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Trespass--Liability for Unintentional, Non-negligent Entry

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the contract. Subsection (3) provides for the application of Uniform Commercial Code § 2-201 regardless of any agreement between the parties. Section 2-201, in effect, requires a writing as to the quantity of the goods when the price is 500 dollars or more. This provides some measure of safety against oral evidence, if the contract as modified would be within the Statute of Frauds. Lorensen, *The Uniform Commercial Code Sales Article Compared With West Virginia Law*, 64 W. VA. L. REV. 32, 58 (1961).

In the instant case, D could have effectively made use of the requirement that the modification be in writing. In Massachusetts, however, the Statute of Frauds is lost if it is not pleaded.

Section 2-209 (4) allows, by waiver, legal effect to be given to the parties actual later conduct, regardless of a clause excluding subsequent oral modification. UNIFORM COMMERCIAL CODE § 2-209, comment 4.

Section 2-209 (5) provides that the waiver in subsection (4) which affects an executory portion of the contract may be retracted by "reasonable notification. . .unless the retraction would be unjust in view of a material change of position in reliance on the waiver."

This section, as a unit, appears to protect those parties whose transactions are governed by the Sales Article. The rejection of the necessity for consideration coupled with the added requirements of "good faith" and the Statute of Frauds, in certain cases, should provide a safe, yet workable, solution. As a counseling point, HAWKLAND, SALES AND BULK SALES 14 (1958), cautions the drafters of contracts to exclude modifications except by a signed writing.

Thomas Edward McHugh

Trespass—Liability for Unintentional, Non-negligent Entry

P brought an action of trespass on the case under the old procedure against *D*, a Virginia corporation. The action arose out of an accident between D's truck and an automobile. The driver of the automobile negligently drove or skidded across the highway and into *D's* truck. The truck cut to the right to avoid the automobile, and, after impact, it traveled some 90 feet before striking and demolishing *P's* house. Trial court rendered a judgment for *P*, which *D* appealed. *Held*, affirmed. Jury questions were presented as to

negligence, if any, of the truck driver in traveling at an improper speed, and whether such negligence, if any, contributed to the damage of *P's* property. A verdict of the jury based upon sufficient facts and supported by substantial evidence will not be disturbed. *Butler v. Smith's Transfer Corp.*, 128 S.E.2d 32 (W. Va. 1962).

This was an action of trespass on the case, and the judgment was based upon the jury's finding that the defendant was negligent. Would the defendant have been liable for damages resulting from his trespass upon the land in the possession of the plaintiff if there had been no basis for holding the defendant to be negligent?

The law pertaining to trespass upon land has been described as both exceptionally simple and exceptionally rigorous. At common law every unauthorized entry upon the soil of another was a trespass. Probably the only defense was that the entry was from causes beyond the trespasser's control. The strict and severe rules of the action of trespass have survived to a considerable extent until the present day. The most important rule to survive was that which imposed liability for invasions of property which were neither intended nor negligent. The defendant was not liable so long as he had done no voluntary act. Thus if he was carried onto the plaintiff's land by others against his will, he was not liable for trespassing. PROSSER, TORTS § 13 (2d ed. 1955).

Trespass to land is said to be an intentional harm, and where there is no intentional act, in the sense of an act voluntarily done, there is no trespass. *Kite v. Hamblen*, 192 Tenn. App. 643, 241 S.W.2d 601 (1951) It is not necessary, however, that the trespasser intend to commit a trespass or even that he know that his act will constitute a trespass. *Socony-Vacuum Oil Co. v. Bailey*, 109 N.Y.S.2d 799 (Sup. Ct. 1952). When one voluntarily and deliberately does an act upon his land which results in physical trespass upon lands in other ownership, the liability is absolute. *Ure v. United States*, 93 F. Supp. 779 (D. Ore. 1950).

While a trespass often arises out of or is accomplished by an act of negligence, liability for trespass may be wholly independent of any act of negligence. Negligence is by no means a necessary element in trespass. *Corrington v. Kalicak*, 319 S. W.2d 888 (Mo. App. 1959); *Whitehead v. Zeiller*, 265 S.W.2d 689 (Tex. Civ. App. 1954). The established rule in cases of *trespass quare clausum fregit* is that the person causing the trespass is liable for resulting damage

irrespective of negligence. *Britton v. Harrison Coal Co..*, 87 F. Supp. 405 (S.D. W. Va. 1948).

