Comparison of the Actions of Trespass and Trover

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COMPARISON OF THE ACTIONS OF TRESPASS

AND TROVER,

A THESIS

By,

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AND TROVER.

INTRODUCTION.

In an essay of this kind, which must necessarily be somewhat limited in scope, it would be inexpedient to endeavor to cover the whole field of the law of trespass or of trover, therefore the writer has directed his attention to the salient characteristics of each action, to those points which are most important and interesting, not only from their prominence, but also from the fact that they are somewhat unsettled.

It is the purpose of the writer to present a comparison of the modern actions of trespass and trover as they now exist, the distinction abolished in form, but still having some influence on the law and practice.
The discussion may be largely historical, theoretical or otherwise impractical, but still of some importance; as a landmark is always interesting, and all the more so when it is gradually disappearing, so these two actions may have some interest to the student of to-day.
Chapter I.

T R E S P A S S.

In dealing with rights of action arising out of injuries done to property, moveable and tangible in its nature, i.e. personality, there are two things to be considered; first, the nature of the wrongful act, and secondly, the right infringed by such act.

It is clear that he who without authority or right damages or takes a chattel belonging to another, is guilty of a wrong, and equally clear that the owner of that chattel is entitled to a remedy. To the person so wronged, the law gives the choice of four so-called 'possessory actions', namely, 'replevin' to recover the chattel, 'detinue' to recover damages for the detention of the chattel, 'trespass' to recover damages for the caption and detention of the chattel, and 'trover' to recover for the detention alone. It is with trover and trespass that we are to deal, and first of trespass.

Trespass is one of the oldest of the common law actions known as possessory actions, and in its
origin was an action to recover damages for an unlawful interference with real property. There being no adequate remedy for a like disturbance of personal property, the scheme of using trespass as a means of remedy was devised and came into general use.

Of trespasses to personalty there are three kinds: first, those trespasses whereby the possession of the owner was disturbed or interfered with, but there was no change of possession, where the act amounted to a disturbance of but not a deprivation of the owner's possession, and secondly, those trespasses where the interference or disturbance amounted to an actual change of possession, where there was an actual caption and transportation of the goods, called under the old forms cepit et asportavit and giving rise to the action of trespass de bonis asportatis.

Those trespasses in which there is not the element of conversion or asportation, are not within our subject, therefore, hereafter, in speaking of trespasses we shall refer to those cases only in which the own-
er is deprived of his goods; where the asportation or conversion is part of the injury complained of.

In the early common law, force was an essential part of the injury of trespass. Trespass at that time was an interference with property, not only unlawful and unauthorized, but also by force and arms (vi et armis), and under the early forms the plaintiff must allege and prove, not only the fact of the taking, but also that the taking was by force, that is, against his will. However, the natural development of the action brought with it the idea of constructive force, and it became sufficient to prove a taking, first against the will, and then without the consent of the owner, active force being alleged only to recover vindictive damages.

In the modern practice the rule is even less strict. It is now sufficient to allege that the disturbance of possession was unlawful or without justification. This, for the reason that the gist of the action is the disturbance of possession and whether
the caption is forcible or not, is a matter not essential to the injury though it may be proved as a matter of aggravation. It is now substantially correct to say that any unauthorised exercise of dominion over the chattel of another is a trespass. So in Miller vs Baker(a), the defendant, a sheriff, had unlawfully attached the goods of the plaintiff; the goods had not been actually disturbed, the sheriff merely placing a keeper in charge with directions not to allow their removal; yet he was held liable in trespass. In the opinion the court quotes the words of Sewall J. in Gibbs vs Chase(b): "No actual force is necessary to be proved. He, who interferes with my chattels, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does so at his peril to answer me in damages in trespass or trover". And in Hardy vs Clendering it is held(c): that trespass will lie against one who knowingly purchases goods at an illegal execution sale.

