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TRESPASS TO LAND IN NORTH CAROLINA†

PART I. THE SUBSTANTIVE LAW

DAN B. DOBBS*

Scholars have traditionally looked upon trespass to land as a relatively simple tort. This analysis of North Carolina case law suggests that the law of trespass to land may be more complex than heretofore believed. The author discusses the degree of "fault" necessary to create liability, the types of interests protected (both possession and ownership), the extent of liability for unintended consequences, and the several privileges that will excuse an intrusion upon the land of another.

INTRODUCTION

Trespass to land cases deal with an ancient and simple tort—unauthorized intrusion, usually intentional, upon land owned or possessed by another. But analysis in these cases is to some extent a mirror to analysis in many other tort cases. There is, first of all, the traditional issue about the basis of liability: is defendant liable only for an intended intrusion, for a negligent one, or even for an unintended one? This, of course, is the same kind of question raised about any tort. Second, again as with other torts, it is important to identify the interests that the law seeks to protect, so that the law can be adjudged and applied with good sense. Third, there is the omnipresent question of the extent of the defendant's liability: will he be held liable, for example, for unintended and unforeseen consequences of his trespass? Finally, there is the problem of balancing the interests of society at large against the interests of the particular plaintiff—again, an issue running through all torts in various guises. In the "intentional tort" cases it is usually raised as a question of "privilege," or as a layman might say, a question of "good excuse." What follows is a survey of these and closely related issues, with a discussion of remedies for trespass postponed for consideration in Part II.**

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INTENT, NEGLIGENCE AND STRICT LIABILITY

Until recent years, the common law imposed liability for trespass to land even where the defendant was wholly without fault.¹ It is now generally accepted that some form of "fault" is ordinarily the basis of liability in trespass, and normally this is intent.² It must be recognized, however, that "fault" is rather artificially defined, and that there are exceptional cases in which liability may be imposed without any fault at all.³

There need be no intent to injure or cause damages,⁴ though normally, at least, the entry upon the land must be intentional or the result of negligence. In *Smith v. Pate*,⁵ the defendant allegedly allowed his car to run onto the plaintiff's land, damaging the plaintiff's building. The defendant answered alleging an unavoidable accident—that is, that the accident occurred without fault. The Court held that such a defense was a good one, stating that fault in the form of intent or negligence was appropriate.⁶ Thus there is ordinarily no liability for purely accidental intrusion.

The rule is different, however, where the intrusion is intentional but mistaken, or at least it was traditionally different. The intent required to impose liability is intent to act in relation to the land or some land, not an intent to do evil. Thus if the defendant believes Blackacre to belong to him and he intentionally goes on the land, he is a trespasser if he is mistaken about the ownership, and he is liable though he is certainly no wrongdoer in any moral sense.⁷ Presumably this is the law

¹ See *Newsom v. Anderson*, 24 N.C. 42 (1841).

² See RESTATEMENT (SECOND) OF TORTS § 166 (1965).

³ *Extra-hazardous activities*: See *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 260 N.C. 69, 131 S.E.2d 900 (1963). *Absolute duties*: Apparently there were certain absolute duties with respect to drainage, and these probably still exist apart from statute. See *Clark v. Patapsco Guano Co.*, 144 N.C. 64, 56 S.E. 858 (1907) (rights to natural drainage of land); see also *Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927). *Unjust enrichment*: Where defendant profits from the trespass, he should disgorge the profits even though he did not intend the trespass. See Part II.

⁴ Cases sometimes speak loosely about this. See, e.g., *Hogwood v. Edwards*, 61 N.C. 350 (1867).

⁵ 246 N.C. 63, 97 S.E.2d 457 (1957). See also *Schloss v. Hallman*, 255 N.C. 686, 122 S.E.2d 513 (1961).

⁶ 246 N.C. at 66, 97 S.E.2d at 459.

⁷ Where the vendor of land sells the wrong land or points out the wrong boundaries and the purchaser, so misled, trespasses, both the vendor and purchaser may be held liable. See notes 19-20 *infra*. These cases appear to rest upon the principle that a mistaken trespass is no defense. See RESTATEMENT (SECOND) OF TORTS § 164 (1965).

of North Carolina because there is a statute⁸ that assumes such a rule. The statute apparently does, however, limit liability in such "mistake" situations to actual damages, so that no damage can be recovered unless pecuniary harm is done.⁹ It is arguable that *Smith v. Pate*¹⁰ changed the old common law rule by requiring intent or negligence as a basis of liability. The *Restatement of Torts*, on which the Court relied in *Smith*, however, adopts both the view that "fault" is normally required,¹¹ and the view that mistake of ownership is no defense.¹² This is consistent with the more or less traditional assumption that the intent required is not an intent to do wrong, but merely an intent to act as distinct from an involuntary or accidental movement.¹³ The existence of a statute based upon the rule that mistake is no defense seems to reinforce the same conclusion. In this sense, at least, fault does not seem to be required: a defendant is liable for an intrusion that he intends, though he reasonably believes the land is his own.

It is also true that the defendant need not have a purpose of trespassing, nor even an intent to intrude upon the plaintiff's land, provided he intends an act he knows will almost certainly involve an intrusion.¹⁴ In *Pegg v. Gray*,¹⁵ the defendant kept a pack of foxhounds and ran them in fox hunts. Foxes frequently ran across the crop lands and grazing lands of the plaintiff, and the hounds damaged crops and stampeded cattle in chasing them. The defendant was held liable for the trespass. The Court thought the evidence sufficient to support a finding that defendant either intentionally sent the dogs on plaintiff's lands or "released them knowing they likely would go on, over, and across the lands. . . ."¹⁶ Thus

⁸ N.C. GEN. STAT. § 1-543 (1953).

⁹ The statute requires that the trespass be "involuntary" or by "negligence." This has been held to cover cases in which defendant mistakes the boundary. *Blackburn v. Bowman*, 46 N.C. 441 (1854).

¹⁰ 246 N.C. 63, 97 S.E.2d 457 (1957).

¹¹ RESTATEMENT (SECOND) OF TORTS § 166 (1965).

¹² *Id.* § 164.

¹³ Some courts and writers have expressed this conception of intent by saying only that a *voluntary act* is required of the defendant. *E.g.*, *McDermott v. Sway*, 78 N.D. 521, 50 N.W.2d 235 (1951); *Buchanan v. Cardozo*, 24 App. Div. 2d 620, 262 N.Y.S.2d 247, *modified*, 16 N.Y.2d 1029, 213 N.E.2d 317, 265 N.Y.S.2d 908 (1965) (court of appeals held the falling of a retaining wall was a continuing trespass, not just a nuisance).

¹⁴ See RESTATEMENT (SECOND) OF TORTS § 8A (1965). A leading case is *Garratt v. Dailey*, 46 Wash. 2d 197, 279 P.2d 1091 (1955), involving trespass to person, where defendant-child removed a chair as plaintiff was sitting down, without purpose to cause harm, but knowing that plaintiff would almost certainly fall. Liability was imposed.

¹⁵ 240 N.C. 548, 82 S.E.2d 757 (1954), *noted in* 33 N.C.L. REV. 134 (1954).

¹⁶ 240 N.C. at 555, 82 S.E.2d at 762.

either intent or negligence appeared to be established, and either is sufficient. *Pegg v. Gray*, of course, does not hold that dog owners are liable for the trespass of their dogs, and normally there is no liability for depredations of otherwise "reputable dogs," apart from statute or ordinance.¹⁷ Any dog not penned or chained will foreseeably, if not certainly, intrude upon property of others; the broad definition of "intent" is thus met, since the owner will assuredly know this. Nevertheless, legal symmetry gives way here to practical solutions, and it is deemed more important to permit dogs to roam than to protect the landowner's grass, at least apart from statute or ordinance. Thus, in the case of household pets even a substantially certain trespass by the pet does not impose liability, but in the case of a pack of hounds, often deliberately run, and with the substantial certainty that they will not only intrude but cause substantial damage, there is liability.¹⁸

There are cases in which the intent seems even more attenuated and remote. If defendant owns Blackacre and sells it to *T*, but points out the boundaries erroneously and thus leads the purchaser to trespass on the plaintiff's adjacent land, defendant is held for the trespass. In *McBryde v. Coggins-McIntosh Lumber Co.*,¹⁹ the plaintiff sued the lumber company as a trespasser. The lumber company was on the land under a deed from its vendor, and brought its vendor in as a third party defendant for contribution or indemnity. This was held proper, since the plaintiff could have sued the vendor of the land directly for the vendee's trespass, at least where the vendor pointed out plaintiff's land as a part of that conveyed. Perhaps the same is true where the defendant merely sells land he does not own without actually pointing out the plaintiff's land as a part of that sold.²⁰ In a sense the requisite intent

¹⁷ Note, 33 N.C.L. REV. 134 (1954). See, e.g., *Olson v. Pederson*, 206 Minn. 415, 288 N.W. 856 (1939). In this case, a dog trespassed on the plaintiff's land and jumped on the plaintiff, knocking her down; no cause of action was stated under the common law rule; many cases are reviewed. A statute has now changed the common law rule as to dog owners and imposes upon them the liability of an insurer. MINN. STAT. ANN. § 347.22 (1957). The wisdom of the common law rule itself was questioned in *Anderson v. Anderson*, 259 Minn. 412, 107 N.W.2d 647 (1961).

¹⁸ See *Pegg v. Gray*, 240 N.C. 548, 82 S.E.2d 757 (1954).

¹⁹ 246 N.C. 415, 98 S.E.2d 663 (1957). An analogous situation arises where a judgment creditor induces the sheriff to levy upon property which turns out not to be property of the judgment debtor at all. In this case, the judgment creditor is not liable merely because he is a judgment creditor, but only if he in some manner induces the levy or execution. See *Mica Indus., Inc. v. Penland*, 249 N.C. 120, 107 S.E.2d 120 (1959) (trespass to chattels).

²⁰ In several cases liability has been imposed upon a grantor of timber lands without any indication that he pointed out erroneous boundaries or otherwise

can be found for holding the defendant liable in such cases, since one is held to intend the natural consequences of his acts,²¹ and certainly the natural consequence of a conveyance is that the purchaser will enter the land so conveyed. Nevertheless, cases of this sort are troublesome, because as a matter of policy a vendor of land probably ought to be free to convey it and to shift at least some responsibilities to a willing purchaser. Probably he is not allowed to do so in certain cases for a combination of reasons, not the least of which is that if the plaintiff had sued the purchaser-trespasser, the purchaser might be able to obtain indemnity from the seller,²² and that being so, the plaintiff might as well be permitted to go against the seller directly. Another reason is probably associated with unjust enrichment, and where there is no economic gain and loss involved, there may be more reluctance to allow a recovery against the grantor.²³ The exact limits of these cases are not known, but it is apparent that they raise difficult problems, some of which are discussed elsewhere.²⁴

There are cases in which liability is imposed where neither intent in the broad sense nor negligence is present. These include not only cases involving blasting²⁵ or other extra-hazardous activity,²⁶ but also cases in which the particular property right in question is deemed absolute and protected even against unintended, non-negligent invasions. Landowners, at least in some states,²⁷ have absolute rights to lateral support of their land.²⁸ Sometimes there are absolute rights and duties in

misled the purchaser into a trespass except by conveying land or timber he did not own. *Owen v. Branning Mfg. Co.*, 168 N.C. 397, 84 S.E. 389 (1915); *Locklear v. Paul*, 163 N.C. 338, 79 S.E. 617 (1913). Some courts apparently would not impose liability—except perhaps for unjust enrichment—on such facts. See *McDermott v. Sway*, 78 N.D. 521, 50 N.W.2d 235 (1951).

²¹ See *Anderson v. United States*, 259 F. Supp. 148 (E.D. Pa. 1966); materials cited note 14 *supra*.

²² See *McBryde v. Coggins-McIntosh Lumber Co.*, 246 N.C. 415, 98 S.E.2d 663 (1957).

²³ See discussion note 31 *infra*.

²⁴ See Part II.

²⁵ See note 3 *supra*.

²⁶ Poison spray is an example. See *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961). See also *Wall v. Trogdon*, 249 N.C. 747, 107 S.E.2d 757 (1959) (a poison spray case decided on the ground that the plaintiff failed to prove cause in fact, and apparently the issue of strict liability was not argued).

²⁷ See Annot., 32 A.L.R.2d 1309, 1331 (1953) (duty of mine operators).

