, s 4; Tas: *Damage by Aircraft Act 1963*, s 3; and *Wrongs Act 1958* (Vic) s 30.

82 *Civil Aviation Act 1990* (NZ), s 97(2).

83 *Bernstein v Skyviews* [1978] QB 479.

owner of aircraft for all "material loss or damage" to person or property while in flight, taking off or landing. [84] This covers sonic booms and other damaging vibrations [85] as well as aircraft crashes.

Damages and injunction

[3.80] For actual damage to the land or its structures by the trespass, the plaintiff is entitled to compensation on the same principles as for negligence. [86] Otherwise, the basic measure of damages is the use value of the land, regardless of whether and how the owner would otherwise have exploited it. [87] In this "user principle" the action reveals its primarily proprietary focus; it is thus not compensatory like typical tort actions, but rather restitutionary, preventing the defendant's unjust enrichment. For intrusions by police or judicial officers substantial damages are in order to vindicate the plaintiff's civil rights and society's interest in law and order. [88] For inadvertent and evanescent trespasses, only nominal damages would be appropriate; while wilful and contumacious conduct may warrant aggravated damages for any affront and indignity to the plaintiff or exemplary damages to punish him. [89]

Consequential damages, if not too remote, are also recoverable, as where trespassers left a gate open, through which cows entered and damaged the plaintiff's olive trees [90] or where diseased cattle infected the plaintiff's herd. [91]

An injunction may be the most effective remedy to stop actual or merely threatened [92] intrusion. Against continuing trespass injunction will ordinarily issue as a matter of course, whether or not damages would adequately compensate for actual damage done. [93] Equally where no such damage has occurred, as in the case of a crane violating the plaintiff's airspace. But in a controversial ruling, the court suspended the injunction until the construction work had been completed, thereby in effect granting the plaintiff a compulsory licence. [94] Only in exceptional circumstances will an injunction be denied, as where the plaintiff waited until a house built in violation of a use restriction was almost completed. [95]

It should be noted that the choice between injunction and damages effectively decides who will set the price when the plaintiff is prepared to negotiate. By granting an injunction the court will leave negotiation to the parties; by denying

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84 See below, [15.xxx].

85 *Steel-Maitland v BA* [1981] SLT 110. *Southgate v Commonwealth* (1987) 13 NSWLR 188 (low flying helicopter startling horse and rider).

86 For example, *Hansen v Gloucester Developments* [1992] 1 Qd R 14 (unimproved land). See below, [10.xxx].

87 *Swordheath Properties v Tabet* [1979] 1 WLR 285 (CA); *Inverugie Investments Ltd v Hackett* [1995] 1 WLR 713 (PC). See Cooke, 110 LQR 420 (1994); Watts, 112 LQR 39 (1996).

88 *Plenty v Dillon* (1991) 171 CLR 635; *NSW V Ibbett* (2006) 229 CLR 638.

89 *XL Petroleum v Caltex Oil* (1985) 155 CLR 148; *Pollack v Volpato* [1973] 1 NSWLR 653 (CA). See also *Horsford v Bird* [2006] UKPC 3 and *Stanford International Bank v Lapps* [2006] UKPC 50 (awards of aggravated damages not warranted on the facts).

90 *Svingos v Deacon* (1971) 2 SASR 126; *Hogan v Wright* [1963] Tas SR 44.

91 *Anderson v Buckton* (1719) 1 Stra 192; 93 ER 467 (cattle-trespass). See also *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333.

92 To avoid irreparable harm: see *Lincoln Hunt v Willesee* (1986) 4 NSWLR 457.

93 *Patel v W H Smith* [1987] 1 WLR 853 (CA).

94 *Woollerton v Costain* [1970] 1 WLR 411. Should not damages have been granted in lieu of injunction?