(a) 1 Met. 27
(b) 10 Mass. 128.
(c) 25 Ark. 436.
In the case of an actual taking, it is even unnecessary that the defendant have a wrongful intent, it is sufficient if the plaintiff show that the act was done without justifiable cause, even though by mistake or accident. In Hobart vs Haggett (a), the defendant, having purchased an ox from the plaintiff, was directed to take it from the enclosure, and, by mistake, taking the wrong animal, was held liable in trespass therefor. So in Guille vs Swan (b), the leading case on this point, Judge Spencer says: "The intent with which the act is committed is by no means the test of the liability of the defendant in an action of trespass. If the act caused the immediate injury, whether intentional or unintentional, trespass is the proper remedy to redress the wrong. What is essentially a trespass cannot become lawful because of its having been done with a good intention; neither can the manner of doing it affect it; if unlawful in its nature, it must continue so". And the same rule applies in trover.

(a) 12 Me. 67.
(b) 19 Johns 381; See also Higginson v Yorke, 5 Mass. 381 and Coal Co. vs McCulloch, 54 Md. 403
as will be seen later.

But that is not a trespass which consists merely in some injury done to property by one to whom for any purpose the property has been entrusted by the owner and who was at the time lawfully holding it (a). But a possession obtained by fraud and for the very purpose of the wrong, is not such a lawful possession as will protect the trespasser, therefore an injury to the chattel, while such a possession continues, is a trespass, so in Butler vs Collins (b), where the defendant obtained possession of the goods by fraud intending to convert them and did convert them, the court held that it was as much a trespass as if the possession had been gained by force, and the defendant was held liable in trespass.

So also the possession may have been gained lawfully, with no intent to convert the goods, but while the goods are in the possession of the defendant, he may by wrongfully dealing with them, render himself a trespasser under the doctrine of "trespass ab initio".

But in this doctrine there is the distinction

(a) 21 Pick. 401.
(b) 12 Cal. 457.
drawn by the courts between a possession gained 'by authority of law' and a possession 'by authority in fact', i.e. license of the owner. This distinction was established by the Six Carpenters Case, where the rule is stated substantially as follows:--Where an authority is given to one by law, and he abuses it, he will become a trespasser ab initio, because abuses are so easily committed under guise of legal authority that the owner of goods must have some protection against one of whom he knows nought and to whom he is obliged by law to deliver his chattels. But the reasons for this protection fail when the owner has of his own volition intrusted his goods to another, wherefore, as to 'authority in fact', the rule is that the license cannot be annulled by any subsequent act of the licensee so as to deprive him of its protection.

Our next topic is as to who may maintain trespass. Trespass is based on possession, therefore it would seem that the plaintiff must have had possession

(a) 1 Smiths Lead. Cas. 257. & notes
(b) Allen vs Crowfoot, 5 Wend. 506; Wendell vs Johnson, 8 N.H. 220; State v Monroe, 12 N.H. 42; Hammond vs Hobart, 42 Me. 565; VanBrunt v Schenck, 13 Johns. 414; Narehood vs Wilhelm, 69 Pa. St. 64; Barrett vs White, 14 Am. Dec. 352 & note, 365.
either actual or constructive, or, as it is better stated, possession or the immediate right of possession. That the rule requires either one or the other is clearly laid down in the case Ward vs McCaulay(a). In that case, the plaintiff, being the owner of a house and furniture, leased the same to Lord Montfort for a term of years. Before the expiration of the term the defendant converted the furniture, seizing it under an illegal attachment. The plaintiff brings trespass. Lord Kenyon, in sustaining the defendant's demurrer, says: "The distinction between trespass and trover is well settled. The former is founded on possession, the latter on property. . . . . When the plaintiff has no possession, his remedy is by an action in trover founded on his property in the goods taken instead of trespass which is founded on possession". And his Lordship further observes "To enable a man to bring trespass, he must at the time when the act was committed which constitutes the trespass, either have the actual physical posses-

(a) 4 Term Rep. 487.
sion or else he must have the constructive possession in respect to the right of possession being actually vested in him". Judge Cooley, in his treatise on torts, adopts the same view. He says: "The possession may be either actual or constructive. The right to the possession of a chattel draws to it in contemplation of law, the possession itself, so that one party may be entitled to sue on his actual possession, while another may sue on his constructive possession. Thus, though a bailee or mortgagor who is left in possession of chattels may bring suit against one who disturbs his possession, still if the mortgagee or bailor is of right entitled to demand and take possession at any time, this right draws to it the possession, and the wrong-doer is a trespasser in him also (a). The whole doctrine rests either upon possession or right to possession, so that a bailor, who has the right to demand and take possession at any time, may maintain trespass, while a lessor for years, whose right to take possession is postponed until the expiration of the lease,

(a) Cooley on Torts, p. 439.
may not(a).