²⁸ There is apparently an absolute duty to avoid removal of support for adjoining land in its natural state, but only a duty of ordinary care to avoid injury by removal of support when the adjoining land is burdened by artificial structures. *Davis v. Summerfield*, 131 N.C. 352, 42 S.E. 818 (1902). But liability is "strict" in any case to the extent that the employer may be liable for even the negligence

connection with drainage of waters as well.²⁹ And, though courts have disagreed, there are decisions imposing liability for underground seepage of liquids that pollute waters on plaintiff's land, usually on a theory of nuisance rather than trespass.³⁰ In addition to these cases in which intent may not always be required, there are cases in which defendant not only damages the plaintiff's land, but profits in so doing, as where he cuts timber and sells it, or where he collects rent from a person living on the land.³¹ In such cases the liability should exist, not because defendant has trespassed but because he has profited from plaintiff's property. Accordingly, whenever such an unjust enrichment case can be made out, intent should not be required. Although the courts have not articulated this reasoning, the cases for the most part seem to be consistent with it, and it is probably accurate to say that intent is not required in these unjust enrichment situations.³²

INTERESTS PROTECTED: POSSESSION AND OWNERSHIP

In General

The law of trespass protects two quite distinct interests in land. One is ownership, the other is possession; however, before the nineteenth century procedural reforms, ownership interests were often protected by actions of *trespass on the case* and hence required proof of actual damages.³³ These interests may be united in one person, of course, but sometimes they are not, for one may possess land under the owner's authority, or one may possess it adversely to the owner, and in either

of an independent contractor who removes adjacent support. *Davis v. Summerfield*, 133 N.C. 325, 45 S.E. 654 (1903).

²⁹ See note 3 *supra*.

³⁰ See *Masten v. Texas Co.*, 194 N.C. 540, 140 S.E. 89 (1927); *Cities Serv. Oil Co. v. Merritt*, 332 P.2d 677 (Okla. 1958); *Iverson v. Vint*, 243 Iowa 949, 54 N.W.2d 494 (1952). In the latter case molasses was, according to custom, dumped in a drainage ditch; it percolated and contaminated plaintiff's well. Recovery was allowed without proof of fault. *Contra*, *Phillips v. Sun Oil Co.*, 307 N.Y. 328, 121 N.E.2d 249 (1954).

³¹ See, e.g., *London v. Bear*, 84 N.C. 266 (1881). One wrongly claiming land leased it to tenants. He then assigned the lease to the defendant, who collected the rents. The true owner then sued defendant and recovered. It may be said that the defendant is liable because he is "in possession" through the tenants. But this certainly seems a strange explanation, for surely he would not be liable if the tenants had not paid him rent. This is explicable only on the unjust enrichment grounds. See Part II.

³² See the fuller discussion in Part II. It must be added, however, that standard doctrine does not establish this view.

³³ See *Cherry v. Lake Drummond Canal & Water Co.*, 140 N.C. 422, 53 S.E. 138 (1906).

case may have an action against a trespasser. But even when the interests in possession and ownership are joined in one person, it is important for practical reasons to distinguish them, because rules of pleading and proof,³⁴ of parties,³⁵ of damages,³⁶ and even perhaps of substance³⁷ are much affected according to which legal interests are involved.

The purpose in protecting ownership or economic interests is easy to understand. If the defendant cuts the owner's timber or otherwise injures the value of the land it is not only clear that the owner may recover—even if he was not in possession—but it is also readily understandable.³⁸

The purpose in protecting possession is more complex. Where possession is under a lease, or similar authority, the possessor is in fact an owner of a limited estate, and the protections extended to full ownership naturally extend *pro tanto* to the limited ownership.³⁹ However, a possessor of land who has no right to be there at all and who is in fact possessing adversely to the true owner, is also protected against trespassers,⁴⁰ though, of course, not against the entry of the true owner or his licensees.⁴¹ Not every person on the land, of course, is a "possessor." A casual trespasser is not,⁴² nor a licensee or tenant at will⁴³ who is not exercising dominion over the land⁴⁴ or who is on it only sporadically.⁴⁵ But if one is in possession by reason of his dominion over the land, he

³⁴ See notes 73-80 *infra* and accompanying text.

³⁵ See notes 61-72 *infra* and accompanying text.

³⁶ *Id.*

³⁷ See notes 52-57 *infra* and accompanying text.

³⁸ Where the owner is not the possessor, he must show actual pecuniary loss. This is often symbolized by saying that his claim is not one for trespass at all, but for trespass on the case.

³⁹ See *Willis v. Branch*, 94 N.C. 142 (1886) (landlord's trespass upon tenant); Annot., 12 A.L.R.2d 1192 (1950).

⁴⁰ See notes 85-86 *infra*.

⁴¹ *Roberts v. Preston*, 106 N.C. 411, 10 S.E. 983 (1890); *Everett v. Smith*, 44 N.C. 303 (1853). The owner may likewise enter against one who is on the land with his permission, but who, as a mere licensee, has no right to exclude the owner. As to such a person, the owner's entry, or that of his agents, is no trespass at all. *Walton v. File*, 18 N.C. 567 (1836) (tenant at will).

⁴² *Patterson v. Bodenhammer*, 33 N.C. 4 (1850).

⁴³ *Cf. Walton v. Hulse*, 18 N.C. 567 (1836) (tenant at will, as against a true owner.) Such a tenant, however, or a licensee, might well exercise sufficient dominion over the land to establish possession that would allow him standing to sue a mere trespasser. See *Cohoon v. Simmons*, 29 N.C. 189 (1847).

⁴⁴ The test is whether the plaintiff is exercising "dominion" over the land, and this is contrasted with casual entry upon it. See *Morris v. Hayes*, 47 N.C. 93 (1854); notes 40 & 43 *supra*.

⁴⁵ See the instruction in *Hulse v. Brantley*, 110 N.C. 134, 14 S.E. 510 (1892).

may maintain trespass against all but the true owner,⁴⁶ even though he himself has no title.⁴⁷ One reason given for this rule is that it is convenient as a matter of judicial administration: "[F]or wretched would be the policy which required the title to be shewn in every instance where the peaceable possession was disturbed. . . . It would tend to broils and quarrels, and the possessor would resort to force. . . ."⁴⁸ Possession most often does in fact represent good grounds for being on the land, and it is convenient to avoid long proof about title when this is so. Beyond this, it is said that such a rule protects against "broils and quarrels," because the possessor will tend to protect himself against all but the true owner, at least, by force. And even the "evil" possessor who knows he has moved onto another's land ought to be protected against marauders, who otherwise might be free to plague the possessor and his family without limit.

The traditional emphasis on protecting the possessor from violence has perhaps obscured other more subtle interests involved in possession. The possessory interest today is largely a dignitary one. Possession is less a physical sanctuary from marauders than an emotional and dignitary one. The right of exclusive possession is a right to the control, self-reliance, and self-confidence such possession can give, and the protection of possession in trespass cases is closely allied with the protection of privacy.⁴⁹ The dignitary interest involved is further emphasized by the number of trespass cases in which plaintiffs recover for mental distress.⁵⁰ As all this serves to underscore, pecuniary harm is thus not

⁴⁶ See notes 48, 85 & 86 *infra*.

⁴⁷ *Id.*

⁴⁸ *Myrick v. Bishop*, 8 N.C. 485, 486 (1821). See also *Frisbee v. Town of Marshall*, 122 N.C. 760, 30 S.E. 21 (1898); *Cphoon v. Simmons*, 29 N.C. 189 (1847); *Horton v. Hensley*, 23 N.C. 163 (1840) (fact that a third person had title so that the plaintiff was a mere possessor was no defense). On similar principles, it is no defense that plaintiff holds title as a trustee or holds title in his own right. *Walker v. Fawcett*, 29 N.C. 44 (1846).

⁴⁹ This is well illustrated by the "Operation Bedcheck" affair, in which welfare workers, on a random basis and without search warrants or other authority, made midnight "raids" on homes of certain female welfare recipients to determine whether they had men in the house. Disapproving this tactic, the California Supreme Court spoke of it as an invasion of privacy, but clearly a case of common law trespass could equally be made out. See *Parrish v. Civil Serv. Comm'n*, 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Repr. 623 (1967).

⁵⁰ *E.g.*, *Brame v. Clark*, 148 N.C. 364, 62 S.E. 418 (1908), where plaintiff recovered for a trespass to his land and the attempted seduction of his wife that accompanied the trespass. Other cases involving mental anguish or dignitary interests in trespass actions are discussed in notes 98-101 *infra*.

required when the action is one to vindicate possessory rather than ownership rights.⁵¹

Ownership and Possession—Interests Excluded

Since actions on a trespass theory protect only ownership or possession of land, any interest that does not fall in one of these two categories is not protected, except as it may be incidental to a protected interest. Thus if defendant trespasses upon Blackacre, the neighbors to Blackacre cannot complain of the trespass,⁵² though depending upon the kind of trespass involved they may have some other kind of claim, such as one based upon nuisance.⁵³ The same idea excludes recovery for overflights of airplanes at 10,000 feet,⁵⁴ since the airspace in such an area is not reduced to possession, and is not now considered subject to ownership, though an intrusion in lower airspace that is in fact possessed or "owned" may be actionable.⁵⁵ It is usually thought that ownership or possession extends downward into the ground indefinitely and that underground trespasses are actionable.⁵⁶ There may be limits, however; as technology makes possible incursions into the earth at great depths, underground activities may come to seem more and more like airplane flights high above the ground, and where the underground incursion does not cause pecuniary loss nor affect the landowner's use, it may be that liability is inappropriate.

Intrusions that do not affect possession or ownership, but only use or enjoyment of land, are considered non-trespassory, and either they

⁵¹ *Schafer v. Southern Ry.*, 266 N.C. 285, 145 S.E.2d 887 (1966), *modified in other respects*, 267 N.C. 419, 148 S.E.2d 292 (1966); *Hutton & Bourbonnais v. Cook*, 173 N.C. 496, 92 S.E. 355 (1917).

⁵² *Cf. Waller v. Dudley*, 194 N.C. 139, 138 S.E. 595 (1927) (unnecessary or improper to join neighbors, though neighbors have a preference as between plaintiff and defendant in trespass action).

⁵³ In general, a nuisance is an unreasonable interference with one's use and enjoyment of his land, and it is usually nontrespassory. *See, e.g., Watts v. Pama Mfg. Co.*, 256 N.C. 611, 124 S.E.2d 809 (1962).

⁵⁴ Apparently everyone agrees that at such altitudes there is no trespass, in spite of the statement frequently made before the use of airplanes, that the landlord owned the airspace above the land. *See RESTATEMENT (SECOND) OF TORTS* § 159, comment *g* (1965). This is the implication of N.C. GEN. STAT. § 63-13 (1965).

⁵⁵ *See* N.C. GEN. STAT. § 63-13 (1965).

⁵⁶ A leading case is *Edwards v. Lee's Adm'r*, 265 Ky. 418, 96 S.W.2d 1028 (1936), where defendant owned land on which there was an entrance to a cave. Tourists were admitted and followed the cave which meandered under the surface of the plaintiff's land. Plaintiff recovered. Defendants have also been held, though often on a nuisance theory, for underground percolation of pollutants shifting to plaintiff's lands and contaminating his wells. *See* note 3 *supra*.

are not actionable at all, or are actionable only on theories such as nuisance⁵⁷ or eminent domain "takings."⁵⁸

On similar principles, an entry upon an easement is often no trespass against the easement holder, since the owner of the easement has no exclusive right to possession.⁵⁹ Only if there is interference with the effective *use* of the easement—a protected interest—can the easement owner have a remedy, for only then has he been wronged.⁶⁰ Indeed, such interference is usually not considered trespassory at all, since the easement owner, by definition, has no right to exclusive possession, but only a right to be free from actual interference with his use of the easement.

Ownership and Possession—Effects on Parties and Damages

The interest invaded determines both the proper party plaintiff and the kind of damages allowable; to a very large extent the question of parties and the question of damages are interrelated. An actual possessor of land is always a proper party plaintiff, for by definition, a trespass invades his possession and he will recover at least nominal damages.⁶¹ Of course, the possessor holding adversely to the true owner has no claim against the owner or his licensees,⁶² for they are not trespassers at all. But if the possessor is there by authority of the owner, or if the trespasser is not, the possessor will always have his action.⁶³ Thus even one who possesses adversely to the true owner has an action against a trespasser.⁶⁴

⁵⁷ See note 53 *supra*.

⁵⁸ See, e.g., *Caveness v. Charlotte, R. & S.R.R.*, 172 N.C. 305, 90 S.E. 244 (1916).

⁵⁹ Cf. *Ferrell v. Durham Tract. Co.*, 172 N.C. 682, 90 S.E. 893 (1916).

⁶⁰ As where an easement gives plaintiff the right to use a road and defendant obstructs it or damages it. *Strickland v. Shew*, 261 N.C. 82, 85, 134 S.E.2d 137, 139 (1964): "One, who by his deed has specifically granted to another an easement of access, may not obstruct the easement in such manner as to prevent or to interfere with its reasonable enjoyment by his grantee." See *Scaife v. Coleman* 239 Ark. 427, 389 S.W.2d 884 (1965); *Ennis v. Gran*, 16 N.J. Super. 184, 84 A.2d 35 (1951).

