§ 158. Liability for Intentional Intrusions on Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally

(a) enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) remains on the land, or

(c) fails to remove from the land a thing which he is under a duty to remove.

§ 162. Extent of Trespasser's Liability for Harm

A trespass on land subjects the trespasser to liability for physical harm to the possessor of the land at the time of the trespass, or to the land or to his things, or to members of his household or to their things, caused by any act done, activity carried on, or condition created by the trespasser, irrespective of whether his conduct is such as would subject him to liability were he not a trespasser.

§ 164. Intrusions Under Mistake

One who intentionally enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, although he acts under a mistaken belief of law or fact, however reasonable, not induced by the conduct of the possessor, that he

(a) is in possession of the land or entitled to it, or

(b) has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or

(c) has some other privilege to enter or remain on the land.

State v. Shack

277 A.2d 369 (N.J. 1971)

JOSEPH WEINTRAUB, C.J.

Defendants entered upon private property to aid migrant farmworkers employed and housed there. Having refused to depart upon the demand of the owner, defendants were charged with violating N.J. Stat. Ann. §2A:170-31 which provides that "[a]ny person who trespasses on any lands . . . after being forbidden so to trespass by the owner . . . is a disorderly person and shall be punished by a fine of not more than $50." Defendants were convicted in the Municipal Court of Deerfield Township. . . .

Complainant, Tedesco, a farmer, employs migrant workers for his seasonal needs. As part of their compensation, these workers are housed at a camp on his property.

Defendant Tejeras is a field worker for the Farm Workers Division of the Southwest Citizens Organization for Poverty Elimination, known by the acronym SCOPE, a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §§2861-2864.* The role of SCOPE includes providing for the "health services of the migrant farm worker."

Defendant Shack is a staff attorney with the Farm Workers Division of Camden Regional Legal Services, Inc., known as "CRLS," also a nonprofit corporation funded by the Office of Economic Opportunity pursuant to an act of Congress, 42 U.S.C.A. §2809(a)(3). The mission of CRLS includes legal advice and representation for these workers.

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*This statute, as well as the subsequently referenced statute, 42 U.S.C.A. §2809(a)(3), have been repealed. See Pub. L. 95-568, §8(a)(2), Nov. 2, 1978, 92 Stat. 2428; Pub. 97-35, tit. VI, §683(a), Aug. 13, 1981, 95 Stat. 519.—ED.

Differences had developed between Tedesco and these defendants prior to the events which led to the trespass charges now before us. Hence when defendant Tejeras wanted to go upon Tedesco's farm to find a migrant worker who needed medical aid for the removal of 28 sutures, he called upon defendant Shack for his help with respect to the legalities involved. Shack, too, had a mission to perform on Tedesco's farm; he wanted to discuss a legal problem with another migrant worker there employed and housed. Defendants arranged to go to the farm together. Shack carried literature to inform the migrant farmworkers of the assistance available to them under federal statutes, but no mention seems to have been made of that literature when Shack was later confronted by Tedesco.

Defendants entered upon Tedesco's property and as they neared the camp site where the farmworkers were housed, they were confronted by Tedesco who inquired of their purpose. Tejeras and Shack stated their missions. In response, Tedesco offered to find the injured worker, and as to the worker who needed legal advice, Tedesco also offered to locate the man but insisted that the consultation would have to take place in Tedesco's office and in his presence. Defendants declined, saying they had the right to see the men in the privacy of their living quarters and without Tedesco's supervision. Tedesco thereupon summoned a State Trooper who, however, refused to remove defendants except upon Tedesco's written complaint. Tedesco then executed the formal complaints charging violations of the trespass statute.

I

The constitutionality of the trespass statute, as applied here, is challenged on several scores.

It is urged that the First Amendment rights of the defendants and of the migrant farmworkers were thereby offended. Reliance is placed on Marsh v. Alabama, 326 U.S. 501 (1946), where it was held that free speech was assured by the First Amendment in a company-owned town which was open to the public generally and was indistinguishable from any other town except for the fact that the title to the property was vested in a private corporation. Hence a Jehovah's Witness who distributed literature on a sidewalk within the town could not be held as a trespasser. Later, on the strength of that case, it was held that there was a First Amendment right to picket peacefully in a privately owned shopping center which was found to be the functional equivalent of the business district of the company-owned town in *Marsh*. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968). [*Logan Valley* rests] upon the fact that the property was in fact opened to the general public.* There may be some migrant camps with

**Logan Valley* was substantially limited in application by the Supreme Court in Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972). See *infra* §2.3.—Ed.

the attributes of the company town in *Marsh* and of course they would come within its holding. But there is nothing of that character in the case before us, and hence there would have to be an extension of *Marsh* to embrace the immediate situation.

