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The Doctrine of Trespass Ab Initio

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THE DOCTRINE OF TRESPASS AB INITIO

In Cline v Tait[1], plaintiff was arrested and incarcerated for a night before being presented to a magistrate. Plaintiff sued the sheriff for false imprisonment. The court denied recovery, holding that since false imprisonment is the unlawful violation of the personal liberty of another, it does not result until the moment at which an imprisonment becomes unlawful; and an arresting officer cannot be held liable for damages theretofore accruing.

Similar decisions on such facts have provoked considerable controversy, for the Montana holding has placed Montana among the few states[2] which have rejected the common law action of trespass ab initio—in cases of false imprisonment, often referred to as the doctrine of "relation back." The majority of states still adhere to the old common law rule in such cases. However, Montana does have support for its views in the American Law Institute Restatement of The Law of Torts as follows:

> "If the actor, having obtained the custody of another by a privileged arrest . . . fails to use due diligence to take the other promptly before a proper court . . . the actor's misconduct makes him liable to the other only for such harm as is caused thereby and does not make the actor liable for the arrest or for keeping the other in custody prior to the misconduct."[3]

In recent times, there have been judicial expressions of disfavor of the doctrine. The United States Supreme Court has frowned upon the doctrine,[4] and law writers have long counseled its death.[5]

The purpose of this comment is to prove that the Montana minority holding is the better view, that the majority common law idea has been outmoded.

The Montana Code[6] requires an officer to bring his prisoner before a magistrate or court to determine whether the prisoner is to be released or held for trial, and to do this in a *reasonable* time. While this is primarily for the protection of the prisoner, a public interest also is involved—the speedy administration of justice.

[1]Cline v. Tait (1942) 129 P. (2d) 89.
[2]Smith, *Surviving Fictions* (1918) 27 YALE LAW JOURNAL 147.
[3]Restatement of the Law of Torts.
[4]McGuire v. United States, 1927, 273 U. S. 95, 47 S. Ct. 259, 71 L. Ed. 556.
[5]PROSSER ON TORTS, 1941, p. 158.
[6]R. C. M. 1935 Sec. 11766.

In the principal case the officer had made a proper and valid arrest, but there was a subsequent dereliction of duty or misconduct on his part in not bringing the prisoner before a magistrate in a "reasonable" time. One performing an act by virtue of legal authority is liable for any subsequent tortious conduct. It is at this point that the doctrine of "relation back" enters. The majority of jurisdictions would hold that the misconduct dislodges the actor's privilege in making the arrest and makes him liable for the entire imprisonment in the same manner as if the original arrest were unprivileged, on the grounds of the trespass ab initio doctrine.

This fiction had its origin in the ancient law of distress of property,[7] and received its first statement by Coke in the "Six Carpenters Case."[8] Coke reports:

> ". . . first, it was resolved when an entry, authority or license, is given, to anyone by the law and he doth abuse it, he shall be a trespasser ab initio; but where an entry, authority, or license is given by the party, and he abuses it, then he must be punished for his abuse, but shall not be a trespasser ab initio."

As a second proposition,

> "It was resolved *per totam curiam,* that not doing cannot make the party who has authority or license by law a trespasser ab initio, because not doing is no trespass."

This latter proposition is based upon the theory that in such a case the landowner might choose his own licensee, and should take the risk of possible abuse of the license.[9] Prosser states that the subsequent act must be one which in itself would amount to a trespass, and that a mere omission, such as a failure to pay for drinks after entering an inn is not sufficient.[10] He is of the opinion that this view has been due, in some respect, to the formal requirements of the trespass action.

It would seem that the early development of the fiction was confined almost wholly to the abuse of some privilege.[11] Thus, the doctrine most commonly applied in case of damage done after a privileged entry upon land,[12] or the misuse or wrongful disposition of goods seized under process of author-

[7]7Holdsworth, *History of English Law*, 1925, 499.
[8]PROSSER ON TORTS, p. 157.
[9]Cole v. Drew (1871) 44 Vt. 49.
[10]Walsh v. Brown (1907) 194 Mass. 317, 80 N. E. 465.
[11]11 HARV. L. REV. 277 (1897).
[12]*Supra*, note 5.

ity of law,[13] or where the reversioner entered to see if the tenant in possession was committing waste.[14]

Prosser is of the further opinion that the doctrine is a procedural device, "due to the misplaced ingenuity of some medieval pleader," which had been designed to circumvent the rule that the action of trespass would not lie where the original entry was not wrongful.[15] A writer in *11* HARVARD LAW REVIEW *277* agrees with Prosser, stating that as long as procedure was the life-blood of law, this fiction of trespass ab initio had served to overcome certain procedural difficulties which tended to obstruct the administration of justice in particular cases. Holmes supports this view, saying:

> "The rule, that, if a man abuse an authority given him by law, he becomes a trespasser ab initio, altho now it looks like a rule of substantive law and is limited to a certain class of cases, in its origin was only a rule of evidence by which, when such rules were few and rude, the original intent was presumed conclusively from the subsequent conduct.'"[16]

True, in the principal case the court did not dwell on the question at any great length, seeming to take it for granted that there was no great controversy present. While it is believed that the court reached a proper result, the case is not so easy on the precedent. The best argument in favor of the doctrine is that it affords a valuable correction for abuses by public officers; but the existence of adequate remedies for the subsequent misconduct should be sufficient.[17] In the field of arrest there is much conflict as to the application of the principle.[18] A failure to make a return of process, even though it is only an omission, is regarded as so identified with the arrest itself as to render it invalid, and make the officer liable from the beginning.[19] Failure to use due diligence to bring the prisoner promptly before a magistrate is given the same effect by most courts,[20] although there is authority to the contrary.[21] A release of the prisoner without any presentment before a