⁶¹ See *Lee v. Lee*, 180 N.C. 86, 104 S.E. 76 (1920); *Salisbury v. Western N.C.R.R.*, 98 N.C. 465, 4 S.E. 465 (1887).

⁶² *Roberts v. Preston*, 106 N.C. 411, 10 S.E. 983 (1890); *Everett v. Smith*, 44 N.C. 303 (1853).

⁶³ *Frisbee v. Town of Marshall*, 122 N.C. 760, 30 S.E. 21 (1898); *Cohoon v. Simmons*, 29 N.C. 189 (1847); *Horton v. Hensley*, 23 N.C. 163 (1840) (fact that a third person had title so that the plaintiff was a mere possessor was no defense); *Myrick v. Bishop*, 8 N.C. 485 (1821).

⁶⁴ *Hayes v. Williamson-Brown Lumber Co.*, 180 N.C. 252, 104 S.E. 527 (1920); *Simmons v. Defiance Box Co.*, 153 N.C. 257, 69 S.E. 146 (1910).

The true owner, however, may or may not have an action against the trespasser. If he is also a possessor he has the action on that basis. If he is not a possessor, however, as where he has leased the premises to a tenant, his interest in the land is an ownership interest only and not a possessory interest. Consequently, in such a case he recovers against the trespasser only if the trespasser has in fact invaded an ownership interest. If the trespasser causes no pecuniary harm at all, he clearly invades only the possessor's interest. Likewise, if the trespasser damages the tenant's goods or frightens the tenant's family, or removes a rose from a rosebush in the garden, no ownership rights have been invaded at all. If the trespasser removes the rosebush altogether, or cuts timber, or quarries rock, he damages the "inheritance" or freehold—ownership rights that will affect the value of the property not only now, but as of the time the owner will come back into possession. These distinctions have been recognized clearly by the North Carolina Supreme Court. Thus one who claims for physical damages to the freehold must show title in himself and not merely possession.⁶⁵ And though a tenant will have an action for disturbance of his possession,⁶⁶ if there is permanent damage to the freehold, the landlord, as owner, will recover damages for that.⁶⁷

As all this would indicate, a remainderman or reversioner will be a proper party plaintiff, since he has an ownership interest, but of course his claim will fall under the same limits as that of any other owner; and he must show, if he is not a possessor, permanent damage to the freehold as a basis for recovery.⁶⁸ For practical reasons, contingent re-

Even a wrongful possessor who is in fact in possession is allowed recovery against the true owner where the true owner attempts a forcible re-entry, since the owner should avoid a breach of the peace and resort to the courts for redress. Cf. *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934) (owner sued for forcible trespass, but recovery denied because owner did not use force, only aggressive language).

⁶⁵ *Daniels v. Roanoke R.R. & Lumber Co.*, 158 N.C. 418, 74 S.E. 331 (1912); *Salisbury v. Western N.C.R.R.*, 98 N.C. 465, 4 S.E. 465 (1887).

⁶⁶ *Tripp v. Little*, 186 N.C. 215, 119 S.E. 225 (1923); *Lee v. Lee*, 180 N.C. 86, 104 S.E. 76 (1920). See also cases cited note 63 *supra*.

⁶⁷ *Tripp v. Little*, 186 N.C. 214, 119 S.E. 225 (1923) (Hoke, J.); *Cherry v. Lake Drummond Canal & Water Co.*, 140 N.C. 422, 53 S.E. 138 (1906). See *Lamb v. Swain*, 48 N.C. 370 (1856). A number of cases state that in trespass for timber cutting, plaintiff must allege and prove that he is the owner. These are evidently decided upon the principle stated in the text and presumably do not mean that a possessor could not recover with appropriately limited damages. See *Norman v. Williams*, 241 N.C. 732, 86 S.E.2d 593 (1955); *Johnson v. Eversole Lumber Co.*, 147 N.C. 249, 60 S.E. 1129 (1908).

⁶⁸ *Cherry v. Lake Drummond Canal & Water Co.*, 140 N.C. 422, 53 S.E. 138 (1906). The Court considered the action to be one of "trespass on the

maindermen are not permitted to sue for a trespass⁶⁹ since this would involve impossible calculations.

It is sometimes said that one cotenant may not sue another cotenant for trespass. This is not entirely accurate. Cotenants have joint rights of possession of the land, and consequently the entry of one is not a trespass at all, for it must be considered authorized. Put another way, the complaining cotenant has no ground for complaint, for he never had any legally protected interest in exclusive possession and a cotenant's entry is not an invasion upon exclusive possession at all. If a cotenant tears the roof off a house held in tenancy with another, however, there is an invasion of the ownership interest, and the innocent cotenant may recover for such an invasion.⁷⁰ Very likely the action will be called one for "waste,"⁷¹ but whatever it is called, it simply means that a cotenant's *ownership* interest is protected against trespass by his cotenant.

Probably a somewhat similar analysis may be made of problems that sometimes arise when there is a sale of land not fully paid for and a trespass then occurs, though the problems in these cases are more complex.⁷²

Ownership and Possession—Effects on Pleading and Proof and Res Judicata

If the plaintiff claims permanent damages to the freehold, as in timber cutting claims, he is necessarily asserting an ownership interest. In this kind of case he must prove his title; probably he should also plead it. At any rate, when plaintiff's title is denied by defendant, the burden is upon plaintiff to prove his title, and he will lose if he does

case" rather than pure "trespass," but with the passing of the forms of action, this means only that plaintiff must show actual pecuniary damages, which in this situation is clear in any event.

⁶⁹ Latham v. Roanoke R.R. & Lumber Co., 139 N.C. 9, 51 S.E. 780, (1905).

⁷⁰ Jones v. McBee, 222 N.C. 152, 22 S.E.2d 226 (1942); Anders v. Meredith, 20 N.C. 199 (1839).

⁷¹ Cases cited note 70 *supra*.

⁷² Earlier cases held or stated that the equitable owner could not recover for a trespass took place before he took possession, but the legal owner held as "trustee for the purchaser." Henley v. Wilson, 77 N.C. 216 (1877); Jones v. Taylor, 12 N.C. 434 (1828); McMilan v. Hafley, 4 N.C. 186 (1815). Later cases have allowed an equitable owner to recover. Skinner v. Terry, 134 N.C. 305, 46 S.E. 517 (1904); Taylor v. Eatman, 92 N.C. 601 (1885) (ejectment on equitable title; deed to wife was void at law but good in equity). On the other hand, if a claim for trespass has accrued before the sale takes place, a deed from the owner to a new purchaser does not transfer any right of action the owner might have. Daniels v. Roanoke R.R. & Lumber Co., 158 N.C. 418, 74 S.E. 331 (1912).

not succeed in doing so. Quite a large number of cases involve situations of this sort,⁷³ in which title is very much an issue, for the plaintiff must rely upon it and not upon the weakness of the defendant's claim.⁷⁴ At the same time it must be remembered that title is not an issue at all in a trespass case where the plaintiff sues only to vindicate his possessory rights.⁷⁵ This is why in some cases the Court emphasizes title while in others it emphasizes possession. The "essence of trespass" is disturbance of possession—where possession rights are being vindicated. Where ownership rights are asserted, the "essence of trespass" is injury to ownership. Thus title must be pleaded or at least proved where damages are sought for injury to the freehold—permanent injury to the land.

The same distinction obviously also affects the description of the land required in pleadings and judgments. Where the plaintiff's claim is based solely upon possession, the land probably need not be described in any legal sense.⁷⁶ It is enough to give some general indication of its location, as by indicating the county or town where the land lies.⁷⁷ The legal description of its boundaries in such a case is probably of no interest, but if it is, a motion to make more definite can be made by the defendant.⁷⁸ Where the plaintiff's claim is one involving ownership interests, or *where the defendant justifies his entry by asserting title superior to plaintiff's*, title is obviously involved just as it is in the daughter action of ejectment. Since title is involved and ought to be cleared up if possible, a good description of the land in the pleadings and proof, if not a necessity, is at least good practice.⁷⁹ Even in such a

⁷³ *Scott v. Lewis*, 246 N.C. 298, 98 S.E.2d 294 (1957); *Williams v. Robertson*, 235 N.C. 478, 70 S.E.2d 692 (1952); *Locklear v. Oxendine*, 233 N.C. 710, 65 S.E.2d 673 (1951); *W.M. Ritter Lumber Co. v. Montvale Lumber Co.*, 169 N.C. 80, 85 S.E. 438 (1915).

⁷⁴ *Bowers v. Mitchell*, 258 N.C. 80, 128 S.E.2d 6 (1962); *Tripp v. Keais*, 255 N.C. 404, 121 S.E.2d 596 (1961); *Shingleton v. North Carolina Wildlife Res. Comm'n*, 248 N.C. 89, 102 S.E.2d 402 (1958); *Hayes v. Ricard*, 244 N.C. 313, 93 S.E.2d 540 (1956); *Andrews v. Bruton*, 242 N.C. 93, 86 S.E.2d 786 (1955); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953); *Meeker v. Wheeler*, 236 N.C. 172, 72 S.E.2d 214 (1952); *Smith v. Benson*, 227 N.C. 56, 40 S.E.2d 451 (1946).

⁷⁵ Where the trespass is "against his possession" the plaintiff is not required to prove title, but only lawful possession and damages for interfering therewith." *Short v. Nance-Trotter Realty, Inc.*, 262 N.C. 576, 578, 138 S.E.2d 210, 211 (1964). "Lawful" possession is in fact any possession. See note 48 *supra*.

⁷⁶ *Whitaker v. Forbes*, 68 N.C. 228 (1873). See *Womack v. Carter*, 160 N.C. 286, 75 S.E. 1102 (1912).

⁷⁷ *Whitaker v. Forbes*, 68 N.C. 228 (1873) ("a certain lot in Enfield" held sufficient).

⁷⁸ *Womack v. Carter*, 160 N.C. 286, 75 S.E. 1102 (1912).

⁷⁹ *Andrews v. Bruton*, 242 N.C. 93, 86 S.E.2d 786 (1955). In *Coastal Land*

case, however, the absence of a good description in the pleadings does not seem critical if the judgment which ultimately goes on record contains an adequate description. The judgment is of course insignificant where only possession is involved, but is quite important as a title document when title is in issue.

Since title is not in issue in a trespass action involving only possession, a judgment for the plaintiff in such a case is not *res judicata* or estoppel by judgment as to plaintiff's title.⁸⁰ The favorable judgment might have been based solely upon plaintiff's right to possession and not upon his title at all. And unless there was permanent damage to the freehold, the plaintiff could not have even put title into issue. Thus considerable care should be taken to frame the pleadings and issues to indicate clearly whether title is or is not involved so as to obtain or avoid the *res judicata* effect as desired.

Actual and Constructive Possession

There is a good deal of old lore concerning possession. Most of it has gradually disappeared since the forms of action were abolished,⁸¹ but even some modern cases may occasionally speak in the fictions of an earlier day and some mention should be made of these.

The main fiction employed is that trespass rules always protect possession. As the trespass action clearly protected ownership as well, the courts redefined possession so as to include ownership. Thus it was said that if one had title and the land was not in the actual possession of anyone else, then he had "constructive possession."⁸² The courts in fact ignored any supposed requirement that the land be "vacant" and found constructive possession in any title holder.⁸³ Thus where owner-

& Timber Co. v. Eubank, 196 N.C. 724, 146 S.E. 857 (1929), the Court held insufficient a description of the land as a "certain tract" in Onslow County east of a railroad track and containing 5,000 acres.

⁸⁰ See *Fincannon v. Sudderth*, 144 N.C. 587, 57 S.E. 337 (1907).

⁸¹ In *Bynum v. Carter*, 26 N.C. 310, 316 (1844), Ruffin, C.J., said: "It is not doubted that the entry of the owner upon a trespasser will enable the former to maintain trespass. . . . [But it] must be an entry for the purpose of taking possession. . . ." In *White v. Cooper*, 53 N.C. 48 (1860), the owner out of possession went on the land with witnesses, read defendant possessor a statement in which the plaintiff-owner claimed title, and stalked off; this was an entry sufficient to enable the owner to maintain trespass. Presumably all this would be unnecessary today.

⁸² See *Waters v. Dennis Simmons Lumber Co.*, 154 N.C. 232, 70 S.E. 284 (1911); *Smith v. Ingram*, 29 N.C. 175 (1847); *Gilchrist v. McLaughlin*, 29 N.C. 310 (1847); *Dobbs v. Gullidge*, 20 N.C. 197 (1838).