Defendants also maintain that the application of the trespass statute to them is barred by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and this on the premise that the application of the trespass statute would defeat the purpose of the federal statutes, under which SCOPE and CRLS are funded, to reach and aid the migrant farmworker. The brief of the United States, amicus curiae, supports that approach. Here defendants rely upon cases construing the National Labor Relations Act, 29 U.S.C.A. §151 *et seq.*, and holding that an employer may in some circumstances be guilty of an unfair labor practice in violation of that statute if the employer denies union organizers an opportunity to communicate with his employees at some suitable place upon the employer's premises. . . .

These constitutional claims are not established by any definitive holding. We think it unnecessary to explore their validity. The reason is that we are satisfied that under our State law the ownership of real property does not include the right to bar access to governmental services available to migrant workers and hence there was no trespass within the meaning of the penal statute. The policy considerations which underlie that conclusion may be much the same as those which would be weighed with respect to one or more of the constitutional challenges, but a decision in nonconstitutional terms is more satisfactory, because the interests of migrant workers are more expansively served in that way than they would be if they had no more freedom than these constitutional concepts could be found to mandate if indeed they apply at all.

II

Property rights serve human values. They are recognized to that end, and are limited by it. Title to real property cannot include dominion over the destiny of persons the owner permits to come upon the premises. Their well-being must remain the paramount concern of a system of law. Indeed the needs of the occupants may be so imperative and their strength so weak, that the law will deny the occupants the power to contract away what is deemed essential to their health, welfare, or dignity.

Here we are concerned with a highly disadvantaged segment of our society. We are told that every year farmworkers and their families numbering more than one million leave their home areas to fill the seasonal demand for farm labor in the United States. The migrant farmworkers come to New Jersey in substantial numbers. . . .

The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated. Although the need for their labors is evident, they are unorganized and without economic or political power. It is their plight alone that summoned government to their aid. In response, Congress provided under Title III-B of the Economic Opportunity Act of 1964 (42 U.S.C.A. §2701 *et seq.*) for "assistance for migrant and other seasonally employed farmworkers and their families." Section 2861 states "the purpose of this part is to assist migrant and seasonal farmworkers and their families to improve their living conditions and develop skills necessary for a productive and self-sufficient life in an increasingly complex and technological society." Section 2862(b)(1) provides for funding of programs "to meet the immediate needs of migrant and seasonal farmworkers and their families, such as day care for children, education, health services, improved housing and sanitation (including the provision and maintenance of emergency and temporary housing and sanitation facilities), legal advice and representation, and consumer training and counseling." As we have said, SCOPE is engaged in a program funded under this section, and CRLS also pursues the objectives of this section although, we gather, it is funded under §2809(a)(3), which is not limited in its concern to the migrant and other seasonally employed farmworkers and seeks "to further the cause of justice among persons living in poverty by mobilizing the assistance of lawyers and legal institutions and by providing legal advice, legal representation, counseling, education, and other appropriate services."

These ends would not be gained if the intended beneficiaries could be insulated from efforts to reach them. It is in this framework that we must decide whether the camp operator's rights in his lands may stand between the migrant workers and those who would aid them. The key to that aid is communication. Since the migrant workers are outside the mainstream of the communities in which they are housed and are unaware of their rights and opportunities and of the services available to them, they can be reached only by positive efforts tailored to that end. The Report of the Governor's Task Force on Migrant Farm Labor (1968) noted that "One of the major problems related to seasonal farm labor is the lack of adequate direct information with regard to the availability of public services," and that "there is a dire need to provide the workers with basic educational and informational material in a language and style that can be readily understood by the migrant." The report stressed the problem of access and deplored the notion that property rights may stand as a barrier, saying "In our judgment, 'no trespass' signs represent the last dying remnants of paternalistic behavior."

A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. [*Sic utere tuo ut alienum non lædas.*] Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. Hence it has long been true that necessity, private or public, may justify entry upon the lands of another. . . .

The subject is not static. As pointed out in 5 Powell, Real Property §745, at 493-494 (Rohan 1970), while society will protect the owner in his permissible interests in land, yet

> . . . [S]uch an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion.

