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## WHEN A TRESPASS CONSTITUTES A TAKING

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THE scope of this study will be limited entirely to a particular application of trespass *quare clausum fregit.* Trespass, in general, is defined by Blackstone[2] as, "Any misfeasance or act of one man whereby another is injuriously treated or damnified;" and *quare clausum fregit* as "An entry on another's ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property." In Bouvier's Law Dictionary we find a trespass to be, "Any unlawful act committed with violence, actual or implied, to the person, property, or rights of another;" and trespass *quare clausum fregit* to be, "Any unauthorized entry upon the realty of another to the damage thereof." The basic elements are generally accepted to be first, injury or misfeasance to the property of another, or rights in that property; and second, the accomplishment of the injury or misfeasance with force or violence, either actual or implied in law.

Trespass *quare clausum fregit* may be committed either physically by the defendant, as by an unauthorized entry upon the land of another, or it may be accomplished by means of some agency either animate or inanimate for which the defendant is responsible. Thus, it has been held to be a trespass where an individual in cutting down

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[2] 3 Bl. Comm. 208, 209.

trees causes one to fall, even without intending to do so, upon the land of his neighbor.[3] The casting of material upon the land of another while improving his own,[4] the throwing of snow upon the land of another,[5] and the causing of water to be discharged upon the land of the plaintiff,[6] have been held to constitute trespasses to real property. Perhaps still more illustrative of the possibility of committing the act by the assistance of an agency, is a New York case where one blasting rocks in the construction of a canal under direct legislative authority caused fragments to be thrown upon the land of another, thereby committing an actionable trespass, and it was no defense that the defendant was guilty of no negligence or intent to injure, but was fulfilling the purpose of his legislative right.[7]

Nowhere in our definitions nor in our abstract treatises upon the subject of trespass to land do we find a positive assertion that it necessarily constitutes a taking. That it is an unlawful entry or deprivation which operates to the injury of the true owner is admitted, and the inference may be well drawn that the violation of an owner's exclusive right to posesssion infers a deprivation which is equivalent to a taking.

In Black's Law Dictionary we find the word "take" defined, "To lay hold of; to gain or receive into possession; to seize; to deprive one of the possession of; to assume ownership." Thus, a constitutional provision provides that a man's property is not to be taken for public use without just compensation. And in Bouvier "take" is defined as, "to seize: as, to take and carry away. . . . In its usual signification the word 'taken' implies a transfer of dominion, possession, or control." In an Indiana case where land adjacent to the banks of a river had been flooded by the defendant's placing a fill

3 Newsom v. Anderson, 24 N. C. 42.
4 Mairs et al. v. Manhattan Real Estate Ass'n, 89 N. Y. 498.
5 Barry v. Peterson, 48 Mich. 265.
6 Gulf, C. & S. F. Ry. Co. v. Clark, 2 Indian Terr. 319, 51 S. W. 962.
7 Hay v. The Cohoes Co., 2 N. Y. 159.

across the bottom lands or bayou during the construction of a bridge upon his own land, the court held that the flooding constituted a trespass, and said:

> The Constitution says, "No man's property shall be taken by law, without just compensation." As we are advised, a proper construction of the word "taken" makes it synonymous with seized, injured, destroyed, deprived of. It is, therefore, evidence that the legislature have no power to authorize, in any case, either a direct or consequential injury to private property, without compensation to the owner. . . . It seems to follow that the defendants, having voluntarily, and for their own profit, so constructed their road as necessarily to injure the plaintiff, there being no remedy given by their charter, are liable in the present action.[8]

Now, as has been said, the gist of the action of trespass *quare clausum fregit* is an injury to the possession. How, therefore, can it be contended that possessory rights may be injured unless there is a taking, whether it be permanent, transitory, or temporary?

The significance of a trespass constituting a taking becomes readily apparent when we view for an instant those who, in general, are liable for the commission of a trespass. A trespass is a tort and generally the rules of liability are the same as they are in all torts. There are exceptions which it is not our purpose to enumerate and it will be sufficient if we mention probably the most notable and outstanding, namely, municipal corporations in the exercise of governmental functions. Ever since the historic decision of *Russell* v. *Men of Devon*,[9] municipal corporations, irrespective of their type, have been exempt from all tort liability regardless of negligence or guilt, and no matter how aggrevated the circumstances, so long as the wrong was committed while the municipality was engaged in the commission of a public, governmental, or better, perhaps, a non-proprietory act.