⁸³ Thus a comparatively modern statement of the constructive possession fiction:

ship rights were asserted, they were protected under the label of constructive possession. The constructive possession definition treated the owner as the "possessor" when no one else was in possession of the land. When the owner put a tenant on the land, however, the tenant was the possessor, and the owner was not. In such a case the owner recovered only if he could prove actual damage—that is, pecuniary loss. This rule, which made very good sense indeed, was explained on the now outmoded ground that the owner's action was one of *trespass on the case* and not one of trespass at all,⁸⁴ and that in the action *trespass on the case*, pecuniary loss is always essential to recovery. The simple explanation seems to be the one given here—namely that the two interests of ownership and of possession were each protected to their full extent, and that actual pecuniary loss was required in certain situations because in those situations there was no other legal interest worthy of protection. The use of the fiction that only possession rights were being protected probably has obscured a good deal of the common sense that in fact exists in trespass law. Relatively little difficulty is encountered when "actual possession" rather than constructive possession is involved. Actual possession involves physical presence upon the land or upon some portion of it, and although this presence need not be continuous, it must involve more than an occasional or casual entry.⁸⁵ The presence need not be "lawful," at least not in the sense that it is accompanied by title or

The action of trespass *quare clausum fregit* is the appropriate remedy for the wrongful invasion of another's possession of realty. It lies for injury to the possession, and . . . it is required that the plaintiff should establish by proper proof that he was in the actual or constructive possession of the property at the time the wrong was done. . . . If there is no evidence of actual possession, and the plaintiff seeks to recover by reason of constructive possession, it becomes necessary for him to show title and to show that such title existed in him at the time of the alleged trespass.

Gordner v. Blades Lumber Co., 144 N.C. 110, 111, 56 S.E. 695, 696 (1907). See also Elliot v. Roanoke R.R. & Lumber Co., 169 N.C. 394, 86 S.E. 506 (1915) (plaintiff has burden of proving title when he relies on constructive rather than actual possession); Drake v. Howell, 133 N.C. 162, 45 S.E. 539 (1903); McLean v. Murchison, 53 N.C. 38 (1860); Smith v. Wilson, 18 N.C. 40 (1834); Phelps v. Blount, 13 N.C. 177 (1829) (title by estoppel is constructive possession). See note 81 *supra* (indicating the court's concern at one time with the owner's establishing "possession" by making an entry upon the land).

⁸⁴ See note 68 *supra*.

⁸⁵ See the instruction apparently approved in Hulse v. Branley, 110 N.C. 134, 14 S.E. 510 (1892). See also Hayes v. Williamson-Brown Lumber Co., 180 N.C. 252, 104 S.E. 257 (1920); Simmons v. Defiance Box Co., 153 N.C. 257, 69 S.E. 146 (1910); Morris v. Hayes, 47 N.C. 93 (1854); Patterson v. Bodenhammer, 33 N.C. 4 (1850) (storing boxes in house not "possession"). Cf. Kaylor v. Sain, 207 N.C. 312, 176 S.E. 560 (1934).

permission of the owner; on the contrary, it may be possession completely adverse to the owner,⁸⁶ and such possession will be a basis for maintaining an action against any one but the owner.⁸⁷

LIABILITY FOR UNINTENDED AND UNFORESEEN CONSEQUENCES

It is generally said that a trespasser is liable not only for the damages he intends to cause or causes negligently, but also for all damages he does in fact cause. In other words, he is liable for unintended and unforeseeable consequences of his trespass—"any consequence which naturally flows."⁸⁸ This extensive liability is said to protect not only the possessor or owner, but also his immediate family or his "household."⁸⁹ There is support for such statements in North Carolina decisions and in others,⁹⁰ but the exact scope of this unusual liability is far from clear.

In *Lee v. Stewart*,⁹¹ the defendant, though he had been told to stay

⁸⁶ But even the owner would be liable for a forcible entry upon his own land and against a wrongful possessor, since the policy is to discourage use of force and to encourage resort to the courts. Cf. *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934) (no recovery against true owner on facts, since he used only aggressive language).

⁸⁷ See notes 48 & 85 *supra*.

⁸⁸ *Hatchell v. Kimbrough*, 49 N.C. 163, 165 (1856). See RESTATEMENT (SECOND) OF TORTS § 162 (1965).

⁸⁹ RESTATEMENT (SECOND) OF TORTS § 162 (1965).

⁹⁰ *E.g.*, *St. Petersburg Coca-Cola Bottling Co. v. Cuccinello*, 44 So. 2d 670 (Fla. 1950). There a trespasser (apparently only a technical trespasser) ran over a child. The court held "unavoidable accident is not a defense to an action for trespass." *Id.* at 677. However, the court also found negligence on the part of the trespasser. In *Keesecker v. G.M. McKelvey Co.*, 141 Ohio St. 162, 47 N.E.2d 211 (1943), a delivery man went into a glassed-in porch to deliver a package; he was, as it turned out, at the wrong house, and his entry allowed the plaintiff, a mentally deficient but apparently normal child, to fall out the door. The Ohio court held that the child could recover if a jury found the delivery man to be a trespasser whose trespass was a "proximate cause" of the injury, but that there would be no liability if the jury found him to be a licensee.

In *Brabazon v. Joannes Bros.*, 231 Wis. 426, 286 N.E. 21 (1939), defendant entered plaintiff's store and sought to sell a fly spray. Plaintiff refused to buy the spray, but defendant proceeded to demonstrate it anyway. The spray caused plaintiff to be sick. The Wisconsin court held that the jury should determine whether defendant had implied permission or whether his implied permission had terminated. The court apparently felt that there would be liability if defendant had exceeded any implied permission he had. In such a case, however, there seems to be more than the minimum "intent" required for ordinary trespass cases.

In *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St. 2d 27, 236 N.E.2d 79 (1968), the rule was again stated that a trespasser is liable for all "proximate" results of his trespass, but it seems clear enough that the trespasser was not being held to any unusual liability; he had set a fire and was held liable when it spread. In the same case a different trespasser, who did not participate in the setting of the fire, was not held liable.

⁹¹ 218 N.C. 287, 10 S.E.2d 804 (1940).

away, went on the plaintiff's land and used his tobacco barn. Thirty minutes after he left the premises, fire was noticed in the barn, probably as a result of the defendant's shattering tobacco in the barn near a furnace. The defendant was held liable on the ground that a trespasser is liable for "all damages which proximately resulted from his wrongful act, whether or not produced intentionally or through negligence."⁹² This result seems entirely appropriate on the facts since it is quite likely on the basis of plaintiff's proof that defendant was negligent, and on the same basis it is certain that the trespass was a conscious one, and not merely a minimal or mistaken intrusion. The decision hardly seems to warrant the conclusion that a trespassing defendant is liable for any unforeseen harm he causes; it does not answer for a case in which defendant is not morally at fault and where he clearly is not negligent. And, of course, it does not hold that he is liable for a fire he did not cause, though probably the court is more liberal in permitting a finding that his acts in fact caused the fire than it has been in cases where no trespass has been involved.⁹³ In this respect *Bear v. Harris*⁹⁴ is similar. In that case a trespasser moved plaintiff's ship from a wharf in Wilmington down the Cape Fear River to a beach. A storm arose, and the ship was either blown over or struck by another vessel and sunk. There was no indication in the opinion that the storm was foreseeable; in fact, the defendant testified that it "was one of the severest ever known in the river."⁹⁵ The defendant further argued that the ship would have been destroyed in the storm even if she had been left at her original berth. The Court held the plaintiff could recover and did not even discuss the unforeseeability of the storm and damage. Further, the Court held that defendant was liable even though the storm might have caused the same damage without the defendant's trespass.⁹⁶ There is an earlier case on distinguishable facts that seems, in spite of factual differences, difficult to reconcile in principle.⁹⁷

⁹² *Id.* at 289, 10 S.E.2d at 805.

⁹³ The North Carolina Court has sometimes been quite strict in requiring rather good proof of cause-in-fact, though perhaps not so strict in *Lee*. See *Maharias v. Weathers Bros. Moving & Storage*, 257 N.C. 767, 127 S.E.2d 548 (1963) (fire). See Note, *Torts—Causal Relationship*, 46 N.C.L. REV. 1001 (1968).

⁹⁴ 118 N.C. 476, 24 S.E. 364 (1896).

⁹⁵ *Id.* at 478.

⁹⁶ "There is no evidence that it *must* have happened. The defendant cannot qualify his wrong in that way and insist on the *possibility* of a loss if he had not exceeded his privilege." *Id.* at 481, 24 S.E. at 364 (emphasis added).

⁹⁷ *White v. Griffin*, 49 N.C. 139 (1856). Plaintiff owned a vessel chartered

Other North Carolina cases are, like *Lee*, inconclusive on the question how far the trespasser is liable. A number of cases involve recoveries for mental anguish suffered by a member of the possessor's family or by the possessor himself as a result of trespass. In *Brame v. Clark*,⁹⁸ the defendant trespassed upon plaintiff's land and while trespassing attempted to seduce the plaintiff's wife. The plaintiff was allowed to recover for this as an element of damages incident to the trespass. A wife was allowed to recover for mental anguish in *Saunders v. Gilbert*,⁹⁹ where defendants trespassed by firing bullets at the plaintiff's house, and in *May v. Western Union Telegraph Co.*,¹⁰⁰ another wife was allowed to recover when the trespasser upon the husband's land sang bawdy songs that upset the wife. In still another case a woman recovered for a miscarriage when defendant trespassed in a very hostile manner and threatened to fight with the woman's brother.¹⁰¹ The defendant's conduct in each of these cases involved more than a trespass to land. Probably in each case he would be liable for his conduct even if it had occurred on his own land, either because his conduct constituted an assault¹⁰² or an intentional infliction of mental distress.¹⁰³ Similarly, cases imposing liability for "trespass" upon a grave are probably most realistically explained as cases involving intentional infliction of mental anguish.¹⁰⁴ In any event, none of these cases makes a very convincing argument for the supposed rule holding a trespasser liable for unintended and unforeseeable consequences, since in all of them harm to persons on the land was foreseeable and perhaps intended as well.

Aside from these cases there is *Bridgers v. Dill*,¹⁰⁵ where the trespasser pulled down fences so that animals got in and destroyed the

to one Burgess. As Burgess was about to sail, defendant detained the vessel in port and so held it one week. At the end of this time, Burgess was permitted to sail, which he did. He encountered a "violent tempest" that he would not have encountered but for the wrongful detention, and the ship was wrecked. The Court held that the plaintiff could recover nominal damages, but could not recover for loss of the vessel. Of course, this case, as well as *Bear v. Harris*, 118 N.C. 476, 24 S.E. 364 (1896), involve trespasses to chattels rather than to land.

⁹⁸ 148 N.C. 364, 62 S.E. 418 (1908).

⁹⁹ 156 N.C. 463, 72 S.E. 610 (1911).

¹⁰⁰ 157 N.C. 416, 72 S.E. 1059 (1911).

¹⁰¹ *Martin v. Spencer*, 221 N.C. 28, 18 S.E.2d 703 (1942). See also *Beasley v. Byrum*, 163 N.C. 3, 79 S.E. 270 (1913) (defendant who entered and shot dog in wife's presence guilty of forcible trespass).

¹⁰² See RESTATEMENT (SECOND) OF TORTS § 21 (1963).

¹⁰³ See RESTATEMENT (SECOND) OF TORTS § 46 (1965).

¹⁰⁴ See *Matthews v. Forrest*, 235 N.C. 281, 69 S.E.2d 553 (1952) (removing flowers from grave of plaintiff's wife; good cause of action stated).

¹⁰⁵ 97 N.C. 222, 1 S.E. 767 (1887).

landowner's crops, and *Welch v. Piercy*,¹⁰⁶ where the trespasser pulled down fences so that the landowner's animals got out and were lost. The Court in these cases did not discuss foreseeability. In *Bridgers*, the Court said that crop damage "was the direct and proximate damage resulting from the wrong . . .,"¹⁰⁷ and in *Welch* it said that every man was "presumed to intend any consequence which naturally flows from an unlawful act. . . ."¹⁰⁸ On the same basis, a tenant recovered against her landlord for loss of an eye that resulted because the landlord had removed the roof of the house causing the tenant to catch a cold "which fell into her eye. . . ."¹⁰⁹

The exact extent of the trespasser's liability for unintended and unforeseen harm is certainly not clear from these cases. It seems to be true that the trespasser, if he is deliberate,¹¹⁰ is liable for at least some injuries he neither intended nor foresaw. And it is clear that it is no defense to say that he could not have anticipated the way the injury came about or that he could not have anticipated the extent of the injury.¹¹¹ Whether he is liable for harm he causes while trespassing if the harm is wholly unrelated to the trespass is, as yet, unclear, though it may well depend upon whether the trespass was a deliberate wrongdoing or something less.

In any event, the tendency to allow recoveries for damages that may be only remotely related to the trespass clearly does not allow recovery for damages not caused at all by the trespass.¹¹² And very probably the courts will demand clearer proof of damage when the harm claimed is pecuniary, such as lost profits, rather than tangible, such as destroyed crops.¹¹³

¹⁰⁶ 29 N.C. 365 (1847).

