May an Action for Trespass to Land in Another State Be Maintained in Kentucky?

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NOTES

MAY AN ACTION FOR TRESPASS TO LAND IN ANOTHER STATE BE MAINTAINED IN KENTUCKY?

In the case of a trespass to land it is the settled rule in England and America that another state cannot take jurisdiction of the cause of action arising therefrom. The action is local and must be brought in the state where the land is situated. This rule had its inception in England and apparently was first announced in the case of Doulson v. Matthews,\(^1\) in 1792. The leading case in America is Livingston v. Jefferson,\(^2\) decided in the United States Circuit Court for the District of Virginia by Chief Justice Marshall. This decision has been frequently followed even in cases where all the parties were within the jurisdiction and it was certain that the defendant could not be reached by the courts of the state in which the land was located.\(^3\)

The concept that an action for injuries to land can be brought only in the state where the real property is located had its foundation in the distinction made between local and transitory causes of action. Originally all actions were local in the sense that they were all tried by a jury of the vicinage. As the jury was limited to its own knowledge in deciding a particular question it was necessary to select it from the neighborhood where the issue arose. With the relaxing of procedural requirements, the modern idea evolved that redress for a tort is a personal right and may be asserted wherever the wrong-doer is found. Nevertheless, the courts have retained the distinction between a cause of action that might have arisen anywhere, and one which could have arisen in only one place. The former they have labeled transitory; the latter, local. Following this classification led to the conclusion that, since it can

\(^1\) 4 T. R. 503, 10 Eng. Rep. 1143 (1792); Storke, The Venue of Actions of Trespass to Land (1921) 27 W. Va. L. Q. 301, 303.
occur only where the land is located, a trespass to land gives rise to a local cause of action only.\textsuperscript{4}

This distinction was clearly set forth in \textit{Livingston v. Jefferson}, and is followed by a majority of the courts today.\textsuperscript{5} In this case Livingston, who owned lands along the Mississippi River, had been ejected by United States troops under orders of Jefferson. Subsequently Livingston sued for a large sum in the Federal District of Virginia. A plea to the jurisdiction was entered. Justice Tyler unhesitatingly adhered to the English law and denied jurisdiction. Chief Justice Marshall reluctantly concurred saying:\textsuperscript{6}

"I have not yet discerned a reason, other than a technical one, which can satisfy my judgment . . . If however, a technical distinction be firmly established, I cannot venture to disregard it . . . The distinction taken is, that actions are deemed transitory, where transactions on which they are founded, might have taken place anywhere; but are local where their cause is in its nature local."

The hesitancy of Marshall in pointing out this distinction might suggest the possibility of limiting the rule to that class of actions which are purely trespass quare clausum fregit as contrasted with actions on the case for indirect or consequential damages. There is however little authority in the cases for such a distinction so far as it bears on the question of jurisdiction now under consideration.\textsuperscript{7} The reasoning given in support of

\textsuperscript{4}1 Chitty, Pleading (5th Am. ed. 1840) 267: "When the cause of action could only have arisen in a particular place or county it is local, and the venue must be laid therein, as in mixed actions, waste, or ejectment, for the recovery of seisin, or possession of land, or other real property. So actions, though merely for damages, occasioned by injuries to real property, are local." (Citing Doulson v. Matthews.)

\textsuperscript{5}Ellenwood v. Marietta Chair Co., 158 U. S. 105 (1895); Prichard v. Campbell, 5 Ind. 494 (1854); Chapman v. Morgan, 2 Greene 374 (Iowa 1849); Brown v. Irwin, 47 Kan. 50, 37 Pac. 134 (1891); Champion v. Doughty, 18 N. J. 3, 35 Am. Dec. 523 (1840); Hill v. Nelson, 70 N. J. 375, 57 Atl. 411 (1904); Dodge v. Colby, 108 N. Y. 448, 15 N. E. 703 (1888); Niles v. Howe, 57 Vt. 388 (1885); see Sentenis v. Ladew, 140 N. Y. 463, 35 N. E. 660, (1893) where the general rule was conceded, but it was held that a judgment rendered by the Supreme Court of New York, in an action for trespass on real property in Tennessee would be binding and conclusive upon the parties, where no objection was made until after the judgment had been rendered.

\textsuperscript{6}Livingston v. Jefferson, Fed. Cas. No. 8,411, at 664 (C. C. A. Va. 1811). It is interesting to note that Storke feels Marshall was influenced by the effect his decision might have on Thomas Jefferson, his political enemy. Storke, supra note 1, at 304.