95 *Bracewell v Appleby* [1975] Ch 408.

it and granting damages in lieu it will set the price itself. The latter would be economically efficient and justifiable only in order to prevent the owner from unfairly exploiting his bargaining position. [96]

Ejectment

[3.90] We have seen that the action of trespass is available only to those in possession at the time of the unauthorised entry. The claim to recovery of land by persons out of, but with an immediate right to, possession is alone enforced by the action of ejectment, or action for the recovery of possession of land as it is called today. Ejectment was a form of the action of trespass, originally designed to protect the tenant for a term of years. At first, only damages could be recovered, but by the end of the 14th century it had become a remedy for the specific recovery of the term itself. [97] Because of its procedural advantages over the ancient real actions, and with the aid of elaborate fictions, it rapidly developed into an action for the trial of title to freehold as well as leasehold interests, and eventually superseded all other remedies as a means of recovering possession from occupiers with an inferior title. [98] Thus, an offspring of trespass came to serve the function of determining questions of ownership.

Title

[3.100] It is incumbent on the plaintiff to establish a right to immediate possession, and he "must recover upon the strength of his own title, and not by the weakness of the defendant's". [99] All the same, the common law continued to adhere to the principle, developed in relation to the real actions, that the nature of the right asserted in ejectment is merely the plaintiff's better right to possession rather than abstract ownership or an absolute right good against the world. Thus, our modern law, like the medieval, recognises only relatively good or relatively bad rights to possession. This conclusion was not reached without some hesitation, and for a time it seems to have been thought that a plaintiff must prove possession for at least 20 years, that is, a possessory title for a period which, under the statute of limitations, barred the right of entry of all claimants. [100] It is now settled, however, that the plaintiff need not remove every possibility of title in another person and that possession anterior to that of the defendant's for any period may be sufficient to make a prima facie case. [101]

The claimant in an action of ejectment fails if it appears that the right to possession is in some third party. In other words, the presumption that possession is prima facie evidence of title, is rebutted if either the defendant can negative the plaintiff's title by proving that it is in some third party or if it is

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96 See Trindade, Cane and Lunney, *The Law of Torts in Australia* (4th ed, 2007) 155-157.

97 *Holdsworth*, vol iii, pp 214-217.

98 *Holdsworth*, vol vii, pp 4-23.

99 *Martin d Tregonwell v Strachan* (1743) 5 TR 107n; 101 ER 61 per Lee CJ; *Roe d Haldane v Harvey* (1769) 4 Burr 2484; 98 ER 302 at 2487 (Burr), 304 (ER) per Mansfield CJ.

100 See authorities cited by *Holdsworth*, vol vii, pp 62-63. On the relation between possession and title see Gordley & Mattei, "Protecting Possession" (1996) 44 Am J Comp L 293.

101 *Perry v Clissold* [1907] AC 73; (1906) 4 CLR 374; *Allen v Roughley* (1955) 94 CLR 98; *NRMA Ins v B & B Shipping Co* (1947) 47 SR (NSW) 273; *Oxford Meat Co v McDonald* (1963) 80 WN (NSW) 681. The contrary view, espoused by *Holdsworth*, is not supported by the authorities.

disclosed in the plaintiff's own case that he has no right to the land. [102] To this rule, that the so-called jus tertii is a good defence, there are two exceptions: it cannot be pleaded by one who is a trespasser vis-à-vis the plaintiff, since otherwise an intruder would be in a better position in ejectment than in an action of trespass. [103] It is deemed impolitic to permit a trespasser, by the very act of wrongful entry, immediately and without acquiescence, to give himself what the law understands by possession against the person he ejects, and to drive him to produce his title. [104] Secondly, one who has acquired possession through another cannot, in an action of ejectment brought by that other or anyone claiming through him, allege that the title is defective, [105] though he may show that it has since expired or been parted with. [106] A common illustration of this principle of estoppel is found in cases of landlord and tenant. [107]