For convenience and brevity, other topics relating to trespass will be discussed in succeeding chapters.

(a) Edwards v do, 11 Vermont, 537; Woodruff v Halsey, 8 Pick. 333; Bass v Pearce, 16 Barb. 595; Staples vs Smith, 48 Me. 470; Faulkner vs Brown, 13 Wendell, 53.
Chapter II.

T R O V E R.

The action of trover is an outgrowth of, and a great improvement upon, the old common law action of detinue which it has largely supplanted by reason of the greater simplicity of pleading in trover, and the avoidance of several annoying and useless incidents of detinue.

Lord Mansfield in Cooper vs Chilly(a), says of trover: "In form the action is a fiction, in substance it is a remedy to recover the value of chattels, wrongfully converted to his own use by the defendant". At common law, the form supposes that the plaintiff may have come lawfully into possession of the chattel, and the declaration counts upon the fact that the plaintiff lost--and the defendant found--the chattel, and refuses upon demand to deliver it to the owner. Under the present practice, generally by statute, the fiction of the loss and finding is abolished, and as a general rule, the

(a) Bull 10.
question of how the defendant came into possession of the chattels is not material at common law and not traversable.

And herein lies the common law distinction between trespass and trover. Under the old forms, the gist of the trespass is the wrongful violation or disturbance of the possession, while in trover, the gist of the action was, not the manner of taking nor the taking wrongful or otherwise, but was the fact that the defendant, having gained the possession, how it matters not, refuses to redeliver the chattel to the rightful owner, and thereby the plaintiff is injured and asks damages. That the wrongful caption is the gist of trespass, is clearly shown by the facts that the chief allegation in the old forms is the wrongful caption, the loss by conversion being merely consequential thereof, and in addition, that if the defendant gained possession lawfully, trespass would not lie at all except in the few cases included in the doctrine of trespass ab initio.

On the other hand in trover the detention is the chief
allegation, the manner of gaining possession being presumed lawful. The distinction may be summed up as follows: in trespass the action is founded on the acquisition of property by the defendant; in trover, on the deprivation of the plaintiff.

The wrong for which trover is brought is technically called conversion, and the term – conversion is called "an unfortunate expression" by Baron Martin in Burroughs v Bayne(a). But, though the expression is an "unfortunate one," and "conveys no impression to the mind" of the learned Baron, yet, in modern practice it is a most important and far reaching term, and conveys to the mind of the modern lawyer the substance of the law regarding remedies for the asportation of personal property.

Conversion according to Judge Bramwell in Hiort v Bott,(b) is the wrong done by "an unauthorized act which deprives another of his property permanently or for an indefinite period": or as was said in McPeters v Paige(c), is "any act of dominion exercised over pro-

(a) 5 H. & N. 802.
(b) L.R. 9 Ex. 86 & 39.
(c) 83 Me. 234.
property in denial of the owner's right or inconsistent with it". In the time of Lord Mansfield, conversion was as he states in Cooper vs Chilly(ante) "the diversion of another's property to one's own use". But this limited meaning of the term has long been left behind in trover (though it still obtains in trespass) for it came to be seen that the diversion to one's own use was not the chief aspect of the wrong,—for what matters it to the plaintiff who gets the benefit of the property, he was deprived of it and what he wanted was recompense for that deprivation? What matters it to the plaintiff whether his property was converted to the use of the person who first took it, or to the use of a third person to whom he delivered it? So that in trover, the plaintiff may sue, not only the person who first converted his goods, but also any other person to whom the goods were delivered, and the defences of "purchase without notice" or "innocent bailee" are of no avail. The advantage to the defendant is not the test, that is the loss of the plaintiff.
The proposition that persons deal with chattels, or exercise dominion over them at their own risk, is well settled in our law and the rule applies very generally (a). But in trespass this rule does not apply. Pollock says (b): "One who received goods from a trespasser, even with full knowledge, does not himself become a trespasser against the real owner, as he has not violated an existing possession". The rule so stated seems a little too broad at the present day: it is better stated by Judge Porter in Brooks v Olmstead (c): "It is no doubt true that one who comes to the possession of goods by delivery, and who has been guilty of no fraud on his part, although it may turn out that the person who made the delivery to him had no title, and was himself a wrongdoer, yet, the receiver, guilty of no fault, cannot be treated as a trespasser; for in such a case he had done no act which aided in depriving the true owner of his property......he is neverthe-