¹⁰⁷ 97 N.C. at 226, 1 S.E. at 769.

¹⁰⁸ 29 N.C. at 370.

¹⁰⁹ *Hatchell v. Kimbrough*, 49 N.C. 163, 164 (1856).

¹¹⁰ The trespasser who knows he is trespassing, but who also knows his act carries no social stigma presents a difficult problem. The man who pulls into another's driveway to turn his car around is a trespasser, presumably. Should he be held liable if without fault he runs over the landowner's child, who suddenly darts in front of him? Cf. *Keesecker v. G.M. McKelvey Co.*, 141 Ohio St. 162, 47 N.E.2d 211 (1943).

¹¹¹ See notes 88, 90 & 92 *supra*.

¹¹² Cf. *Schafer v. Southern Ry.*, 266 N.C. 285, 145 S.E.2d 887 (1966): Defendant railroad dug a ditch between its track and plaintiff's building. This allegedly caused water to accumulate next to the foundation so that the building cracked. The Court indicated that defendant would be liable if in fact the trespass caused the crack. See also notes 96-97 *supra*.

¹¹³ See *Willis v. Branch*, 94 N.C. 142 (1886). This involved a trespass to plaintiff's theatre, which caused it to close. The Court said it would allow a

AUTHORIZED INTRUSION

Consent

There is no trespass at all if the defendant has a right to be upon the land and does not exceed his rights there, since trespass is an unauthorized intrusion.¹¹⁴ Thus in many cases the "defense" to a trespass action is that the defendant has a right to be upon the land because he owns it or an interest in it.¹¹⁵ In many other cases the "defense" is that, though the defendant had no right to be upon the land by reason of title, he had a right to be there by reason of the consent of the owner or possessor.¹¹⁶ Technically this should not be a matter of defense at all; rather it is a part of the plaintiff's case to prove that defendant was not only upon the land but that his presence there was not an authorized one. Thus if the defendant raises the title issue, the plaintiff must prove his own title or other right to exclusive possession, and he cannot merely rely upon the weakness of defendant's title.¹¹⁷ The same is probably true with the "defense" of consent; plaintiff must prove that the entry is unauthorized, at least if defendant raises the issue, which means there must be evidence that the intrusion was not consented to by someone with authority.¹¹⁸ Ordinarily this is not a problem, since the nature of the defendant's act is usually good evidence by itself that there was no consent, and in any event the plaintiff can usually testify that none was given. There is an important difference, however, between saying that defendant may prove consent as a defense and saying that plaintiff must prove a lack of consent or other authority for defendant's entry. The difference is the burden of proof; it would seem that

recovery for such provable economic harm as lost engagements existing at the time of the trespass, but would not allow a recovery for profits that might have been made from uncontracted-for engagements.

¹¹⁴ See RESTATEMENT (SECOND) OF TORTS § 158, comment *c* (1965).

¹¹⁵ *E.g.*, notes 73-74 *supra*.

¹¹⁶ *E.g.*, *Williford v. Williams*, 127 N.C. 60, 37 S.E. 74 (1900) (burden is on defendant to show consent, but see note 118 *infra* as to this); *Cox v. Dove*, 1 N.C. 73 (1796) (letter giving permission).

¹¹⁷ See note 74 *supra*.

¹¹⁸ The issue whether consent is a privilege and a matter for defense or whether lack of consent is an element of plaintiff's case to be proved by him does not arise often. In *Williford v. Williams*, 127 N.C. 60, 37 S.E. 74 (1900), the Court said that defendant, having admitted the cutting of timber on plaintiff's land, had the "burden of proof" on the issue of consent. Very probably this means only that the plaintiff has made a *prima facie* case and that the jury would be justified in believing that no consent was given to cut timber unless the defendant persuaded it otherwise. RESTATEMENT (SECOND) OF TORTS § 167, comment *c*, places the burden of proving consent on the one relying on it.

that burden is or should be upon the plaintiff to show that the intrusion complained of was unauthorized. This, of course, would not prevent defendant from showing consent if he could do so, and in practice that is often how the consent issue arises.

In any event, whoever has the burden of proof, if it is established that the plaintiff consented to the intrusion upon the land, there is no trespass—at least as to the plaintiff.¹¹⁹ Any evidence of consent, or “license” as it is sometimes called, is admitted as bearing on the issue, subject only to the normal rules of evidence. Sometimes the consent is explicit and perhaps even in writing.¹²⁰ Conditional sales contracts and similar instruments often authorize repossession when payments are overdue, and usually these also explicitly authorize entry upon land if necessary to effect the repossession.¹²¹ Even where an entry upon land is not expressly authorized, there may be a privilege afforded by law that permits peaceful entry to effect repossession,¹²² though of course neither consent granted by the plaintiff nor a privilege granted by law justifies a forceful entry upon the land.¹²³

The effectiveness of consent to avoid liability for trespass is not derived from any theory that consent conveys an interest in land—emphatically it does not convey such an interest.¹²⁴ Rather liability is avoided by consent because the consent shows that the defendant is not a trespasser at all. Consequently, there is no requirement that the consent

¹¹⁹ A tenant's consent, for example, would not make a trespasser any less the trespasser as to the landlord, if the trespasser did permanent damage to the freehold, *i.e.*, if he invades any recognized interest of the landlord. But the tenant's consent to picnic in the field, if not exceeded, is good protection for the picnicking intruder, for as to the tenant he has consent, and as to the landlord he is not a trespasser and never was, since he did not invade any interest of the landlord's.

¹²⁰ *Scarborough v. Calypso Veneer Co.*, 244 N.C. 1, 92 S.E.2d 435 (1956) (timber deed); *Cox v. Dove*, 1 N.C. 72 (1796) (letter from plaintiff giving permission may be read in evidence).

¹²¹ *E.g.*, *McDowell v. Talcott, Inc.*, 183 So. 2d 592 (Fla. App. 1966); *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962); *Freeman v. General Motors Accept. Corp.*, 205 N.C. 257, 171 S.E. 63 (1933). The validity of such provisions is a problem usually allocated to commercial law rather than the law of trespass.

¹²² As to privileges afforded by law generally see pp. 58-68 *infra*. The UNIFORM COMMERCIAL CODE § 9-503 explicitly authorizes taking possession of collateral “without judicial process if this can be done without breach of the peace. . . .” N.C. GEN. STAT. § 25-9-503 (1965). See also RESTATEMENT (SECOND) OF TORTS § 183, comment *g* (1965).

¹²³ *Freeman v. General Motors Accept. Corp.*, 205 N.C. 257, 171 S.E. 63 (1933). *But see* *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934); *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934); notes 21-22 *supra*.

¹²⁴ See pp. 55-58 *infra*.

be in writing. It may be oral¹²⁵ or indeed it may be merely implied from all the circumstances.¹²⁶ Since there is no particular form required to establish consent and the problem is only whether consent was given and what its scope was, it is at least conceivable that legal instruments may evidence consent even when they fail as legal instruments. A consent is not a contract, however, and ordinarily it is revocable at any time.¹²⁷

Both the existence of a consent and its scope may be implied rather than explicit. If the alleged consent is embodied in a document or results from some interest defendant has in the land, as under a timber deed, the document may require construction.¹²⁸ If the consent is to be inferred from circumstances, the circumstances will require interpretation. One common principle involved where consent by implication is relied upon is that one impliedly consents to whatever is reasonably necessary to accomplish anything explicitly consented to. Thus, if a land owner agrees that his car may be repossessed, he impliedly agrees that defendant may enter the land if necessary to accomplish the repossession,¹²⁹ though of course he does not consent to removal of his own belongings that may be in the car.¹³⁰ Another principle is that until given notice to the contrary, a defendant may usually assume the landowner consents to what is customarily consented to—for example, that acquaintances, certain salesmen, probably information seekers, may enter inhabited land. In addition, any behavior of the landowner that reasonably conveys a willingness to suffer an entry implies a consent, as where the landowner motions for an entry, or where he does not forbid the entry of a man walking toward the land. Even the landowner's conduct after the entry may have evidentiary value; if he is silent and makes no objection to the entry, this "acquiescence" will, under some circumstances, tend to show his consent,¹³¹ though this will always depend on circumstances and silence is not always consent.¹³²

¹²⁵ See *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934); *Gardner v. Rowland*, 24 N.C. 247 (1842).

¹²⁶ See pp. 52-53 *infra*.

¹²⁷ See pp. 55-58 *infra*.

¹²⁸ *Scarborough v. Calypso Veneer Co.*, 244 N.C. 1, 92 S.E.2d 436 (1956); *Roper Lumber Co. v. Richmond Cedar Works*, 158 N.C. 161, 73 S.E. 902 (1912).

¹²⁹ See note 121 *supra*.

¹³⁰ *Rea v. Universal C.I.T. Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962) (defendant privileged to enter land to repossess, but is liable for items locked in car and belonging to plaintiff).

¹³¹ See *Antonio v. General Outdoor Adver. Co.*, 414 P.2d 289 (Okla. 1966).

¹³² *Northern States Power Co. v. Franklin*, 265 Minn. 391, 122 N.W.2d 26 (1963) (silence not conclusive so as to permit summary judgment).

The consent, whether explicit or implicit, may be limited in space or time, or according to a purpose; or it may be conditioned upon defendant's conduct. It is frequently a problem how far an implied consent extends in one of these respects. Unless revoked, the implied consent extends to allow whatever is necessary to achieve the object for which the consent was given. Where two adjoining landowners agreed to lay a rail fence along their common boundary, one-half of the bottom rail on the land of each landowner, and the defendant located a portion of this on the plaintiff's land but later removed it, consent was a defense. "Of course in such arrangements exactness is not expected or required. . . ."¹³³ Similarly, where plaintiff consents to timber cutting by giving a "timber deed," he necessarily expects the cutting to be done in an ordinary manner and must expect that the trees will fall and that some will stop up drains or do other damage. Only if the defendant is negligent in cutting timber or cuts it in a way to cause un-consented-to damage is he liable in such a case, again on the principle that the plaintiff impliedly consented to all the normal incidents of timber cutting.¹³⁴ But though a defendant may act as reasonably necessary to accomplish whatever was consented to, he may not go beyond that and act for any other purpose; he has no more consent than is "essential to the enjoyment" of that to which plaintiff consented.¹³⁵ Thus where the defendant has permission to store goods on plaintiff's land, he may ordinarily remove the goods, but he must not cause unnecessary or unreasonable damages to plaintiff's goods or land in doing so, as by allowing swine

¹³³ *Whitfield v. Bodenhammer*, 61 N.C. 362, 364 (1867). As was common at this date, the Court expressed the idea of consent in terms of defendant's "joint possession" of the boundary area. The fundamental notion is clearly one of implied consent, however.

¹³⁴ *Lewis v. Butters Lumber Co.*, 199 N.C. 718, 155 S.E. 726 (1930). Similar is *Waters v. Greenleaf-Johnson Lumber Co.*, 115 N.C. 648 20 S.E. 718 (1894), where the plaintiff by contract authorized defendant to cut timber and to construct a train road for removal of the timber. *Held*, error to allow damages for removal of "so much timber as . . . was reasonably necessary . . . to construct a way" for the trains. In granting the right to build a road, "the plaintiff, by necessary implication, agreed to surrender his claim to such damage to his land as might be incident to the skillful construction of what he had empowered Simmons to build." 115 N.C. at 654, 20 S.E. at 720. In *Roper Lumber Co. v. Richmond Cedar Works*, 158 N.C. 161, 73 S.E. 902 (1912), the defendant sought, unsuccessfully, to invoke the same principle. There the plaintiff had written to the defendant that, "Should there be any desire on your part to remove the timber . . . you will not find us unwilling to give our permission." 158 N.C. at 165, 73 S.E. at 903. The Court held, however, that the language was too indefinite to furnish any consent at all, and hence the Court did not get to the question of the scope of the consent.

¹³⁵ *Gardner v. Rowland*, 24 N.C. 247 (1842).

to trample plaintiff's crops.¹³⁶ The same is true if plaintiff has borrowed goods of the defendant; defendant no doubt may enter plaintiff's land to recover the goods, but he may not use the occasion to damage plaintiff's goods.¹³⁷

The consent is not in any event a consent to violence, and defendant is liable for trespass if he enters with consent but by his violent or outrageous conduct goes beyond it. In one case this principle was extended to hold a defendant a trespasser though his only improper conduct was a harsh, rude voice.¹³⁸ Probably something more is ordinarily demanded, and no doubt much turns on circumstances, for it is quite unlikely that the social guest who is rude or unpleasant becomes a trespasser by reason of that fact alone. At any rate something more than rudeness has been required in the other cases, and defendant is held to have exceeded the consent only when he goes beyond "rudeness of language."¹³⁹ Of course where the defendant's privilege upon the land is derived solely from the plaintiff's non-contractual consent, the consent may be revoked or limited at any time, and the rude or unpleasant visitor becomes a trespasser if he does not leave after he is told to do so.¹⁴⁰

¹³⁶ *Id.*

¹³⁷ *Whitley v. Jones*, 238 N.C. 332, 78 S.E.2d 147 (1953). In *Whitley* the plaintiff borrowed defendant's boat trailer and put his boat on it in his own yard. While plaintiff was in the hospital, defendant's men re-took the trailer, putting the plaintiff's boat in the water where it was damaged. The Court said that defendant would be liable for trespass to land on these facts. The rationale is not clear, but presumably defendant had authority of law or implied consent to re-take his trailer in a reasonable fashion, on analogy to the repossession cases (note 121 *supra*). The explanation of the decision, then, is probably that defendant's men exceeded the implied consent.