Professor Powell added in §746, at 494-496:

> As one looks back along the historic road traversed by the law of land in England and in America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognized scope of social interests in the utilization of things. . . .
>
> To one seeing history through the glasses of religion, these changes may seem to evidence increasing embodiments of the golden rule. To one thinking in terms of political and economic ideologies, they are likely to be labeled evidences of "social enlightenment" or of "creeping socialism" or even of "communistic infiltration," according to the individual's assumed definitions and retained or acquired prejudices. With slight attention to words or labels, time marches on toward new adjustments between individualism and the social interests.

This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property. Accordingly substantial alterations have been made as between a landlord and his tenant.

The argument in this case understandably included the question whether the migrant worker should be deemed to be a tenant and thus entitled to the tenant's right to receive visitors, Williams v. Lubbering, 63 A. 90 (N.J. Sup. Ct. 1906), or whether his residence on the employer's property should be deemed to be merely incidental and in aid of his employment, and hence to involve no possessory interest in the realty. See Scottish Rite Co. v. Salkowitz, 197 A. 43 (N.J. 1938). These cases did not reach employment situations at all comparable with the one before us. Nor did they involve the question whether an employee who is not a tenant may have visitors notwithstanding the employer's prohibition. Rather they were concerned with whether notice must be given to end the employee's right to remain upon the premises, with whether the employer may remove the discharged employee without court order, and with the availability of a particular judicial remedy to achieve his removal by process. We of course are not concerned here with the right of a migrant worker to remain on the employer's property after the employment is ended.

We see no profit in trying to decide upon a conventional category and then forcing the present subject into it. That approach would be artificial and distorting. The quest is for a fair adjustment of the competing needs of the parties, in the light of the realities of the relationship between the migrant worker and the operator of the housing facility.

Thus approaching the case, we find it unthinkable that the farmer-employer can assert a right to isolate the migrant worker in any respect significant for the worker's well-being. The farmer, of course, is entitled to pursue his farming activities without interference, and this defendants readily concede. But we see no legitimate need for a right in the farmer to deny the worker the opportunity for aid available from federal, State, or local services, or from recognized charitable groups seeking to assist him. Hence representatives of these agencies and organizations may enter upon the premises to seek out the worker at his living quarters. So, too, the migrant worker must be allowed to receive visitors there of his own choice, so long as there is no behavior hurtful to others, and members of the press may not be denied reasonable access to workers who do not object to seeing them.

It is not our purpose to open the employer's premises to the general public if in fact the employer himself has not done so. We do not say, for example, that solicitors or peddlers of all kinds may enter on their own; we may assume for the present that the employer may regulate their entry or bar them, at least if the employer's purpose is not to gain a commercial advantage for himself or if the regulation does not deprive the migrant worker of practical access to things he needs.

And we are mindful of the employer's interest in his own and in his employees' security. Hence he may reasonably require a visitor to identify himself, and also to state his general purpose if the migrant worker has not already informed him that the visitor is expected. But the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties.

It follows that defendants here invaded no possessory right of the farmer-employer. Their conduct was therefore beyond the reach of the trespass statute. The judgments are accordingly reversed and the matters remanded to the County Court with directions to enter judgments of acquittal.

NOTES AND QUESTIONS

2. *Criminal versus civil actions.* Shack and Tejeras were charged with a

criminal offense as defined in a New Jersey statute passed by the state legislature. Tedesco invoked the criminal system by calling the police and filing a criminal complaint against Shack and Tejeras. Crimes are always created and defined by statutes. Criminal proceedings are generally initiated by federal, state, or local government officials rather than by private citizens, and their purpose is to deter wrongful activities and to punish those who engage in them. Prosecutors exercise discretion in determining whom to prosecute for what crimes. They base their decisions on such factors as the cost of litigating, the likelihood of success, and the kinds of criminal activity the prosecutor's office targets for special attention. See Robert Cover, Owen Fiss, and Judith Resnik, Procedure 9-21 (1988). These proceedings may include arrest, criminal complaint or indictment by the prosecutor, arraignment (bringing formal charges against the accused in court), plea bargaining, and trial. Punishment may include imposition of a fine payable to the state, probation (continued supervision), incarceration, and, in some states, the death penalty.