The law on the subject of trespass to property is undergoing a process of change. The most significant recent development is the position taken by the Restatement of Torts which finds liability for trespass only in the case of intentional intrusion, or negligence, or some "extra-hazardous activity" on the part of the defendant. Prosser, *supra* at § 13. The Restatement provides that an unintentional and non-negligent entry on land of another, or causing a thing or third person to enter the land, does not subject the actor to liability, even though the entry causes harm to the possessor. RESTATEMENT, TORTS § 166 (1934).

Prosser believes this position will be adopted in time by the courts and that strict liability will be confined to unusual and highly dangerous enterprises such as blasting. Various courts have already adopted the Restatement position. These courts hold that there is no liability for a trespass unless it is intentional, the result of recklessness or negligence, or the result of engaging in an extra-hazardous activity. *Gallin v. Poulou*, 140 Cal. App. 2d 638, 295 P.2d 958 (1956). See also, *Wisconsin Power & Light Co. v. Columbia County*, 3 Wis.2d 1, 87 N.W.2d 279 (1958); *Edgarton v. Welch*, 321 Mass. 603, 74 N.E.2d 674 (1947).

In a case somewhat similar to the principal one, the driver of a loaded truck drove with brakes which he knew to be defective. The brakes failed when he attempted to stop at an intersection, and, to avoid a collision, he steered the truck off the road and into a building. The case was based on both trespass and negligence, but it was held that the driver was negligent as a matter of law. The court recognized the modern trend of authority regarding trespass but left open the subject of its application to a case of this character. *Jewell v. Dell*, 284 S.W.2d 92 (Ky. 1955). One year later the same court was called upon to decide another interesting case. A rock was thrown from the wheels of a truck, striking and injuring the plaintiff. There was no evidence of negligence by the driver. The court held that an unintended entry does not constitute actionable trespass and pointed out that an attempt to apply a strict rule of liability based on trespass would lead to an incongruous result. To say that the plaintiff could recover for her injuries if she was in her yard but could not recover if she was one step outside of it is a patent absurdity. The essential question is whether or not the defendant

committed a culpable act, not the plaintiff's geographical location. *Randall v. Shelton,* 293 S.W.2d 559 (Ky. 1956).

No West Virginia case has been found that would indicate that this state has yet adopted the Restatement view of non-liability for unintentional, non-negligent entries to land. It must be assumed, then, that the strict rule of liability is still applicable in West Virginia. Under this view, even if the defendant in the principal case was not negligent, he would be held strictly liable as a trespasser on the plaintiff's property. His only defense would be that his entry was involuntary—that he was carried onto plaintiff's property against his will by the act of another person.

The adoption of the new West Virginia Rules of Civil Procedure, abolishing the common-law forms of action and providing for a "civil action", has no affect on the outcome of the principal case. It is only matters of form which have been affected by these provisions. The substantial distinctions and the principles of law underlying the common-law forms of action remain, until modified by statute. *North River Ins. Co. v. Aetna Fin. Co.,* 186 Kan. 758, 352 P.2d 1060 (1960). To be entitled to recover the plaintiff need only show that he is possessed of a right which has been violated by the defendant, to the plaintiff's damage.

Thomas Richard Ralston

ABSTRACTS

Domestic Relations—Wife's Action For Loss of Consortium

P's husband was injured in an automobile accident. *P* brought an action for loss of consortium against *D* on the theory that *D* negligently caused the injury to *P's* husband. *D's* motion to dismiss was sustained. *Held,* affirmed. A wife may not maintain an action for loss of consortium of her husband caused by the negligence of the defendant tort-feasor. *Seagraves v. Legg,* 127 S.E.2d 605 (W.Va. 1962).

Note is taken that this is a case of first impression in West Virginia. A discussion of the division of authority on this issue is found in 63 W. VA. L. REV. 186 (1961). The author of that comment pointed out, as did the principal case, that the weight of authority supports the view denying recovery to a wife under such