¹³⁸ *Freeman v. General Motors Accept. Corp.*, 205 N.C. 257, 171 S.E. 63 (1933). Defendant entered to repossess a car, payments on which were overdue. The owner was not at home and the wife told the men not to take the car; the man's manner was "rather harsh" and he raised his voice. This appears to be the only untoward conduct. *But see* note 139 *infra*.

¹³⁹ *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934). Defendant entered to discuss a claim plaintiff was making under an insurance policy. Defendant was abusive and unpleasant but there was no offer of violence. The Court held that a trespass claim could not be sustained on these facts. [A]lthough not a trespasser in the beginning, he becomes a trespasser as soon as he puts himself in open opposition to the occupant of the premises. It is not necessary that the occupant actually be put in fear. . . . Rudeness of language, mere words, or even a slight demonstration of force against which ordinary firmness is a sufficient protection will not constitute the offense.

Id. at 11, 173 S.E. at 8. *Accord*, that more than rudeness is required, *Kaylor v. Sain*, 207 N.C. 312, 176 S.E. 560 (1934).

¹⁴⁰ As to revocation see pp. 55-58 *infra*.

The consent may have implied limits as to space as well as to the kinds of acts done by the defendant. If he is admitted to a swimming pool, the consent probably does not authorize him to enter the sewers.¹⁴¹

Consent by Contract—Revocable and Irrevocable Licenses

In most cases where a landowner gives consent to another to enter or use his land, the parties understand that the consent is revocable and that it may be withdrawn at any time; this intent is given effect by the law, so that one who remains on the land after the consent is revoked or has expired becomes a trespasser whom the landowner is free to eject.¹⁴² However, the landowner may make a valid contract that amounts to a consent for entry upon and use of his land and if the contract is indeed valid, the consent may not be revocable. The easiest case is the one in which the landowner not only gives consent by contract but in fact conveys an interest in the land itself—for instance, by conveying an easement with a document that meets all the required formalities.¹⁴³ On the other hand, the landowner's consent, though contractual in nature, may not meet the requirements of the Statute of Frauds;¹⁴⁴ if he contracts to permit the promisee to use his land for five years for hunting, this may be an interest in the nature of an easement or *profit a prendre*, and if the statute is not complied with, the "consent" may be revocable.¹⁴⁵ In such a case the landowner would be privileged to eject the promisee after revoking the consent.¹⁴⁶

Sometimes a consent purchased by the promisee and given contractually by the landowner does not comply with the forms prescribed by

¹⁴¹ See *Cleveland Park Club v. Perry*, 165 A.2d 485 (D.C. Mun. Ct. App. 1960).

¹⁴² See cases cited note 149 *infra*.

¹⁴³ "An easement is an interest in land, and is generally created by deed." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 542 (1953).

¹⁴⁴ N.C. GEN. STAT. § 22-2 (1965).

¹⁴⁵ Discussion of this and related points usually is given under the rubric of "licenses." An excellent article is Conard, *An Analysis of Licenses in Land*, 42 COLUM. L. REV. 809 (1942). Hunting rights have been characterized as "profits a prendre." They are created only "by grant." See *Council v. Sanderlin*, 183 N.C. 253, 111 S.E. 365 (1922).

¹⁴⁶ A landowner may forcibly eject a trespasser, using no more force than is reasonably necessary. RESTATEMENT (SECOND) OF TORTS § 77 (1965). Of course, cases may arise concerning these revocable licenses quite apart from a landowner's attempt to eject the "trespasser"; the landowner may sue for trespass instead of attempting an ejection, as in *Hawkins v. Alaska Freight Lines, Inc.*, 410 P.2d 992 (Alas. 1966); or the landowner may sue to enjoin use of his land, as in *Bieber v. Zellner*, 421 Pa. 444, 220 A.2d 17 (1966). Revocability of the license is also relevant in interference with contract cases. See *Morgan v. Speight*, 242 N.C. 603, 89 S.E.2d 137 (1955).

the Statute of Frauds, but nevertheless does not seem to violate any policy behind the statute. A ticket to a theatre is permission to enter and use land, but it does not convey an interest in land, and it does not violate any policy of the Statute of Frauds to enforce the landowner's consent in such a case.¹⁴⁷ The same is true where the promisee is given permission to leave goods on the landowner's land,¹⁴⁸ or buys or repossesses goods already there,¹⁴⁹ such permission is not conveyance of an interest in land and is entirely valid even if it does not comply with the Statute of Frauds. Indeed in such situations it is held that the consent given is "irrevocable" and that the promisee may enter and remove his goods within a reasonable time even if the landowner attempts to revoke his consent.¹⁵⁰ The landowner's consent in these instances is usually called a "license coupled with an interest,"¹⁵¹ but this seems only to mean that there is no Statute of Frauds policy involved and possibly that in such cases the law would confer a privilege upon the promisee even if the contract did not do so.¹⁵²

When the landowner gives consent contractually for use of his land, the promisee, or "licensee" as he may be called, may enter the land even after consent is revoked, where his entry is to protect or remove his property.¹⁵³ In some cases, however, the promisee is not allowed this "self help" remedy; if the consent is revoked, he must remove himself from the land peaceably, and if he does not do so, he is a trespasser subject to ejectment by the landowner. At least this is said to be true in the case of theatre and race track patrons and others who have pur-

¹⁴⁷ See Conard, *An Analysis of Licenses in Land*, 42 COLUM. L. REV. 809 (1942). See also *Marrone v. Washington Jockey Club*, 227 U.S. 633 (1913) (ticket did not convey an interest in a race track).

¹⁴⁸ See *Western N.C.R.R. v. Deal*, 90 N.C. 110 (1884) (oral license to use land for depot; railroad could remove depot when license was revoked). See on this and related situations RESTATEMENT (SECOND) OF TORTS §§ 176-83 (1965).

¹⁴⁹ Repossession: *Rea v. Universal C.I.T. Credit Corp.*, 257 N.C. 639, 127 S.E.2d 225 (1962); *Freeman v. General Motors Accept. Corp.*, 205 N.C. 257, 171 S.E. 63 (1933); note 121 *supra*. *Whitley v. Jones*, 238 N.C. 332, 78 S.E.2d 147 (1953), discussed in note 137 *supra*, is distinguishable.

¹⁵⁰ Consent clearly had been revoked, if revocation was possible, in *Rea v. Universal C.I.T. Credit Corp.* 257 N.C. 639, 127 S.E.2d 225 (1962). See also materials cited note 151 *infra*.

¹⁵¹ 2 AMERICAN LAW OF PROPERTY §§ 8.112, 8.114 (A.J. Casner ed. 1952).

¹⁵² See pp. 59-60 *infra* (privilege of entering to recapture chattels). In *Bear v. Harris*, 118 N.C. 476, 24 S.E. 364 (1896), defendant purchased the cargo of a wrecked ship and by terms of the sale was given certain time to remove it. He moved the ship itself, which the court said was a trespass, exceeding the license conferred by law.

¹⁵³ See note 149 *supra*.

chased tickets for entertainment,¹⁵⁴ in the absence of civil rights legislation. The conceptual reason for this, as expressed by Justice Holmes in *Marrone v. Washington Jockey Club*,¹⁵⁵ was that since an interest in land was not involved the race track patron "had no right to enforce specific performance by self-help."¹⁵⁶ Of course it does not follow from this that the landowner has a right to violate his contract by self-help in the form of forcible ejection. Nevertheless, there may be good reason to say that, though a theatre patron wrongly turned away should have a legal action on contract or possibly in tort in some cases, he does not have the self-help remedy. Probably landowners will not often turn patrons away, at least in the amusement-place cases, without good reason, except perhaps in civil rights cases. Their economic interest can usually be relied upon to prevent arbitrary treatment of patrons; to minimize harassment suits, it makes sense for the law to insist that the patron show something more than that he was turned away¹⁵⁷—discrimination, intentional infliction of mental anguish,¹⁵⁸ or at least arbitrariness,¹⁵⁹ for example—or to limit his recovery to contract damages.¹⁶⁰ These limita-

¹⁵⁴ See *State v. Cobb*, 262 N.C. 262, 136 S.E.2d 674 (1964) (Negroes, through white intermediary, purchased theatre tickets in "white" section; criminal trespass convictions upheld). Apart from legislation, there is no obligation on the part of the landowner to consent or sell tickets in the first instance, except as to common carriers and innkeepers and certain monopolies. See notes 161-163 *infra*. The fact that the state licenses or regulates the business, such as a race-track, does not necessarily impose a duty upon the business to accept all comers, at least absent discrimination. See *Tamelleo v. New Hampshire Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10 (1960). On the same principle, where tickets are secured surreptitiously by persons whom the landowner would not otherwise admit, there is no contract or consent at all and the landowner is not obliged to admit such ticket holders any more than he would be obliged to sell them tickets in the first instance. See *State v. Cobb*, *supra*; cf. *Griffin v. State*, 225 Md. 422, 171 A.2d 717 (1961).

¹⁵⁵ 227 U.S. 633 (1913).

¹⁵⁶ *Id.* at 636.

¹⁵⁷ See Conard, *The Privilege of Forcibly Ejecting an Amusement Patron*, 90 U. PA. L. REV. 809 (1942).

¹⁵⁸ One might be ejected by use of more force than is reasonably necessary so that a battery action would lie, or he might be ejected in a manner calculated to humiliate, so that an action for intentional infliction of mental anguish would lie. The ejection itself, if otherwise rightful, of course would not furnish a basis for "intentional infliction" action, apart from legislation. See *Tynes v. Gogos*, 144 A.2d 412 (D.C. Mun. Ct. App. 1958) (Negro husband and white wife told that "mixed dancing" was forbidden, no action lies; inadequate discussion of common law). Humiliation is at least an element of recovery at common law where a passenger is wrongfully ejected from a common carrier. *Edwards v. Southern Ry.*, 162 N.C. 278, 78 S.E. 219 (1913).

¹⁵⁹ See *Tamelleo v. New Hampshire Jockey Club, Inc.*, 102 N.H. 547, 163 A.2d 10 (1960); 2 AMERICAN LAW OF PROPERTY § 8.121 (A.J. Casner ed. 1952).

¹⁶⁰ In the ticket cases, the ticket or "license" is revocable only in the sense

tions are not unfair, and they would tend to discourage harassment suits and to assure the reality of the patron's claim of mistreatment.

There are "landowners" who are obliged to accept all paid customers, either under civil rights legislation¹⁶¹ or under common law rules regulating carriers¹⁶² and innkeepers.¹⁶³ These are cases in which the law itself imposes a duty upon the landowner, and for that reason there is of course no problem of Statute of Frauds, nor is there any argument that the license of the patron to enter may be revoked, except for reasonable cause.

In addition, there are cases in which the landowner's consent is an attempt to convey an interest in land—a permanent right to use a road, for example—so that the Statute of Frauds policy is apparently involved and would avoid such a "consent." In some of these cases, however, there are equitable considerations that, at least in some jurisdictions, have taken the case out of the statute and validated the consent. These are, of course, beyond the scope of any discussion of trespass.

PRIVILEGES AFFORDED BY LAW

In General

In a number of situations the law affords a privilege to an actor who otherwise would be considered a trespasser. In general, these situations are those in which the actor, though on the land of another, does not seem at "fault" and his presence on the land is for a socially desirable purpose, typically to protect his property, or himself, or to execute legal process.¹⁶⁴ As in cases involving consent,¹⁶⁵ liability will be imposed if

that the ticket holder-licensee cannot specifically enforce it by self-help; he may always sue on the contract represented by the ticket and recover the cost of the ticket and expenses incurred in attending. *See* *State v. Cobb*, 262 N.C. 262, 136 S.E.2d 674 (1964).

¹⁶¹ "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation. . . ." Civil Rights Act of 1964 § 201(a); 42 U.S.C. § 2000a (a) (1965). Remedies are limited, however, and do not include a tort action. 42 U.S.C. § 2000a-6.