[8] The Evansville & Crawfordsville R. R. Co. v. Dick, 9 Ind. 433.
[9] 2 T. R. 667.

While it is true today that the rule as laid down in *Russell* v. *Men of Devon* has been modified in its application, depending upon the particular class or type of municipal corporation as well as the character of the function, certainly there is no doubt of its application to those wrongs committed by quasi municipal corporations such as townships, counties, and school districts, that are wholly involuntary in organization, and, as a consequence, no liability attaches to actions, except under a statute expressly giving such remedy and limited to a particular locality. It is not our purpose to discuss the various classes or types of municipal organizations nor the nature or character of the functions in which they may engage. It will be sufficient for our ends if we limit ourselves to the involuntary type where there is accepted to be no tort liability for a wrong committed.

This principle of non-liability with the distinction is clearly stated in a recent Illinois case where an action was brought against a city for negligently causing the death of a little girl by fire which was started by a street sweeper while engaged in the cleaning of the city streets. The court held the city to be liable and in its opinion said:

> The principle upon which municipal corporations, such as villages, towns, and cities, incorporated by special charters or voluntarily organized under general laws, are held liable to individuals injured by the negligent acts of their agents and servants in respect to corporate duties, while public involuntary quasi corporations, such as counties, townships, school districts, and road districts, are not liable to respond in damages in a civil action for negligence in the performance of public duties unless such action is given by the statute, was considered in *Elmore* v. *The Drainage Comrs.*, 135 Ill. 269, where it was said: "That a private corporation formed by voluntary agreement, for private purposes, is held to respond in a civil action for its negligence or tort goes without saying, and yet, in deciding the mooted question at issue in this case, it seems convenient to re-state that proposition. So, also, it is admitted law that municipal corporations proper, such as villages, towns, and

cities, which are incorporated by special charters or voluntarily organized under general laws, are liable to individuals injured by their negligent or tortious conduct, or that of their agents and servants, in respect to corporate duties. In regard to public involuntary quasi corporations the rule is otherwise and there is no such implied liability imposed upon them. These latter,—such as counties, townships, school districts, road districts and other similar quasi corporations,—exist under general laws of the state, which apportion its territory into local subdivisions for the purposes of civil and governmental administration, and impose upon the people residing in said several subdivisions precise and limited public duties and clothe them with restricted corporate functions co-extensive with the duties devolved upon them. In such organizations the duties, and their correlative powers, are assumed *in invitum,* and there is no responsibility to respond in damages, in a civil action, for neglect in the performance of duties, unless such action is given by statute."[10]

For the purpose of the structure of our argument, which has already been intimated, namely, that a trespass constitutes a taking, we should now pause for a moment to review those provisions in the constitution of the United States and of the State of Illinois that seem pertinent to our discussion. The Fifth Amendment to the United States Constitution states: "No person shall . . . be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

In sections two and thirteen of article two, the Bill of Rights, of the Constitution of 1870 of Illinois, the same subject matter is contained, though the wording is substantially different—a fact which may prove significant. They are respectively: "No person shall be deprived of life, liberty, or property, without due process of law." "Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the State, shall be ascertained by a

[10] Roumbos v. City of Chicago, 332 Ill. 70.

jury, as shall be prescribed by law . . .'' In section thirteen we find the addition of the words ''or damaged'' which are not present in the Federal constitution, and it seems only logical that in construing both documents, the construction to be placed on the Constitution of the State of Illinois must necessarily be broader and more comprehensive.