[13]PROSSER ON TORTS p. 157; Salmond, *Law of Torts* 8th Ed. p. 222 (1934).
[14]Commonwealth v. Rubin (1896) 165 Mass. 453, 43 N.E. 200.
[15]*Supra*, note 12.
[16]28 COLUM. L. REV. p. 841 (1928).
[17]Bohlen and Shulman, EFFECT OF SUBSEQUENT MISCONDUCT UPON A LAWFUL ARREST, (1928) 28 COLUM. L. REV. 841.
[18]*Supra*, note 17.
[19]Gibson v. Holmes (1905) 78 Vt. 110, 68 A. 11.
[20]Peckham v. Warner Bros. Pictures (1939) 36 Cal. App. 2d 214, 97 P. 2d 472.
[21]PROSSER ON TORTS, p. 159.

court is regarded as a trespass ab initio by some courts,[22] and not by others.[23] As to any mistreatment of the prisoner,[24] or efforts to coerce him into compliance with orders,[25] there are surprisingly few decisions. The doctrine ought to be banished at least from the law of arrest. In the great majority of cases the delay is obviously due to some carelessness or oversight on the part of the officer after the arrest. It would be unjust to make the officer liable to the prisoner simply because he had failed to comply with a mere matter of detail.

The reasons given by the courts for the continuance of the doctrine lack conviction. As an example, one such reason is that the abuse of the privilege creates a conclusive presumption that the actor intended from the outset to use the public authority as a cloak under which to enter for a wrongful purpose. The majority of American courts have seen fit to continue nursing this common law fiction along, by saying that subsequent conviction of the prisoner does not release the officer from liability for his tortious conduct.[26]

Legal fictions have played an important role in the development of a system of law. The law at this point has attained sufficient maturity so that it no longer need recognize the fiction of trespass ab initio. The Montana court has adopted this mature viewpoint, as its codes abolish the old common law forms of action so that it is unnecessary to support this fiction on the theory that it is a procedural device.[27]

It is admitted that an officer should be liable for his tortious acts, and our courts recognize the rights of the prisoner by providing him with means by which he may bring an action against the offending officer for malicious prosecution.[28] Certainly if our courts have developed sufficiently to be willing and able to punish such official misconduct, then there is no room in our tort law for anomalous civil liability to a plaintiff who has suffered no harm from the misconduct.

The weight of authority has based its holding on precedent.[29] This is adequate at times, but it should not be followed

[22]Atchison, T. & S. F. R. Co. v. Hindsell, (1907) 76 Kan. 74, 90 P, 800. RESTATEMENT OF LAW OF TORTS, s 136.
[23]*Supra*, note 1.
[24]Halley v. Mix (1829) 3 Wend., N. Y. 350, 20 Am. Dec. 702.
[25]McGuire v. United States (1927) 273 U. S. 95, 47 S. Ct. 259, 71 L. Ed. 556.
[26]*Supra*, note 8.
[27]*Supra*, note 22.
[28]*Supra*, note 25.
[29]POLLOCK ON TORTS, 12th Ed. p. 402 (1923) SALMOND ON TORTS 6th Ed. 232 (1924).

where it has been plainly discredited, even in the field where it has had its origin.[20] Especially is this true in this case where the prisoner has adequate tort remedies.

Therefore, it is the conclusion of the writer that the holding in the principal case is the correct view. The reason for the Common Law doctrine no longer exists inasmuch as plaintiff has a remedy against the offending officer where he can prove actual harm. Accordingly, the doctrine of trespass ab initio should be discarded.

—Ted James.
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[20]PROSSER ON TORTS p. 157. *Supra*, note 8.

ORAL CONTRACTS TO DISPOSE OF PROPERTY AT DEATH

In *Gravelin* v. *Porier*[1] the plaintiff sued the administrator upon an oral agreement of deceased to leave the plaintiff a "child's share in the estate." The estate was composed of both real and personal property. The Supreme Court held that such an oral agreement was within the Montana statute of frauds[2] both as an "agreement for the sale of real property" and an "agreement for the sale of goods." In *Rowe* v. *Eggum*[3] an oral agreement not to change an existing will was also held to be within the statute of frauds.

In these cases Montana is in accord with the prevailing rule.[4] However, in other states, distinctions are sometimes made so that certain types of such oral agreements are withdrawn from the statute of frauds.[5] For example, a contract to die intestate has been held not to be within the statute.[6] But tho there are no direct decisions on these distinctions, the language

[1](1926) 77 Mont. 260, 250 P. 823.
[2]R. C. M. 1935, §10, 613.
[3](1938) 107 Mont. 378, 87 P. (2d) 189.
[4]Holz v. Stephen (1936) 362 Ill. 527, 200 N. E. 601, 106, A. L. R. 737; Nelson v. Schoonover (1913) 89 Kan. 388, 131 P. 147; Hamilton v. Thirston (1901) 93 Md. 213, 48 Atl. 709; Alexander v. Lewes (1918) 194 Wash. 32, 175 P. 572; Thompson v. Weimar (1939) 1 Wash. (2d) 145, 95 p. (2d) 772. SCHOULER, WILLS (6th ed. 1923) §696, p. 795. *Frauds, Statute of*, 24 C. J. §170.
[5]Schnebly, *Contracts to Make Testamentary Dispositions*, 24 *Mich. L. Rev.* 749 (1926).
[6]Stahl v. Stevenson (1918) 102 Kan. 447, 171 P. 1164; Quinn v. Quinn (1894) 5 S. D. 328, 58 N. W. 808, 49 Am. L. R. 875.