¹⁶² *Dennis v. Baltimore Transit Co.*, 189 Md. 610, 56 A.2d 813 (1948) (passenger "cannot be arbitrarily ejected when he is not guilty of any misconduct."); *Edwards v. Southern Ry.*, 162 N.C. 278, 78 S.E. 219 (1913).

¹⁶³ N.C. GEN. STAT. § 72-1 (1965): "Every innkeeper shall at all times provide suitable food, rooms, beds and bedding for strangers and travelers whom he may accept as guests in his inn or hotel."

¹⁶⁴ *See* *Welch v. Piercy*, 29 N.C. 365 (1847). In that case the court ordered defendant to lay out a road; this was beyond the court's power, and defendant, who had entered plaintiff's land in laying out the road, was held liable.

¹⁶⁵ *See* pp. 50-58 *supra*.

the privilege is abused or exceeded, and the privilege is not one to enter forcibly but only to enter peaceably.¹⁶⁶ The privilege may be a strong one that protects the defendant even where he has been forced to do actual damage; or it may be a weak one that protects him only to the extent that he is not liable for nominal damages. There is no set number of privileges. A privilege may be found whenever it seems socially desirable to permit unauthorized entry upon another's land. Though these occasions are rare, there is no arbitrary limit to the groups of cases in which the privilege might be found. The cases do, however, tend to fall into several common categories, which are examined briefly.

Recovery of Chattels

Where defendant owns goods rightfully left upon the plaintiff's land, he is privileged to remove them within a reasonable time after his license to be upon the land is revoked,¹⁶⁷ except where his license is for a stated period, in which case he is not privileged to remove the chattels after the license terminates.¹⁶⁸ The same sort of privilege exists to recover his goods where the landowner takes them on the land, a thing that often happens in cases involving repossession of automobiles.¹⁶⁹ In both cases it may be said that the landowner "consents" to defendant's entry upon the land and that his "consent" is irrevocable, since defendant has a "license coupled with an interest."¹⁷⁰ This seems to be an unnecessarily complicated way of looking at the situation, and it is probably more direct and accurate to say simply that in either case the law affords the defendant a privilege to retake his property, and the consent of the landowner, or lack of it, is wholly immaterial. Again, however, it must be recognized that the privilege is strictly limited to its purpose and defendant will be liable if he exceeds it by using force or by dealing with property with which he is not privileged to deal.¹⁷¹

A similar privilege is afforded if a flood or other natural catastrophe unexpectedly carries property to the land of another. The true owner of the goods is privileged to enter the land to recover them, at least to

¹⁶⁶ See *Anthony v. Teachers' Protective Union*, 206 N.C. 7, 173 S.E. 6 (1934); *Freeman v. General Motors Accept. Corp.*, 205 N.C. 257, 171 S.E. 63 (1933), discussed in notes 138-139 *supra*.

¹⁶⁷ See *Western N.C.R.R. v. Deal*, 90 N.C. 110 (1884), discussed in note 148 *supra*.

¹⁶⁸ See RESTATEMENT (SECOND) OF TORTS § 177, comment *b* (1965).

¹⁶⁹ Cases cited note 166 *supra*.

¹⁷⁰ See pp. 55-58 *supra*; RESTATEMENT (SECOND) OF TORTS § 176, Scope Note (1965).

¹⁷¹ See *Bear v. Harris*, 118 N.C. 476, 24 S.E. 364 (1896) and note 165 *supra*.

the extent that he is not liable for nominal damages for the entry.¹⁷² A similar result was reached by the Connecticut court where defendant's cattle strayed onto plaintiff's land, because the plaintiff had failed to fence the cattle out as required by agreement; in that case the defendant was privileged to enter for the purpose of re-taking the cattle.¹⁷³ The privilege in these cases is the privilege of the owner of the goods to protect his own property, and persons who do not claim ownership may not claim the privilege,¹⁷⁴ though if the goods are in danger of imminent destruction, one not the owner may enter to save them.¹⁷⁵

For obvious reasons there are relatively few cases, but it seems likely that a distinction should be drawn between cases in which the landowner is in some measure at fault and where he is not. Where the landowner is at fault, the privilege of the defendant to recover his goods is justifiably a strong one and should protect him against liability even though he causes damage to the land, if the damage is reasonably necessary to the recovery of his own goods. One repossessing an automobile, for example, should not be liable if in trying to remove it from the landowner's muddy back yard, the wheels spin and dig ruts in the ground or it slides into a rosebush. On the other hand, where the landowner is not even causal in the transaction—he has not brought the goods on the land, nor has he harbored them purposefully or used them—then recovering the goods is a cost fairly to be borne by the owner of the goods. He is protected by the privilege against a claim for nominal damages; but if the landowner suffers pecuniary harm, it is fair enough to put this burden upon the owner of the goods where the landowner is not a cause of their presence on the land.

Removal of Buildings Built Under Mistake of Ownership

When someone builds a building upon land in the good faith belief that he owns the land or is otherwise rightfully there, problems become more complicated. The building becomes realty and ownership of it normally goes with ownership of the land. The landowner should not be forced to accept a building he does not want; on the other hand, he should not be allowed to retain and benefit from the building at the

¹⁷² *Polebitzke v. John Week Lumber Co.*, 173 Wis. 509, 181 N.W. 730 (1921) (logs drifted onto plaintiff's land; no liability for nominal damages when defendant removed logs).

¹⁷³ *Arlowski v. Foglio*, 105 Conn. 342, 135 A. 397 (1926).

¹⁷⁴ *Mitchell v. Oklahoma Cotton Growers' Ass'n*, 108 Okla. 200, 235 P. 597 (1925).

¹⁷⁵ *Proctor v. Adams*, 113 Mass. 376 (1873).

builder's expense. The solution has been to allow the landowner an election: he may permit the builder to remove his building and recover only for any actual damages the builder does to the land, or he may keep the building and pay its fair value to the builder.¹⁷⁶ This seems to mean that the builder has a privilege to remove the building unless the landowner elects to pay its value. The builder, however, would remain liable for any actual damages done to the land, as for example, by leaving an excavation upon the land after removing the building.

Private Necessity

In a number of situations one is privileged to enter another's land to protect himself or his property or others from imminent and serious danger, or apparently serious danger. One may tie up at another's dock when a sudden and serious storm threatens;¹⁷⁷ or he may seek refuge from vicious dogs on plaintiff's land;¹⁷⁸ perhaps he may even, under some circumstances, remain in the landowner's home when he is ill and when to leave would be a serious threat to his health.¹⁷⁹ Not only is "necessity" found where human life or limb is in danger, but it may also be found where property is endangered, so that one might be privileged to lay a firehose across another's land to protect burning property elsewhere.¹⁸⁰

In such situations the privilege is limited. It protects the actor against a claim for nominal damages, otherwise available,¹⁸¹ and it deprives the landowner of his privilege to eject the actor.¹⁸² But it leaves the actor

¹⁷⁶ The Betterments Statute so provides in effect for defensive situations, *i.e.*, where the landowner sues the builder, and where the builder has color of title. N.C. GEN. STAT. § 1-340 (1953). Equity recognizes a similar right for offensive use in a suit by the builder against the landowner, where the builder has been denied the privilege to remove the building. *Beacon Homes, Inc. v. Holt*, 266 N.C. 467, 146 S.E.2d 434 (1966); *Cf. Navin, Contracts, Survey of N.C. Case Law*, 45 N.C.L. REV. 895, 898 (1967); *Survey of N.C. Case Law—Equitable Remedies*, 39 N.C.L. REV. 321, 370 (1961); Note, *Statute of Frauds—Oral Contracts to Convey or Devise—Part Performance—Damages*, 15 N.C.L. REV. 203 (1937).

¹⁷⁷ *Ploof v. Putnam*, 81 Vt. 471, 71 A. 188 (1908) is a leading case.

¹⁷⁸ See *Rossi v. DelDuca*, 344 Mass. 66, 181 N.E.2d 591 (1962) (dog-bite statute did not protect trespasser, but child trying to escape one dog is not a trespasser and can recover for bite of defendant's dog).

¹⁷⁹ *Depue v. Flatau*, 100 Minn. 299, 111 N.W. 1 (1907).

¹⁸⁰ *Northern Assurance Co. v. New York Cent. R.R.*, 271 Mich. 569, 260 N.W. 763 (1935) (dictum).

¹⁸¹ See note 51 *supra*.

¹⁸² The landowner may normally use reasonable force to eject a trespasser, where it is clear that he will not leave on request. See *Edwards v. Johnson*, 269 N.C. 30, 152 S.E.2d 122 (1967); *State v. Goode*, 130 N.C. 651, 41 S.E. 3 (1902); *State v. Yancey*, 74 N.C. 244 (1876).

liable for any actual damage he in fact does to the land in the course of saving himself or his goods.¹⁸³

These principles of "private necessity" are generally accepted, though there is little direct authority concerning them in North Carolina. One case bears discussion, if only for the purpose of distinguishing it. In *Schloss v. Hallman*,¹⁸⁴ the defendant was driving a wrecker when another car suddenly cut in front of him. He avoided a collision by cutting his wheels, leaping a curb, and running into a billboard belonging to plaintiff. The Court refused to allow the plaintiff's claim, finding no negligence on the part of the defendant in the light of the emergency, and no trespass, since there was neither negligence nor an intentional entry upon the land.¹⁸⁵ This result seems both correct and in accord with the view that use of another's land to avoid serious injury to one's self requires payment for actual damage done.¹⁸⁶ Payment was not required in *Schloss*, evidently because there was neither a negligent nor intentional entry upon the land, but what, for practical purposes at least, was an accidental entry or at most an entry by reflex action. If the driver in *Schloss* had had sufficient time to make a rational choice, so that intent to enter could be found, perhaps he would have been regarded as a privileged trespasser, but one who, nevertheless, must pay for pecuniary damage caused.

Public Necessity

An entry upon land may be privileged, not only where the entry is made to protect one's own property or life, or the property or life of another, but also where the entry appears necessary to avoid serious harm to public interests.¹⁸⁷ Where individuals properly exercise this privilege, they are not liable even for pecuniary harm done to the land or buildings;¹⁸⁸ indeed, the whole purpose of the privilege is to encourage destruction that appears reasonably necessary for the protection of the public. There seems no reason not to impose liability upon the public through the appropriate governmental unit, but this is difficult

¹⁸³ *Vincent v. Lake Erie Transp. Co.*, 109 Minn. 456, 124 N.W. 221 (1910) (a leading case).

¹⁸⁴ 255 N.C. 686, 122 S.E.2d 513 (1961).

¹⁸⁵ Although there must be either a negligent or an intentional injury, a mistake about ownership does not make the entry any less intentional. See note 12 *supra*.

¹⁸⁶ RESTATEMENT (SECOND) OF TORTS § 196 (1965); see note 183 *supra*.

¹⁸⁷ See generally RESTATEMENT (SECOND) OF TORTS § 196 (1965).

¹⁸⁸ See cases cited notes 193-194 *infra*.

because of governmental immunity,¹⁸⁹ and special legislation may be necessary.

Public necessity situations are not common in this country. During the war between the states, military emergencies arose that justified the taking of personal property¹⁹⁰ or did not,¹⁹¹ according to how serious the emergency was; in Tennessee, for example, the arrival of Union armies in the vicinity justified destruction of the plaintiff's whiskey to protect the public.¹⁹² In more recent times similar results have been reached where property is destroyed to prevent the spread of serious contagious disease¹⁹³ or the spread of fire or flood.¹⁹⁴

Where the destruction of property is carried out by a city or other governmental agency, it seems reasonable to hold the governmental agency liable for such damages as are actually caused, since the public has benefited and there is no reason why the individual landowner should be forced to bear the cost of the public benefit. However, state and local governments are immune to tort suits, except so far as immunity is waived, and it is not waived as to trespasses in North Carolina.¹⁹⁵ At the same time, recovery is always allowed, as it must be,¹⁹⁶ for a "taking" of private property. Thus, though no tort action for "trespass" lies against a municipality that burns plaintiff's house to avoid a small-pox epidemic, an action for "taking" plaintiff's property might. This is far from clear, however. In *United States v. Caltex, Inc.*,¹⁹⁷ the plaintiff owned petroleum facilities in Manila at the beginning of the Japanese attack upon the Philippines. These facilities were destroyed by

¹⁸⁹ The North Carolina Tort Claims Act, N.C. GEN. STAT. §§ 143-291 to -300.1 (1964), eliminates the immunity only for "negligent" acts, and the municipal and county immunities are unaffected by this act in any event. The Federal Tort Claims Act, waiving the immunity of the United States, is similarly limited. 28 U.S.C. § 2671 (1964).

¹⁹⁰ *Koonce v. Davis*, 72 N.C. 218 (1875) (emergency justified taking a buggy).

¹⁹¹ *Bryan v. Walker*, 64 N.C. 141 (1870) (military emergency was not sufficient to justify taking mules).