Alternatively, Tedesco could have sued Shack and Tejeras by bringing a civil lawsuit against them. Civil proceedings begin with a complaint filed by the complaining party—the plaintiff—with the appropriate court and mailed or presented to the defendant, generally with a summons issued by the court. The complainant is usually a private party—a person or organization—but may also be a government entity. The complaint includes a statement of the facts of the dispute and the requested relief. To avoid an unfavorable default judgment, the defendant must respond to the complaint either by ***answering*** the complaint—admitting or denying the allegations in the complaint—or by ***moving to dismiss*** the complaint, either because the court lacks the power (***jurisdiction***) to hear the case or because the complaint fails to state a legal claim upon which relief can be granted or for some other lawful reason. The lawsuit may be ***settled*** between the parties before trial. If the case is not settled, it may proceed to trial, at which time witnesses may appear to establish the facts necessary to support the claim for relief. The case may or may not be heard by a jury. If it is a jury trial, the judge will instruct the jury on the applicable rules of law. The jury will determine the facts based on evidence presented at the trial and then apply the law to the facts to decide whether the defendant violated the plaintiff's legal rights.

After the trial, one or both parties may ***appeal*** the case to a higher court on the grounds that the trial court judge did not apply the law correctly. On appeal, the attorneys for the parties will write ***briefs*** on disputed questions of law, with each side arguing for different interpretations of the rules in force and presenting policy arguments for the rules each side favors. The attorneys may also engage in ***oral argument*** before the judges on the appellate court, at which time the judges may ask the attorneys questions about their legal arguments. Sometime after oral argument, the appellate court will decide the case and may issue a written ***opinion*** explaining the rule of law adopted by the court and the reasoning justifying its decision.

3. *Trespass doctrine.* Shack and Tejeras were charged with ***criminal tres-***

pass as defined by the New Jersey statute, N.J. Stat. Ann. §2A:170-31. Trespass is also a common law doctrine. The common law of trespass would govern a civil lawsuit brought by Tedesco against Shack and Tejeras. The definition of common law trespass is somewhat different from the criminal trespass rule adopted by the New Jersey legislature.

a. Definition of trespass. A trespass is an *intentional intrusion on property possessed by another.* The *intent* requirement is met if the defendant engaged in a voluntary act, such as walking onto the property. It is not necessary to show that the trespasser intended to violate the owner's legal rights; thus, mistaken entry on the land of another does not relieve the trespasser of liability. The intent requirement is not met if the trespasser is carried onto the property against her will by others. The *intrusion* occurs the moment the nonowner enters the property. An intrusion may occur upon physical entry by a person, an agent such as an employee, or an object such as a building that extends over the boundary onto a neighbor's property. A trespass may occur both above or below the surface. For example, a well dug on one's property that slants to an area underneath the neighbor's property constitutes a trespass. Similarly, a second-story porch that overhangs the neighbor's property also qualifies as a trespass.

b. Exceptions or defenses to a trespass claim. A trespass is privileged, and thus not wrongful, if (1) the entry is done with the *consent* of the owner;[1] (2) the entry is justified by the *necessity* to prevent a more serious harm to persons or property; or (3) the entry is otherwise encouraged by *public policy.* Entry on property of another may be privileged, for example, if one is doing so to stop a crime or to help someone out of a burning house. See Roger Bernhardt, Real Property in a Nutshell 351-356 (2d ed. 1981); Prosser and Keeton on Torts §13, at 67-85.

4. *Trespass remedies.* Civil litigants may request three kinds of relief. First, they may ask for *damages.* Unlike fines imposed by criminal laws, damages are paid to the injured party by the wrongdoer. A possessor may always recover *nominal damages* for trespass even if no other harm has occurred. The possessor may recover *compensatory damages* if the trespasser has caused other harm to the property. The amount of compensatory damages is measured either by the cost of restoring the property to its previous condition or by the diminution in its market value. The cost of the lawsuit might exceed the amount of damages recovered. However, a possessor might sue even for nominal damages as a way to establish that he has the right to possess the property—to have the court declare that the owner has the right to exclude others from the property in question.

Second, the plaintiff may ask the court to issue an *injunction* ordering

1. One who enters property with the permission of the owner or possessor is called a *licensee* and has a property interest called a *license.* If the owner revokes the license, the nonowner must leave the land within a reasonable time; failure to do so will constitute a trespass.

the wrongdoer to cease her wrongful conduct. Failure to obey such an injunction is punishable by contempt proceedings, and the recalcitrant party may be fined or imprisoned. If the entry by the trespasser is permanent, the plaintiff may bring a lawsuit for *ejectment*. For example, if someone moves onto someone else's property, perhaps mistakenly believing it is her own property and having some reason to think that she has a right to possess the property—such as being the grantee of a deed that describes the parcel and purports to transfer it to her—the true owner will sue to eject the trespasser by getting a judgment that the property belongs to the plaintiff and an order that the defendant leave the property.