That this has been fully sensed by the Illinois Supreme Court is proven by the reference made to it in various decisions,[11] that of *Rigney* v. *City of Chicago*,[12] probably being the most expressive. There we have an action of trespass on the case brought against the city for damages to the property of the plaintiff arising out of the defendant's construction of a viaduct upon a public street near its intersection with another, thereby cutting off access to the first street from the plaintiff's house except by means of a flight of stairs. The defense to the action was that the injury was but consequential, that it merely affected his lands injuriously and as a consequence did not amount to a taking within the meaning of the constitution. The plaintiff argued that the word ''damaged'' was equivalent to the words ''injuriously affected'' or ''injured.'' The lower court instructed for the defendant but was reversed upon appeal. The reviewing court emphasized the presence of the words ''or damaged.'' In the Constitution of 1848 they were not contained. In the words of the court:

> The addition of the words ''or damaged'' can hardly be regarded as accidental or as having been used without any definite purpose. On the contrary, we regard them as significant, and expressive of a deliberate purpose to change the organic law of the state. Nor were they used simply to conserve existing rights, as has been suggested by counsel, but on the contrary, in our judgment, they declare a new rule of civil conduct, from which spring new rights which did not exist under the Constitution of 1848.

[11] Otis Elevator Co. v. City of Chicago, 263 Ill. 419; City of East St. Louis v. Hackett, 85 Ill. 382; Stone v. Fairbury, Pontiac & Northwestern Railroad Co., 68 Ill. 394; Rigney v. City of Chicago, 102 Ill. 64.

[12] 102 Ill. 64.

Mere taking, as our definitions have shown us, seems by inference to involve an acquisition even though but temporary, and the contention may be made that the infliction of damage constituting a trespass contains no such element.

In the case of *Chicago & Iowa Railroad Co.* v. *Hopkins*,[13] which was an eminent domain proceeding, the Railroad Company had laid its tracks across the land in question without any right or easement. At a subsequent time the defendant purchased the land at a judicial sale and brought an action of trespass to recover damages. In the present action the petitioning railroad seeks to avoid payment, contending that the defendant purchased with notice of an easement already established. The court held against the petitioner, saying:

> The company was a mere intruder. It had no easement or right of way, and the purchaser at the judicial sale was not bound to take notice of a right that had no existence in fact. The Constitution itself provides, private property shall not be taken or damaged for public use without just compensation, and the act of the corporation in taking and retaining the land was a continuing trespass.

While in this case we have no question of quasi municipal delictual liability, we do have a construction of that section of the constitution and by inference it would seem that the court has recognized that a trespass may constitute a taking, and, as such, probably comes within the scope of the constitutional provision.

This is also illustrated in a Georgia case where the plaintiff hired an automobile to the officers of the county. The machine was subsequently damaged by fire due entirely to the negligence of the county servants. In an action brought to recover the damage the court held:

> Where the tortious acts of the officers, agents and servants of the county amount to the taking or injury of private property directly for the public use, the county can be held liable to the extent of the injury sustained, not on the theory that the

[13] 90 Ill. 316.

county is liable, as are other tort feasors for the negligent acts and conduct of its agents while acting within the scope of their authority, but for the reason that it can not, either with or without the guise of contractual authority, appropriate or damage the property of another for its own benefit without just and adequate compensation being paid.[14]

And in a Kentucky case, *Bushart* v. *Fulton County*,[15] we have an action in trespass brought against the county by the plaintiff where his land had been taken by the county for a public road without compensation. The defense raised was the non-liability of a county in tort. The court held the county to be liable and in its opinion held a trespass not only might amount to a taking, but under the authority of the constitution the action as such might be brought—this, even though the value of the plaintiff's land had previously been judicially found, inasmuch as he had not been compensated therefor before the entry. That court said:

Appellant though deprived by the judgment of the county court of a sufficiency of his land for a roadway, has not been paid its value or any part of the incidental damages thereby caused him. This should have been done before depriving him of the possession of the land. While the judgment appears to have fixed the amount to which he was regarded by the court entitled, it failed to require its payment before depriving him of the land, and the appropriation of his land to the use of the public as roadway, under the circumstances, was a clear violation of the sections of the Constitution, constituting a trespass for which the county of Fulton is liable in damages. Appellant might have taken an appeal from the judgment or he might have maintained an injunction to prevent the opening of the road, but he was not bound to pursue either of these remedies. He also has the right to elect to sue for the trespass as he has done, and the judgment of the county court will not bar the action, if the averments of the petition are established by proof.