¹⁹² *Harrison v. Wisdom*, 54 Tenn. 99 (1872).

¹⁹³ *Levin v. Burlington*, 129 N.C. 184, 39 S.E. 822 (1901); *Prichard v. Morganton*, 126 N.C. 908, 36 S.E. 353 (1900) (county officers burned house, clothes, and crops to prevent spread of smallpox; city and county not liable because of governmental immunity).

¹⁹⁴ The leading case is *Surrocco v. Geary*, 3 Cal. 69 (1853); see the mention of the doctrine in *Stocking v. Johnson Flying Serv.*, 143 Mont. 61, 387 P.2d 312 (1963) (a negligence action, in which fire retardant dropped on public forest lands contaminated plaintiff's adjoining lands); *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902, 904 (1966) (dictum).

¹⁹⁵ N.C. GEN. STAT. §§ 143-291 to -300.1 (1964).

¹⁹⁶ As a matter of due process of law, U.S. CONST. amend, V, XIV,

¹⁹⁷ 344 U.S. 149 (1952).

the United States as the Japanese were entering Manila, but the Supreme Court held that plaintiff could not recover. One ground given was that the plaintiff's property "was destroyed, not appropriated for subsequent use."¹⁹⁸ This does not seem to be a very good ground. Destruction in this case is for public benefit and is a form of public "use" in the sense that seems relevant; that is, in the sense that the public *did* benefit. However, the decision may be correct because of the probability that the plaintiff would have lost the property even if the United States had not destroyed it. It might also be explained on the ground that if recovery had been allowed, the Court would then have been forced to consider liability for battle casualties or to attempt to draw a line between casualties in actual battle and those in preparation for battle—probably an undesirable kind of line. Thus it remains possible, even if a state follows the *Caltex* case, to say that when war problems are not involved and the destruction occurs to prevent spread of disease or fire or the like, the government may be held, if not for trespass, at least for a "taking" of property so destroyed.¹⁹⁹ Probably this result is desirable, not only as a matter of justice, but as a matter of maintaining a government of limited powers, responsible to individuals for its destruction of their property; some state statutes compel such payment.²⁰⁰

Regulation, Police Power and Nuisances

Related to "public necessity" situations are several situations involving not public disaster, but a settled public interest that justifies imping-

¹⁹⁸ *Id.* at 155. See also note 204 *infra*.

¹⁹⁹ Permanent trespasses, equivalent to "takings," will be discussed in Part II. There is a cryptic remark in *Prichard v. Morganton*, 126 N.C. 908, 36 S.E. 353 (1900), a case in which officers burned plaintiff's house, clothes, and crops to prevent a smallpox epidemic. The court held that the defendants, city and county, were not liable because of governmental immunity, but said that some unspecified remedy "will doubtless suggest itself" to plaintiff's counsel. This might be read as a broad hint to claim a "taking" rather than a trespass. 126 N.C. at 913, 36 S.E. at 355. See *Levin v. Burlington*, 129 N.C. 184, 39 S.E. 822 (1901) (similar facts). As to the possibility that government action is a "regulation" rather than a "use" of property, see note 204 *infra*.

²⁰⁰ GA. CODE ANN. § 88-401 (1963):

Analogous to the right of eminent domain is the power from necessity, vested in corporate authorities of cities, towns, and counties, to interfere with and sometimes to destroy the private property of the citizen for the public good, such as the destruction of houses to prevent the extension of a conflagration, or the taking of possession of buildings to prevent the spreading of contagious diseases. In all such cases, any damages accruing to the owner from such acts, and which would not otherwise have been sustained, must be paid by such municipal corporation or county.

The chapter was re-codified and this section was dropped, whether advertently or not does not appear.

ing upon the landowner's property interests. Acts necessary, or reasonably thought necessary, to discover and punish crime, for example, are in this category; short of committing illegal acts, anyone privileged to make an arrest is privileged to enter the landowner's property to do so if necessary.²⁰¹ Related privileges, such as the privilege to prevent a crime or to investigate it, carry with them the privilege of entry upon land where such an entry is reasonably necessary, and where the entry is in fact carried out reasonably.²⁰² As with other privileges, if the actor acts unreasonably, for example by using excessive force, he will be liable.²⁰³

It is arguable, however, that a governmental unit that damages property in causing an arrest or in doing some similarly privileged act, ought to be liable for a "taking" of property, if not for a "trespass," to the extent that actual damage is done. However, there is no taking in a constitutional sense if the government has only "regulated" the plaintiff's use of his property.²⁰⁴ In a Georgia case,²⁰⁵ officers entered the plaintiff's land in the course of a murder investigation to search for a body. They drained the plaintiff's lake, and in so doing, he alleged, damaged his property to the extent of some 5,000 dollars. The Court of Appeals of Georgia held that this was "regulation," or use of police powers, not a "taking" and that the state was therefore not liable. Presumably the officers are privileged if they acted reasonably. The difference between a "taking," which is compensable, and a regulation or exercise of police powers, which is not, is at most a matter of degree, and to describe the conduct involved as "regulation" is only to symbolize

²⁰¹ See generally RESTATEMENT (SECOND) OF TORTS, §§ 204-208 (1965); note 203 *infra*.

²⁰² See generally RESTATEMENT (SECOND) OF TORTS, § 204, comment *g* (1965).

²⁰³ *State v. Mooring*, 115 N.C. 709, 20 S.E. 182 (1894). Officers with a warrant for the arrest of *A* sought to enter *D*'s premises. *D* forbade entry and said that *A* was not there. The officers broke in and *D* "drew an axe." *D* was then charged with and found guilty of assault and battery. The conviction was affirmed. Even though the officer was notified that *A* was not on the premises, he might have good reason to think otherwise and was therefore reasonable in entering. Since the entry was reasonable it was privileged, and because it was privileged, *D* had no privilege to eject the officer or offer force.

²⁰⁴ In *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958), the War Production Board had closed plaintiff's gold mines by administrative order, but had not taken possession of them. The purpose was to re-allocate labor and equipment to the mining of war-essential metals during World War II. The Court held that, though "the form of regulation can so diminish the value of property as to constitute a taking," the regulation here was not a "taking" and no compensation was required. *Id.* at 168. See note 205 *infra*.

²⁰⁵ *McCoy v. Sanders*, 113 Ga. App. 565, 148 S.E.2d 902 (1966).

in a short way the conclusion that compensation need not be paid; it is not to give a reason. It would seem desirable to require compensation by governmental units when private property is actually damaged in the course of investigations or arrests, even though the individual officers should remain privileged. However, such a view has little judicial support at present, perhaps because the problem has not been a pressing one quantitatively.

Similar to the arrest-investigation and related privileges is the privilege to abate a nuisance.²⁰⁶ At least in extreme circumstances, a private nuisance²⁰⁷ may be abated in a reasonable way and within a reasonable time by the landowner who is victimized by it. But self-help is not always justifiable merely because a nuisance in fact exists. The victim must at least notify the creator of the nuisance that he intends abatement if the creator does not himself abate it.²⁰⁸ Beyond this, the abatement is justified only if it is reasonable; if the victim of the nuisance has long lived with the nuisance, or moved to it, or if it is of a nature to suggest that he might easily await the action of courts, it may well be unreasonable to use self-help, and liability may be imposed. Since entry upon another's land to abate a nuisance may lead to a breach of the peace, the question whether it is reasonable to use self-help is tested with some care.²⁰⁹

A public nuisance that causes no harm to the victim's land is nevertheless a real nuisance, and it may cause more harm to an individual than to the public, as where defendant pollutes a public stream and thus harms the plaintiff's commercial fishing rights in it.²¹⁰ Where the individual suffers special harm from the public nuisance, he is allowed to abate it in a reasonable way and at a reasonable time.²¹¹ In *State v. Parrott*,²¹² a railroad had built a bridge across the Neuse River, blocking boat traffic. Defendant had, several months before, notified the plain-

²⁰⁶ See generally RESTATEMENT (SECOND) OF TORTS §§ 201-03 (1965) (public and private nuisances).

²⁰⁷ As to the distinction between a private nuisance and a public one, see *Hampton v. North Carolina Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943).

²⁰⁸ See *State v. Brown*, 191 N.C. 419, 132 S.E. 5 (1926). In that case defendant was convicted of malicious injury to property because he had drained a pond which was causing his road to flood. The conviction was affirmed in part because, though he had advised the pond owners of his "predicament," he had not advised that he would abate the nuisance.

²⁰⁹ See *id.*

²¹⁰ See *Hampton v. North Carolina Pulp Co.*, 223 N.C. 535, 27 S.E.2d 538 (1943).

²¹¹ *Id.*

²¹² 71 N.C. 311 (1874).

tiff of his need to have the bridge removed, and upon being delayed 30 hours at the bridge, removed a portion of it so that the boat could pass. On these facts the defendant was acquitted of a charge of trespass. On similar facts, in *State v. Dibble*,²¹³ a defendant was allowed to remove a portion of a bridge built by a county, since the bridge was a "public nuisance" in blocking water traffic contrary to a statute. The court in that case thought that the county court, in authorizing a bridge without a "draw," had exceeded its jurisdiction and consequently thought that the bridge it constructed could be a public nuisance subject to abatement.

The private individual's privilege to abate a public nuisance is usually held to exist only if the public nuisance has focused upon the individual so that his damage is substantially different in degree from the "public harm."²¹⁴ And the nuisance must in fact be actionable, or at least it must threaten harm that is actionable in law or equity.²¹⁵

Express or Implied Grant of Privilege by Statute

Statutes sometimes expressly grant a privilege to enter land. In one kind of eminent domain in North Carolina, the governmental unit condemning land is given a statutory privilege to enter in advance for the purpose of making surveys.²¹⁶ The State Highway Department is given a statutory privilege to enter land where necessary to carry out its assigned tasks, subject only to payment of any actual damages done, so that it is not liable unless harm is done.²¹⁷

²¹³ 49 N.C. 107 (1856).

²¹⁴ See generally RESTATEMENT (SECOND) OF TORTS § 203 (1965).

²¹⁵ See, e.g., *Hummel v. State*, 69 Okla. Crim. 38, 99 P.2d 913 (1940) (only when party is injured to such an extent as to give him a right of action). *Hummel* is an interesting case involving a rancher's effort to protect his cattle from a scrub bull by converting him into "a handsome steer, that is, a bull that had lost his social standing in the community in which he resided. . . ." *Id.* at 43, 99 P.2d at 916.

²¹⁶ N.C. GEN. STAT. § 40-33 (1966):

The petitioner may enter upon the land proposed to be acquired for the purpose of making a survey and of posting any notice thereon which is required by this article: Provided, that such survey and posting of notice shall be done in such manner as will cause the least possible inconvenience to the owners of the real property.

Some states with similar provisions add another requiring payment for any actual damage done. See *Onorato Bros. v. Massachusetts Turnpike Authority*, 336 Mass. 54, 142 N.E.2d 389 (1957). Damages for actual harm are recoverable under some other North Carolina statutes. See note 217 *infra*.

²¹⁷ N.C. GEN. STAT. § 136-20 (1964) authorizes the Highway Department to enter where necessary to carry out duties assigned and provided that such an entry is not a "taking" or a "trespass," but that actual damages done in such an entry are recoverable.

In other situations, statutes may not be explicit, but may nevertheless impliedly grant a privilege to enter. Presumably a statute means to accord such privileges as are necessary to carry out duties assigned in the statute itself. A statute authorizing execution upon property to enforce a judgment or attachment before judgment clearly implies a privilege in the officer to enter land where necessary to enforce the process in his hands, though the rule is sometimes otherwise if the process under which he acts is void or not fair on its face.

Free Speech

In limited situations, the United States Constitution may afford a privilege to commit a technical trespass, though presumably it would not afford a complete privilege to do physical harm. In *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*,²¹⁸ union members picketed a grocery located in a shopping center. Such picketing on public sidewalks can be regulated to avoid undue congestion or violence, but since it involves communication protected by the Constitution, it cannot be prohibited altogether. The same principle was applied to the privately owned property in the *Logan Valley Plaza* case, where the Court held that a flat prohibition against peaceful picketing would unduly infringe the free-speech protection. But several limitations must be noticed. First, the Court did not sanction a trespass that inflicted physical harm to property, and presumably would not do so. Second, the shopping center was open to the public generally, a fact noted by the Court. Relatedly, the shopping center in American life today has, at least for many suburbanites, supplanted the "downtown" shopping area with its public walks available for picketing. Third, there was no reasonable way for the picketers in Logan Valley Plaza to communicate to customers of the picketed establishment by using public areas outside the center. Finally, there was neither violence nor chronic congestion of traffic. On these facts, a free-speech privilege to commit a technical trespass exists. On the other hand, this decision would not warrant a trespass inside the supermarket itself, or in one's home, since neither place is customarily open to the public without restriction.

²¹⁸ 391 U.S. 308 (1968).