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TRESPASS—ABSOLUTE LIABILITY WITHOUT FAULT IN KENTUCKY

In the eyes of the common law every unauthorized entry upon the soil of another was a trespass. It was immaterial whether the entry was intentional, or whether it was purely accidental and without fault. So long as the defendant did an act which resulted in an entry upon the realty of another, he was liable in trespass.¹

Liability was enforced for these entries by the actions of trespass and trespass on the case.² Trespass arose out of an injury which was caused by a direct act, while case arose out of an injury which was indirectly caused.³

With the passing of time this procedural distinction between trespass and case was abandoned, and case, being more convenient, was extended to include injuries which were merely negligent, while the action of trespass remained for those wrongs which were intentional.⁴

Of the surviving rules of trespass, one of the most difficult to rationalize is that which imposes absolute liability for all damage resulting from invasions of real property which were neither intended nor negligent.⁵ Kentucky is one of the jurisdictions which has blindly followed that rule heedless of a trend toward a requirement of negligence or intent.

¹ I STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) pp. 19-25. Cf. HOLMES, THE COMMON LAW (1881) pp. 77-129. (It is Holmes' theory that there was never a doctrine of absolute liability for trespass to realty at common law.)
² III STREET, FOUNDATIONS OF LEGAL LIABILITY (1906) pp. 252-253. Here the language of Chief Justice Raymond in the case of Reynolds v. Clark (1725) 1 Strange 634, 93 Eng. Rep. 747, is quoted: “The distinction in law is, where the immediate act itself occasions a prejudice, or is an injury to the plaintiff's person, house, land, etc., and where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff's person, house, land, etc. In the first case trespass vi et armis will lie; in the last it will not, but the plaintiff's proper remedy is by an action on the case.”
³ Leame v. Bray (1803) 3 East 593, 102 Eng. Rep. 724. The case of Reynolds v. Clark, cited supra note 2, gives the classical illustration of the distinction between trespass and case: “. . . if a man throws a log into the highway, and in that act it hits me; I may maintain trespass, because it is an immediate wrong; but if as it lies there I tumble over it, and receive an injury, I must bring an action upon the case; because it is only prejudicial in consequence, for which originally I could have no action at all . . .”
⁴ PROSSER, TORTS (1941) 38.
In the case of *Louisville Railway Company v. Sweeney*, the plaintiff, while standing in her own yard, was injured when a street car belonging to the defendant left the tracks and struck a telephone pole which fell against a gate causing it to strike the plaintiff. The court told the jury in substance that if they believed from the evidence that the car left the track and ran against the pole and that the pole was thereby thrown against the gate and the gate was thereby caused to strike the plaintiff and she was thereby injured, they should find for her. A verdict for the plaintiff was sustained and the instruction was approved on the ground that this was a trespass, making it unnecessary for the plaintiff to show negligence on the part of the defendant.

This doctrine of absolute liability for injury sustained through trespass to realty has been followed in Kentucky where a spool of wire, under the control of defendant's employee, slid from a sled and rolled down a hill and through the house of the plaintiff; and where a slate car ran uncontrolled down an incline, and slate was thrown into a house, injuring the plaintiff.

There is a trend away from this old common law idea of absolute liability for trespass to realty in both England and the United States. In the English case of *Peacock v. Nicholson*, the defendant's servant was driving his horse and cab down the street when the horse slipped and a breeching was broken. The servant tried to turn down a side street and in so doing ran into the shop of the plaintiff. There was failure to show negligence, and no showing of intention and the court refused recovery in trespass.

*Parrott v. Wells Fargo & Co.*, the famous Nitroglycerine Case, is a leading case in the United States opposed to the rule of liability without fault where there is trespass to realty. The defendants, on premises leased by them, were opening a box which was leaking an oily fluid when there was an explosion which damaged the adjoining property owned by the plaintiffs. There was a failure to show negligence or intent and the court refused recovery for trespass.

The view adopted by the *Restatement of Torts* is:

"Except where the actor is engaged in an extra-hazardous activity, an unintentional and non-negligent entry on land in the possession of another or causing a thing or third person to enter the land, does not subject the actor to liability to the possessor,

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5 157 Ky. 620, 163 S. W. 739 (1914). See also, Kentucky Traction & Terminal Co. v. Bain, 174 Ky. 679, 192 S. W. 656 (1917).

7 Happy Coal Co. v. Smith, 229 Ky. 716, 17 S. W. 2d 1008 (1929).

8 Consolidated Fuel Co. v. Stevens, 223 Ky. 192, 3 S. W. 2d 203 (1927).


11 *RESTATEMENT, TORTS* (1934) sec. 166.
even though the entry caused harm to the possessor or to a thing or third person in whose security the possessor has a legally protected interest."

While there is reason for absolute liability in cases where the instrumentality is dangerous, such as in blasting cases,\textsuperscript{12} or, as in the leading case of \textit{Rylands v. Fletcher},\textsuperscript{12} where a large store of water is maintained on a person's premises which may break loose and cause injury to others, there is little reason for the rule when the instrumentality in use is not necessarily a dangerous one, if operated correctly. As stated by Prosser:\textsuperscript{14}

"There is no great triumph of reason in a rule which makes a street railway company, whose car jumps the track, liable only for negligence to a pedestrian on the sidewalk but absolutely liable to the owner of the plate glass window behind him. . . ."

In regard to liability for unintentional and non-negligent entries on land, Kentucky might well adopt the rational and common sense view which would restrict the doctrine of absolute liability to those cases where the actor is engaged in an extra-hazardous activity.

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\textsuperscript{12} Allegheny Coke Co. v. Massey, 163 Ky. 792, 174 S. W. 499 (1915); Wendt v. Yant Const. Co., 125 Neb. 277, 249 N. W. 599 (1933).


\textsuperscript{14} PROSSER, TORTS (1941) 77.