(a) McPheters vs Paige, ante. Hoofman v Carow, 20 Wend. 21; Coles v Clark, 3 Cush. 399; Robinson v Bird, 153 Mass. 357; Arkel v Waterman, 63 Cal. 34; Spraights v Holley, 39 N.Y. 441; Rice v Yocum, 155 Pa. St. 538.
(b) Pollock on Torts, 454.
(c) 17 Pa. St. 27.
less liable in trover........So it may be stated safely that he who buys property from a trespasser without any knowledge of the original trespass cannot be treated as a trespasser(a)".

From the foregoing it may be said that the plaintiff in trover may pursue his goods and recover damages from any one to whom they were delivered or into whose hands they have come, while the plaintiff in trespass can sue only the original wrongdoer and those who by an unlawful taking from that wrongdoer have become liable to him in trespass(a).

The question as to who may maintain trover, is in an unsatisfactory condition. On principle it would seem that the person having title to goods should be allowed to maintain this action whether he had actual possession or an immediate right to possession, or not. And indeed in Ward vs McCaulay(ante) that seems to be the opinion of Lord Kenyon. In the early history of the law of trover, the rule was so stated as to

(a) Brooks v Olmstead, ante. Gloss v Black, 91 Pa. St 418; Ehle v do, 5 Comstock, 506; Stanley v Gaylord, 1 Cush. 556.
be misleading, for it was then said "that to maintain 
trover the plaintiff must show a legal title or a pro-
prietary right". And from the decisions on this 
point the following rule may be deduced: to maintain 
trover the plaintiff must have had at the time of the 
alleged wrong a property, general or special, entitled 
him to possession, or possession (a).

It was long in dispute whether bare possession 
was sufficient to support an action of trover; under 
the old forms it clearly was not, - title of some kind 
must have been coupled with the possession. The 
rule was settled finally in the leading case of Armory 
vs Delamirie (b), where the finder of a jewel was allowed to maintain trover against one to whom he had de-
levered it for examination, and who refused to return it. 
In the case of Gulf Co. vs Johnson (c), Justice Caldwell 
of the Supreme Court of the United States observed:
"The presumption of law is that the person who has pos-
session, has the property, and the law will not permit

(a) Hunter vs Cronkhite, 36 N.E. 924. Jaggard on 
Torts, 710; Ins. Co. v Drury, 38 Md. 242-49; 
Cooley on Torts, ante.
(b) 1 Strange, 505; Smiths Lead. Cas. 679
(c) 54 Fed. 974.
that presumption to be rebutted by evidence that the property is in a third person, when the evidence is offered by one who claims no title and who is a wrong-doer".

And in the same case the court observes: "In the law of trespass the jus tertii cannot be asserted, and in this respect I can see no practical difference between trespass and trover, for the general presumption of law is that he who has the possession has the property". In accordance with this decision, it is held in New York(a), that trover will lie on a bare possession, and that a defendant in trover cannot set up title in a third person without showing in himself some claim, title or interest derived from such third person. From what has been said heretofore it thus appears that there is no practical difference between trespass and trover as to the status of the plaintiff, -- in either case he must have had possession or constructive possession in order to succeed(b).

(a) Darnes vs Ball, 11 Wend. 57; Duncan vs Spear, 11 Wend. 54; See also Harker vs Dement, 9 Gill, 9 & 12; Knap vs Winchester, 12 Vt. 351; Bartlett vs Hoit, 29 N.H. 317;

(b) R'y Co. vs Kidd, 7 Dana, 245. See also case in Wake a 912 and case vs 919 Motz. Not a copy.
The next point to be determined is, what amounts to a conversion? In general it may be said that any dominion exercised over a chattel without authority of the owner, and inconsistent with his right, is a conversion sufficient to maintain trover (a); and of trespass de bonis asportatis it may be said that any unlawful taking and asportation of the goods is sufficient to maintain trespass (b). The only difference is the added element of the unlawful caption or taking in trespass.