Mesne profits

[3.110] As long as ejectment was an action of trespass available only to lessees, a plaintiff could recover not only the land but also consequential damages. But concomitant with its extension to freeholders, damages for dispossession became nominal, and a separate action of trespass for mesne profits was created to permit recovery for loss suffered in consequence of the ouster. [108] This action is based on the doctrine of "trespass by relation" which we have already encountered. [109] For, though it is not trespass to continue in possession of land in the absence of an initially wrongful intrusion, as when a tenant holds over without consent, yet upon re-entry the plaintiff is deemed to have been in possession ever since the accrual of his right of entry and may sue in trespass for all acts done upon the land during the period of his dispossession. But as a corollary, it is necessary for the plaintiff to have re-entered the land before suing for mesne profits. [110] To this requirement an exception has long been allowed wherever entry is impossible because the plaintiff's title to possession has since terminated. [111] Moreover, by statute a claim for mesne profits may now be coupled with proceedings for ejectment and, if the plaintiff elects to do so rather than to sue separately, prior re-entry is no longer required. In that event,

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102 *Doe d Carter v Barnard* (1849) 13 QB 945; 116 ER 1524; *Wood v Eisen* (1947) 48 SR (NSW) 5 at 13. There is a dictum to the contrary in *Asher v Whitlock* (1865) LR 1 QB 1 at 6; but neither in that case nor in *Perry v Clissold* [1907] AC 73 was, or could, jus tertii have been raised as a defence: see *NRMA Ins v B & B Shipping Co* (1947) 47 SR (NSW) 273 at 279 and the discussion by Wiren, "Plea of Jus Tertii in Ejectment" (1925) 41 LQR 139; Hargreaves, "Terminology and Title in Ejectment" (1940) 56 LQR 376; Holdsworth, "Terminology and Title in Ejectment–A Reply" (1940) 56 LQR 479 and *Holdsworth*, vol vii, pp 62ff.

103 *Davison v Gent* (1857) 1 H & N 744; 156 ER 1400.

104 Where the plaintiff has desisted from attempts at reinstating himself, leaving the other in undisturbed occupation for a time, it is for the jury to decide whether the defendant has gained possession as distinguished from the mere lawless intrusion of a trespasser: *Hawdon v Khan* (1920) 20 SR (NSW) 703.

105 *Dalton v Fitzgerald* [1897] 2 Ch 86; *Smith v Smythe* (1890) 11 LR (NSW) 295. *Asher v Whitlock* (1865) LR 1 QB 1 has been explained on this ground: Radcliffe & Miles, *Cases* (1904), p 282.

106 *Claridge v MacKenzie* (1842) 4 Man & G 143; 134 ER 59.

107 *Dudley v Brown* (1888) 14 VLR 655; *Cavenough v Buckridge* (1868) 8 SCR (NSW) 90.

108 *Holdsworth*, vol vii, p 15.

109 See above, [3.50].

110 *Minister of State v RT Co Pty Ltd* (1962) 107 CLR 1.

111 2 Rolle Abr 550 (k).

ejectment may once again be regarded not only as a proprietary action for the recovery of land, but also as a tort remedy for consequential loss. [112]

Damages are not confined to the rent of the premises, [113] but include other loss resulting from the dispossession, like interest on a sum offered as a premium by a prospective tenant [114] or loss of custom caused by the defendant shutting up an inn. [115] Apparently, no set-off is allowed for the value of improvements made by a defendant, even if he acted under a misapprehension that the land was his [116] except when the plaintiff had stood by and countenanced his acts. [117]

112 *Nilan v Nilan* (1951) 68 WN (NSW) 271 at 272.

113 These can be restitutionary, that is, at the market rate, whether or not the plaintiff proves loss: see *Inverugie Investments v Hackett* [1995] 1 WLR 713 (PC) see also above, [3.80].

114 *Lee v Blakeney* (1887) 8 LR (NSW) 141.

115 *Dunn v Large* (1783) 3 Doug 335; 99 ER 683.

116 *Tai Te Whetu v Scandlyn* [1952] NZLR 30.

117 *Cawdor v Lewis* (1835) 1 Y & C Ex 427; 160 ER 174.