Third, the plaintiff may ask the court for a *declaratory judgment* stating his legal rights against the other party. For example, Shack and Tejeras might sue Tedesco, claiming they have legal right to enter Tedesco's property to visit the farmworkers and asking the court to issue both a declaratory judgment confirming that right and an injunction ordering Tedesco not to interfere with the exercise of their legal rights.

5. *Criminal versus common law trespass.* The court in *Shack* applied the state criminal trespass statute. How did the criminal charge of criminal trespass differ from the common law definition of trespass?

6. *Legal basis for decision.* Did the court in *Shack* rest its ruling on the U.S. Constitution, a federal statute, a state statute, or the state common law? If the court rested its opinion on only one of these sources of law, what role did the others play in determining the outcome of the case?

Dan B. DOBBS, Tort and Compensation: Personal Accountability and Social Responsibility for Injury 58-61 (1985)

b. Conversion of Chattels — Trover

Dubbs steals Pedrick's watch. This is a conversion and Dubbs is a converter. He has, as it is said, "converted the watch to his own use," by exercising substantial "dominion" over it. In such a case Pedrick can sue for the value of the watch at the time and place of the taking. In the earlier common law the form of action used to redress this conversion was known as *Trover*, and this is the word under which conversion cases are usually indexed even today.

1. *Intent.* Conversion is an intentional tort and there must be intent to exercise substantial dominion over the chattel. But, as in the case of trespass to land, there is no requirement that the defendant be conscious of wrong-doing. One who takes another's watch in the honest belief that it is her own, is still a converter if the dominion thus exercised is sufficiently substantial. Should the transferred intent doctrine apply anyway?

2. *How conversion is accomplished.* A simple theft is a conversion, but substantial dominion over another's property may take place in other

ways. In each case suppose the defendant believes he has a right to deal with the property, but he is reasonably mistaken:

(a) Defendant decides to burn his copy of a torts casebook and throws it in the fire. By mistake he got the plaintiff's copy instead.

(b) Defendant restaurant holds a coat checked by A and also one checked by B. By mistake defendant gives B's coat to A, who disappears and is never found. B's coat is far the more valuable of the two.

(c) Defendant, honestly believing that Turvey has the right to sell a watch, buys it from him. The watch in fact was stolen from plaintiff.

All these cases are cases of conversion. Notice that in each case the defendant might be wholly innocent. Nevertheless, he has exercised substantial dominion over the property of the plaintiff and intended to do so.

One of the more difficult issues is what constitutes such dominion. It is clear that dominion is exercised in all the above cases, and also where the property is substantially damaged by the defendant. But in other cases defendant merely takes the property for a short period of time, as in the case of a joyride. If he takes a car for a joyride and it is destroyed in the process, he is no doubt liable. But suppose he takes it and returns it. Is this a conversion? This and scores of variations on it raise questions of degree which cannot be resolved firmly on principle. This has led the American Law Institute to conclude that it is all a matter of how serious the interference is. Since a finding of conversion will mean that the defendant pays the full value of the chattel, the ALI concluded that the interference should be serious enough to justify imposing such liability and that a number of factors were important including:

(a) extent and duration of control;
(b) the defendant's intent to assert a right to the property;
(c) the defendant's good faith;
(d) the harm done; and
(e) expense or inconvenience caused.

See RESTATEMENT SECOND OF TORTS § 222A (1965).

4. *Serial conversions.* Dubbs steals Pedrick's watch, then sells the watch to Byer. Dubbs is a converter and so is Byer, since both have exer-

cised substantial dominion and have intended to do so. Pedrick could sue either or both, though he could collect only once.

5. *Bona fide purchasers*. Byer in the preceding illustration is liable even if she buys in good faith, that is, even if she is a bona fide purchaser for value and without notice of Pedrick's rights. The theory is that Byer cannot purchase from Dubbs any more than Dubbs has. Dubbs has no title and thus cannot transfer title to Byer.