Under the old forms the distinction was even wider, for then the element of force was necessary in trespass; -- there must have been a taking (vi et armis) or constructively violent, while in trover the taking or getting possession was indisputably presumed to be lawful, the wrong following when the owner demanded possession and it was refused; But though force as a requisite, has ceased to be a necessary allegation in trespass (b), "and it has frequently been decided that

(a) See Fouldes vs Willoughby, 8 M. & W. 540; Dexter vs Cole, 6 Wis. 320.
(b) Dexter vs Cole, supra.
to maintain trespass it is not necessary to prove forcible dispossession, but evidence of any unlawful interference with, or exercise of act of dominion over, property, to the exclusion of the owner, is sufficient to maintain the action; -- yet the old idea of vi et armis has had a strong influence on the law of trespass, and with its consequent idea of personal injury, has prevented the expansion of the action and has limited its application to that class of cases where the possession is obtained unlawfully, or being obtained lawfully, was rendered unlawful by subsequent acts of the defendant.

Trover, on the other hand, based on the elastic idea of detention, utterly disregarding the method of gaining possession, has gradually widened its jurisdiction and slowly but surely, as the sea gradually encroaches upon and covers the land, has finally covered all those cases where one person withholds the property of another and the latter sues to recover damages for a detention or conversion. And moreover this all conquering trover has swallowed the jurisdiction of its
sister action, and now may be maintained in all cases where trespass de bonis asportatis will lie; the plaintiff, waive the tort and sue in trover for the conversion(a). Judge Morton observes(b): 'the tortious taking of personal property is a conversion of it, and trover will lie wherever trespass de bonis asportatis will lie'.

However, the converse of the rule does not apply; for trover lies wherever the defendant is wrongfully in possession of the plaintiff's property or when he has converted it to his own use or another's, no matter how he came into the possession; but trespass lies only when the possession is gained unlawfully, or when a defendant is a trespasser ab initio: in the first case plaintiff must show unlawful detention only, in trespass he must also show unlawful caption: and therein lies the chief distinction between trespass and trover in theory, in practice and in measure of damages.

(a) Pierce vs Berryman, 14 Pick. 356.
(b) Ibid. Oxley vs Watts, l T.R. 12; Attack vs Bramwell, 3 B. 520.
In Shea vs Milford(a), the defendant removed the plaintiff's tools from one part of his land to another in consequence of which they were lost, and the plaintiff sues in trover. The plaintiff in removing the goods had no intent to convert them, and was held not liable in trover there being in fact no conversion. But the court intimated that the defendant might be liable in trespass for there it is sufficient to prove an unlawful disturbance, and the damages for the loss of the tools would follow as consequential damages.

The plaintiff in trover may waive the tort and sue in assumpsit, but trespass is not so convertible (b). That is, if it is a mere naked trespass, if there is a trespass de bonis asportatis the plaintiff may, because he may waive the trespass and sue in trover, sue on an implied assumpsit.

In Grafton vs Carmichael(c), the question became important as to whether the action was in the

(a) 145 Mass. 125.
(b) Finnigan vs Dowers, 59 N. W. 981.
(c) 48 Wis. 660.

(1)
nature of trespass or of trover, for the court did not recognize the 'doctrine of trespass ab initio' as applicable to the case. If the action is trover, the plaintiff recover, but if trespass he can't. The court says: "The gravemen of the charge is a wrongful and unlawful taking. The defendant justified under an attachment which afterwards proved to be invalid. The plaintiff cannot maintain trespass; if it had been trover the result would have been otherwise".

Bushall vs Miller(a), is another case in which the distinction became important. A intrusted certain goods to the plaintiff who placed them in a hut occupied by himself and the defendant in such a place that they were in the way of the defendant. The defendant removed them and they were lost, and the plaintiff having made satisfaction to A, brings this action. The court decided that the defendant was not liable for the conversion though he might be for the trespass.

The cases above cited illustrate the propo-

(a) 1 Strange, 128.
sition that even where the distinction between forms has been abolished by statute, there still remains a distinction in practical effect.
Chapter III.

MEASURE OF DAMAGES.

We have now come to the measure of damages, the most important topic from a practical point of view, in our discussion. In the consideration of this topic, it is not my intention to cover the whole field of the measure of damage in either action; I shall confine myself, as far as possible, to those points where a distinction exists or is thought to exist, between the two actions and if I digress into other topics it is because it seems necessary.