\textsuperscript{7}The distinction made between trespass quare clausum fregit and trespass on the case has usually been applied where the act was in one state and the injury occurred in another. See Ducktown Sulphur Copper & Iron Co. v. Barnes, 60 S. W. 593, 606 (Tenn. 1900), which
the general rule revolves around the idea that because trespass is a possessory action the title or boundary of the land injured may enter into the case, and can best be solved by the court which has the power to act on the title or order the land to be surveyed. If an admittedly technical rule is to be followed it should stand the test of practical application by reaching an equitable result. Under modern conditions of transportation the plaintiff has no remedy which can be enforced when a court refuses jurisdiction in an action for trespass to land merely because the land is situated in another state. If the offender has no property, he need only cross the state line to evade service. In an economic society which permits absentee ownership of property, it is conceivable that both parties to such a suit may reside outside of the jurisdiction where the land is located. Furthermore a trespass is essentially a tort for which personal damages are sought, and there appears to be no valid reason why it should not be handled in a manner similar to other personal actions.

Marshall recognized the fact that the objections raised to making the action transitory could also be raised in other situations where the action has never been considered local when he said:

"It is admitted that on a contract respecting lands, an action is sustainable wherever the defendant may be found; yet, in such a case, every difficulty may occur which presents itself in an action of trespass. An investigation of title may become necessary. A question of boundary may arise... yet these difficulties have not prevailed against the jurisdiction of the court. They have been countervailed, and more than countervailed by the opposing consideration, that if the action be disallowed, the injured party may have a clear right without a remedy in a case where the person who has done the wrong, and who ought to make the compensation, is within the power of the court." 

said in effect that residents of Georgia might maintain an action in Tennessee, for injuries to their real property in Georgia caused by a nuisance. But the nuisance was maintained in Tennessee, and even courts which follow the general rule make an exception where the act and the injury occur in different states. Stillman v. White Rock Mfg. Co., Fed. Cas. No. 13,446 (C. C. A. R. I. 1847); Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474 (1848).

In spite of this analysis the courts have generally refused to go against the authority in support of the historical rule.\textsuperscript{11}

Only one state, Minnesota, has chosen to establish by actual decision a minority to the effect that a trespass to land is no different from any other wrong for which damages are sought. After clearly and consisely stating the reasoning for and against the rule, the court in \textit{Little v. Chicago, etc. Ry. Co.},\textsuperscript{12} said:

"We recognize the respect due to judicial precedents, and the authority of the doctrine of stare decisis; but, inasmuch as this rule is in no sense a rule of property, and as it is purely technical, wrong in principle, and in practice often results in a total denial of justice \ldots we do not feel bound to adhere to it, notwithstanding the great array of judicial decisions in its favor. If the courts of England, generations ago, were at liberty to invent a fiction in order to change the ancient rule that all actions were local, and then fix their own limitations to the application of the fiction, we cannot see why the courts of the present day should deem themselves slavishly bound by those limitations."

Both logical analysis and analogy seem to support the position of this minority court, but by authority based on a historical English rule, trespass to land is local in its nature and hence local jurisdictionally. It is a curious and unfortunate anomaly in the law of venue.

Though there is a text book statement to the effect that an action for trespass to land is local in Kentucky,\textsuperscript{13} no case has been found which was decided squarely upon this point. The dictum in \textit{Campbell v. Ritter Lumber Co.},\textsuperscript{14} is indicative of the manner in which lip service may be paid to the rule, but its direct application evaded. Here the plaintiffs entered into a contract to sell certain timber on a tract of land in Virginia, giving the vendee the right to use all the buildings and improvements then on the land. The lumber company proceeded to remove the timber and in the process removed the

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\textsuperscript{11} The language of Cullen, C. J. in \textit{Brisbane v. Penn. Ry. Co.}, 205 N. Y. 431, 98 N. E. 752, 753 (1912) is typical: "Were the question an open one, I would favor the doctrine that our courts have jurisdiction of actions to recover damages for injuries to foreign real estate."
\textsuperscript{12} 65 Minn. 48, 67 N. W. 846, 847-848 (1896). This case was followed in \textit{Peyton v. Desmond}, 129 Fed. 1 (1904) on the grounds that such a question was one for local decision by which the United States Circuit Court of Appeals was bound.
\textsuperscript{13} I Newman, \textit{Pleading and Practice} (3rd ed. 1916) Sec. 23b: "Actions, therefore, for damages occassioned by all injuries to real property, are local \ldots ."
\textsuperscript{14} 140 Ky. 312, 314, 131 S. W. 20 (1910).
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buildings and further injured the property. Campbell filed his petition in Kentucky. The court in taking jurisdiction said:

"It has been held in a number of cases that an action of tort cannot be maintained in one state to recover damages for trespasses on land in another state. . . . We need not consider in this case whether the rule (of Doulson v. Matthews) is in force in Kentucky. This is an action upon a contract; and undoubtedly the cause of action upon a contract follows the person. . . ."