There is one special wrinkle in this rule. If Dubbs does not steal the watch but tricks Pedrick into selling it to him, then Dubbs *does* get title. Since he got it by a trick or fraud, Pedrick could go to court and have the sale avoided; he could get his watch back because of Dubbs' fraud. However, he is not *required* to do this. He may do nothing at all and keep the money Dubbs paid him. At any rate, until he does go to court, Dubbs has title to the watch. This means that Dubbs could transfer title to someone else, including Byer. In this kind of case Byer would obtain good title and would *not* be a converter if she were a bona fide purchaser for value and without notice of Pedrick's rights. On the other hand, if Byer knew of the fraud practiced on Pedrick, and bought the watch anyway, she would also be a converter, along with Dubbs.

6. *The Uniform Commercial Code*. A comprehensive statute enacted in almost all states regulates many commercial dealings. One provision of this code covers this kind of case: Orwell takes his bike to the Merchant Bike Shop for repair. The bike shop repairs the bike but before Orwell returns, sells it to Dalzell. Under the rules stated above, Dalzell would be liable, since Merchant had no title to pass. The UCC, however, provides that if goods are entrusted to the possession of a merchant who deals in goods of that kind, the merchant has the legal power to transfer all the rights of the "entrustor." Is it clear whether Dalzell is liable or not? Suppose Orwell had stolen the bike, then taken it to Merchant for repair. Would Dalzell be liable?

7. *Remedies*. The usual remedy for conversion is damages, measured by the value of the chattel at the time of conversion. At times, however, the value of the chattel fluctuates in the market, as in the case of shares of stock or commodities. The plaintiff, who has lost her property, may be forced to replace it in a rising market. If so, the time of conversion rule would be unfair. Some courts have accordingly permitted the plaintiff to recover the highest market value of the chattel that occurs within a reasonable time for replacement. The plaintiff might, instead of seeking value of the chattel, seek "replevin" or "claim and delivery," that is, an actual return of the chattel itself. This might also be possible in some instances through an injunction suit brought in equity.

9. Damon Deptford stole a watch belonging to his twin brother, Robertson. The watch was engraved "Deptford." Damon sold the watch to Tribble. Damon then fled the jurisdiction. Is Tribble a converter? Suppose: (a) she thought Damon was Robertson and the watch was Robertson's; (b) she thought Damon was Damon and that the watch was his.

c. *Trespass to Chattels*

Trespass to chattels involves some intermeddling with a chattel of another person, and at times even dispossession, but something short of a conversion. As in the case of conversion itself, it is much a matter of degree. Liability is imposed only if the possessor of the chattel suffers dispossession or lost use, or if the chattel or the possessor is harmed. See RESTATEMENT SECOND OF TORTS § 218 (1965). Liability is based on actual damage, however, not on the market value of the chattel.

Is there a trespass to chattel, a conversion or no tort at all in the following cases?

(a) Defendant pets the plaintiff's dog although the plaintiff has repeatedly told him not to do so. The dog is not harmed.

(b) Defendant leans against the plaintiff's car.

(c) Defendant takes the car for a joyride against the plaintiff's will, and puts the dog in the front seat with him.

(d) Defendant, angered at the dog's barking, kicks the dog then pushes the car over a cliff, causing substantial damages.

SECOND RESTATEMENT OF TORTS

§ 217. Ways of Committing Trespass to Chattel

A trespass to a chattel may be committed by intentionally

(a) dispossessing another of the chattel, or

(b) using or intermeddling with a chattel in the possession of another.

§ 218. Liability to Person in Possession

One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if,

(a) he dispossesses the other of the chattel, or

(b) the chattel is impaired as to its condition, quality, or value, or

(c) the possessor is deprived of the use of the chattel for a substantial time, or

(d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

§ 229. Conversion by Receiving Possession in Consummation of Transaction

One who receives possession of a chattel from another with the intent to acquire for himself or for a third person a proprietary interest in the chattel which the other has not the power to transfer is subject to liability for conversion to a third person then entitled to the immediate possession of the chattel.