[14] Bates v. Madison County, 32 Ga. App. 370, citing Terrell County v. York, 127 Ga. 166; Elbert County v. Brown, 16 Ga. App. 834; Rheberg v. Grady County, 27 Ga. App. 578.

[15] 183 Ky. 471.

Whether or not the action of trespass is maintainable where damages rather than purchase are requested was squarely decided in the affirmative in *Theiler* v. *Tillamook County*[16] by the Supreme Court of Oregon. In that case a complaint was predicated upon trespass requesting a thousand dollars in damages. The county, it seems, maintained a road along the edge of the plaintiff's premises through which a creek flowed. In building a bridge and culvert the county so changed the course of the stream that the plaintiff's land was flooded and damaged. The flooding was not permanent but successive, depending on the season and the amount of water. The defense raised was that, as an involuntary quasi corporation, the county was not liable in tort for damages. The contention was upheld in the trial court but was reversed on appeal. The court said:

> Though a purely municipal corporation does not ordinarily sustain to a person injured by its negligence the exact relation of a quasi public corporation, it is believed that the analogy is sufficient to render a county liable in damages for a trespass upon private property when such invasion practically amounts to a taking of any part of the premises without condemnation.

In Illinois the distinction between a trespass which amounts to a taking and other torts does not seem to have been fully recognized. The general classification of municipal corporations both as to character and as to function seems to have overlooked the fact of a constitutional provision in a tort sense. If the suggestion we have made is squarely contradicted by any individual case, it is probably that of *Symonds* v. *Clay County*,[17] which was an action on the case to recover for damage done to the plaintiff's property by means of a fire which was started by agents of the defendant on the county poor farm, and negligently allowed to spread to the land of the plaintiff. The lower court directed the jury to find for the defendant, the second instruction being as

[16] 75 Ore. 214.
[17] 71 Ill. 355.

follows: "There is no law authorizing a recovery, by a private individual, in a suit against the county, for injuries committed by the servants of the county. While railroads and other private corporations are liable for the negligence of their servants, a county is not so liable." Upon appeal the court upheld the judgment of the trial court for the defendant, basing its decision upon the fact that a county was an involuntary quasi corporation. It amounts to a political subdivision of the state, whose sole purpose is to aid in the administration of government. The court suggested in its opinion that in the absence of a statute creating such liability the plaintiff could not hold the county responsible.

There is nothing in the opinion even suggesting that the constitutional guarantee prohibiting a taking was raised, nor is there evidence to show that a taking was in fact committed. Surely the allusion of the court to the absence of a statute permitting a recovery against the county loses its weight when we consider that provision contained in the document of admittedly greater dignity.

The further suggestion of the court that the action of the county in maintaining the poor farm was governmental, as an agent of the state, and the county was consequently no more liable than its sovereign principal, is obviously fallacious, inasmuch as the constitutional provision is applicable to the state as well as to an individual.

There is evidence to this effect in the opinion of the court in *Lake Shore Building Company* v. *City of Chicago*,[18] where an action of trespass was brought against the defendant for the excavation of a water tunnel under the plaintiff's land without its consent and without condemnation proceedings. The plea was the statute of limitations, which the plaintiff countered by contending a continuing trespass. The court found for the plaintiff, holding in its opinion:

It will be noted that defendant in constructing the tunnel in question, entered upon private property and that it actually

[18] 207 Ill. App. 244.

occupies plaintiff's premises. In other words, defendant has unlawfully appropriated private property to its own use without compensation. . . .

By constitutional enactment, every owner of land is assured that his property will not be appropriated for public use without just compensation. Even the state itself must observe this right which is guaranteed to every citizen. The defendant is, therefore, in the position of a trespasser who has taken property belonging to another, without his consent, and, having held it for some fifteen years, claims that by reason of the lapse of time plaintiff's right to a recovery for damages is precluded.