It must further be considered whether section 62, subsection 4, of the Civil Code,15 would bind a Kentucky court should it be called upon to determine its right to take jurisdiction over a tort to foreign land. This section provides that:

"Actions must be brought in the county in which the subject of the action, or some part thereof, is situated for an injury to real property."

The presence of the word "county" in this section should logically make it apply only where the question of venue within the state is involved. It has been so held,16 and such a decision is not out of line with those of other jurisdictions where similar statutes have been interpreted.17 When it is remembered that process knows no county boundary, but must stop at the state line in the absence of an attachment or equivalent procedure, it is readily seen that the limitation placed on this code provision is no strained or arbitrary one.

Possibly the Kentucky courts would think themselves bound by one additional factor. This element is the extent to which the common law of England is a part of our common law in this jurisdiction. In other words, is Doulson v. Matthews a portion of the English common law which has found its way into the law of Kentucky? By statutory provision the decisions of the courts of Great Britain rendered since 1775 are not binding authority upon the courts of this state,18 but attention must be

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35 The Code of Practice in Civil Cases (Carroll's 1935).
36 Smith v. Southern Ry. Co., 138 Ky. 163, 165, 123 S. W. 678 (1909) states: "The Civil Code of Practice, section 62, subsection 4 . . . applies only to actions that arise or may be brought within the state."
37 It was said in Wolff v. McGaugh, 175 Ala. 299, 57 So. 754 (1911) that the conflict among the cases over the jurisdiction of an action for trespass to land in another state does not affect the question of venue as between different counties of the same state. See also the Home Ins. Co. v. Penn. Ry. Co., 11 Hun. 182 (N. Y. 1877); Little v. Chicago, etc., Ry. Co., 65 Minn. 48, 67 N. W. 846 (1896).
38 Carroll's Ky. Stat. (1936), Sec. 2418.
called to the fact that Kentucky upon becoming a separate state adopted, by constitutional provision, "all laws which on the first of June, 1792, were in force in the state of Virginia." \(^1\)

Virginia had previously by an ordinance of 1776 adopted "the common law of England, and all statutes or acts of parliament made in aid of the common law prior to the fourth year of King James, and which were of a general nature, and not local to that Kingdom." \(^2\)

Thus in order to be binding upon the courts of Virginia and a part of the common law of that state which was adopted by Kentucky, a decision of an English court must have been rendered prior to 1776. The date of *Doulson v. Matthews* is 1792 and its rule is thereby eliminated.

Inasmuch as the question under consideration is undecided in Kentucky, at least two alternatives are open to our courts. The way shown by Minnesota is available. By clear-cut logical decision a state may establish that there is no distinction to be made with reference to a tort committed against foreign land and a tort to personal property. Unfortunately few courts are willing to surmount the obstacles presented by the influence of neighboring authority and the tradition that the law of this country in regard to land is essentially territorial. On the other hand there is always the method of statutory reform. This way is open to even those states that have followed the majority rule explicitly. New York offers a model code provision in section 982a of the Code of Civil Procedure, \(^2\) which reads:

"An action may be maintained in the courts of this state to recover damages for injuries to real estate situated without the state, or for breach of contracts or covenants relating thereto, whenever such an action could be maintained in relation to personal property without the state."

Such a provision removes the illogical contrast placed on real and personal property when purely personal damages are sought for their injury, and yet, retains as binding on both the ordinary limitations of process and procedure which are characteristic of the latter.

\(^1\) Kentucky Constitution, Sec. 233.
\(^2\) This provision is recommended by Storke, 27 W. Va. L. Q. 301, 311 (1921).
If Kentucky should choose not to follow the technical and impracticable rule that trespass to foreign land gives rise to a local cause of action, it is submitted that there is no need for a code revision. The practical and sound position pointed out by Minnesota could and should be followed.

W. L. Matthews, Jr.