Kennedy, Duncan. "Form and Substance in Private Law Adjudication,"

89 Harv. L. Rev. 1687 (1976)

I. THE JURISPRUDENCE OF RULES

The jurisprudence of rules is the body of legal thought that deals explicitly with the question of legal form. It is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to.[4]

A. *Dimensions of Form*

1. *Formal Realizability.* — The first dimension of rules is that of formal realizability. I will use this term, borrowed from Rudolph von Ihering's classic *Spirit of Roman Law*, to describe the degree to which a legal directive has the quality of "ruleness." The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way. Ihering used the determination of legal capacity by sole reference to age as a prime example of a formally realizable definition of liability; on the remedial side, he used the fixing of money fines of definite amounts as a tariff of damages for particular offenses.[5]

At the opposite pole from a formally realizable rule is a standard or principle or policy. A standard refers directly to one of the substantive objectives of the legal order. Some examples are good faith, due care, fairness, unconscionability, unjust enrichment, and reasonableness. The application of a standard requires the judge both to discover the facts of a particular situation and to assess them in terms of the purposes or social values embodied in the standard.[6]

It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty. The two are distinct but overlapping. Official arbitrariness means the sub rosa use of criteria of decision that are inappropriate in view of the underlying purposes of the rule. These range from corruption to political bias. Their use is seen as an evil in itself, quite apart from their impact on private activity.

Certainty, on the other hand, is valued for its effect on the citizenry: if private actors can know in advance the incidence of official intervention, they will adjust their activities in advance to take account of them. From the point of view of the state, this increases the likelihood that private activity will follow a desired pattern. From the point of view of the citizenry, it removes the inhibiting effect on action that occurs when one's gains are subject to sporadic legal catastrophe.[7]

It has also been common ground, at least since Ihering,[8] that the virtues of formal realizability have a cost. The choice of rules as the mode of intervention involves the sacrifice of precision in the achievement of the objectives lying behind the rules. Suppose that the reason for creating a class of persons who lack capacity is the belief that immature people lack the faculty of free will. Setting the age of majority at 21 years will incapacitate many but *not all* of those who lack this faculty. And it will incapacitate some who actually possess it. From the point of view of the purpose of the rules, this combined over- and underinclusiveness amounts not just to licensing but to requiring official arbitrariness. If we adopt the rule, it is because of a judgment that this kind of arbitrariness is less serious than the arbitrariness and uncertainty that would result from empowering the official to apply the standard of "free will" directly to the facts of each case.

2. *Generality.* — The second dimension that we commonly use in describing legal directives is that of generality vs. particularity. A rule setting the age of legal majority at 21 is more general than a rule setting the age of capacity to contract at 21. A standard of reasonable care in the use of firearms is more particular than a standard of reasonable care in the use of "any dangerous instrumentality." Generality means that the framer of the legal directive is attempting to kill many birds with one stone. The wide scope of the rule or standard is an attempt to deal with as many as possible of the different imaginable fact situations in which a substantive issue may arise.[9]

The dimensions of generality and formal realizability are logically independent: we can have general or particular standards, and general or particular rules. But there are relationships between the dimensions that commonly emerge in practice. First, a general rule will be more over- and underinclusive than a particular rule. Every rule involves a measure of imprecision vis-à-vis its purpose (this is definitional), but the wider the scope of the rule, the more serious the imprecision becomes.

Second, the multiplication of particular rules undermines their formal realizability by increasing the number of "jurisdictional" questions. Even where the scope of each particular rule is defined in terms of formally realizable criteria, if we have a different age of capacity for voting, drinking, driving, contracting, marrying and tortfeasing, there are likely to be contradictions and uncertainty in borderline cases. One general rule of legal capacity at age 18 eliminates all these at a blow, and to that extent makes the system more formally realizable.[10]

Third, a regime of general rules should reduce to a minimum the occasions of judicial lawmaking. Generality in statement guarantees that individual decisions will have far reaching effects. There will be fewer cases of first impression, and because there are fewer rules altogether, there will be fewer occasions on which a judge is free to choose between conflicting lines of authority. At the same time, formal realizability eliminates the sub rosa lawmaking that is possible under a regime of standards. It will be clear what the rule is, and everyone will know whether the judge is applying it. In such a situation, the judge is forced to confront the extent of his power, and this alone should make him more wary of using it than he would otherwise be.[11]

Finally, the application of a standard to a particular fact situation will often generate a particular rule much narrower in scope than that standard. One characteristic mode of ordering a subject matter area including a vast number of possible situations is through the combination of a standard with an ever increasing group of particular rules of this kind. The generality of the standard means that there are no gaps: it is possible to find out something about how judges will dispose of cases that have not yet arisen. But no attempt is made to formulate a formally realizable general rule. Rather, case law gradually fills in the area with rules so closely bound to particular facts that they have little or no precedential value.[12]