Also in the case of *Holm* v. *County of Cook et al.*,[19] we have even stronger support for this theory. The plaintiff was the owner of land which adjoined the Oak Forest Poor Farm. Under his land he constructed a system of drain tile to carry off water to a drainage ditch. The defendant connected the sewerage system of the poor farm to the drain tile, thereby rendering the latter unfit for the purpose for which it was intended and rendering his land unfit for cultivation. In the lower court it was held that the action would not lie inasmuch as a county could not be sued in tort. Upon appeal, however, the decision was reversed and the court squarely held that where the defendant's wrongful act amounts to a taking, and thus a violation of the constitutional guarantee, an action may be maintained. The court said:

In our opinion, plaintiff's declaration sets up a state of facts from which it appears that his said property has been both taken and damaged for public use without compensation. . . .

So, in the case at bar, the defendant, Cook County, acting within its general powers, constructed the said infirmary, the proper use of which required a sewerage system. In connecting its sewerage system with plaintiff's said tiling system and in using the latter to carry off the sewerage from the infirmary—a use for which it was clearly not intended and to which plaintiff did not consent—the defendant wrongfully appropriated and damaged plaintiff's property for public use. If, on the other

[19] 213 Ill. App. 1.

hand, defendant's position were tenable, viz., that a county may never be sued in tort, then the aforesaid provision of our Constitution would be in fact nugatory, for it would leave the injured person remediless in situations as here presented.

We conclude, therefore, that the court erred in sustaining the objection to the introduction of plaintiff's offered evidence and in directing a verdict and entering judgment for the defendants.

In the case of *Matsumura* v. *County of Hawaii,*[20] which was an action against the county for negligence in the diverting of a stream so that a landslide was caused which demolished plaintiff's buildings, we have the identical proposition as suggested in this treatise; and, rendering the case even more interesting and significant, it was one of first impression. In reversing the judgment of the lower court for the defendant, Justice Ballou, made an exhaustive survey of all municipal corporate liability, in which he discusses at length the foundation of the immunity of counties from liability for torts. Tracing the evolution of the doctrine of *Russell* v. *Men of Devon* to its accepted application today, he points to the misapplication of the original doctrine as the reason for the present rule. "This doctrine, so far from resting on 'historical' grounds, is the result of the gradual growth of error, which can be easily traced in the earlier American cases."

*Matsumura* v. *County of Hawaii* was upheld by the United States Circuit Court of Appeals, Ninth District, in *Hawaii County* v. *Halawa Plantation, Limited,*[21] which was an action involving the same question, the injury being inflicted by a fire set by road officials and permitted to spread to the land of the plaintiff. The court said:

We have examined, not only the cases cited in the opinion of the Supreme Court of Hawaii, but many others, and as a result, we believe that in the case of *Matsumura* v. *County of Hawaii, supra,* the Territorial Court correctly pointed out that Lord

20 21 Ann. Cas. 1338.

21 239 Fed. 836.

Kenyon, in *Russell* v. *Men of Devon,* decided as the main point that the body of men sued in the action before him were not associated in a corporate capacity, and therefore, that it was inexpedient, if not impossible, to hold the inhabitants at large responsible for the alleged tort. It is undoubtedly true that the case has been applied broadly to sustain a doctrine of general non-liability of a county for tort committed by the agents of the county. But that it should not be used as a basis for so far-reaching a decision is shown by the opinions in the later English cases, which refer to Lord Kenyon's reasoning.[22]

In conclusion, let it be said that it is not the purpose of this study to suggest that the rule, in general, absolving quasi municipal corporations from tort liability has been departed from. The law of *Russell* v. *Men of Devon,* or perhaps better, the law which results from a later construction of the principal there laid down, remains and probably will, in the absence of statute, the weight of authority. That the reasons for it no longer exist with our present form of corporate government must be admitted. In the interest of society it would be well were it departed from, and this is rapidly becoming the accepted opinion. However that may be, there is no justification for its application in such a manner as to circumvent and thus nullify, the purpose and the guarantees contained in the constitution.

22 Kent v. Worthing Local Board, 10 L. R., Q. B. 118; Borough of Bathurst v. Macpherson, 4 L. R. App. Cas. 256; Maguire v. Liverpool Corporation [1905] 1 K. B. 767.