Remembering the theory at common law that in trespass there are two elements of injury, namely, the wrongful taking and the asportation, and in trover only one element of injury, the deprivation of possession, it would seem that therein will lie any distinction that might exist between the measures of damage
in the two actions. I apprehend that under the old forms such was the case; that in trespass the plaintiff might allege and recover damages for the taking (if only nominal) and also the value of the chattel if he were deprived of the possession, while in trover he could, recover damages only for the deprivation of possession the value of the chattel. So Lord Mansfield says of trover: "The form supposes that he came by it lawfully (the chattels in suit); yet, if he did not, by bringing this action (trover), the plaintiff waives the trespass; no damages are recoverable for the act of taking, all must be for the act of conversion" (a). It would seem from this that the chief practical distinction lay in this very fact, that in trespass, the plaintiff could compensate himself not only for the loss of the chattel, but he might also, by getting vindictive damages, be repaid and the defendant punished for the wrongful taking.

But this distinction seems to have almost disappeared from the present practice, by what process I do not know, unless it is due to the combined influ-

(a) Cooper vs Chilly, ante.
ences of permitting trover to be substituted for trespass, the tendency of courts to make the measure of damages uniform in all tort actions, the tendency to give exemplary damages in all tort actions, alike, only when there aggravating circumstances, and lastly the abolishing of the distinctions in form by the legislature in the simplification of procedure and practice.

In Forsyth vs Wells (a), the court says: "It is apparent that this view would transfer to the plaintiff all the defendant's labor, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do, and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it; .......but still, the fact that the form is for the sake of the principle, and not the principle for the sake of the form, requires that the form shall not now rule the principle".

(a) 11 72 111. 111. 2.
The case of Concord vs Insurance Co.,(a) has had an important bearing on the abolition of the distinction between the two actions. The court there says: "The rule which ought to govern juries in assessing damages for injuries to personal property, depends much on the circumstances of each case.....but where an individual acting in pursuance of what he considers a just claim to property, proceeds by legal process to enforce it, causes a levy to be made on what is claimed by another, without abusing or perverting its objects (referring to the legal process) there is and ought to be a different rule (speaking of the rule giving exemplary damages in trespass)......If the plaintiff in an action of trespass, succeed, he is entitled to legal satisfaction for the injury sustained by the taking and detention in cases not attended with circumstances of aggravation. The general rule of damages is the value of the property with interest. This is generally considered the extent of the injury sustained, on this is deemed legal compensation, which refers solely to the

(a) UQ L 152-172
injury done to the property so taken, and not to any collateral and consequential damages resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated.

It follows, in all cases in tort under the new procedure and the modern rulings thereunder, where no question of malice intervenes, that the measure of relief does not depend upon the form of the action, that the measure of damages is determined, in all cases where the facts are similar, without regard to the form of the action, by fixed rules varying somewhat in different jurisdictions, according to the view of the courts in each jurisdiction. These varying rules are all based upon the broad general principle that the damages, except where there are aggravating circumstances, should simply compensate the plaintiff for the loss of his chattel.

And so in Wylie vs Smitherman(a), the court says: "The proper measure of damages in actions of this kind (trespass), is the real value of the property de-

(a) 8 Ired. 236; Also, Dibble vs Morris, 26 Conn. 416; Forsyth vs Wells, ante 25.
stroyed, unless the trespass is committed wantonly or maliciously, in which case the jury may, if they think proper, give vindictive damages".

And in conformity with the foregoing it has also been decided that when trespass is brought for personal property and no circumstances of aggravation are shown, the action for the purpose of measuring the damage, is to be regarded as similar to conversion(a). The general rule in each case is the value at the time the act was committed with interest to the date of the trial; and here a distinction may be drawn. In trespass, according to this rule, the value would be estimated at the time of the trespass, that is, when the taking commenced, or when the defendant exercised dominion over the chattels unlawfully(b). Ordinarily the rule would have the same effect in trover, but there seems to be an exception, for in trover the conversion may be established by demand and refusal, and in such a case the

(a) Cases in preceding note, and Kelly vs McDonald, 39 Ark. 387; Dorsey vs Manlow, 14 Cal. 553; Coal Co. vs Long, 81 Ill. 359; Scott vs Bryson, 74 Ill. 420; R'y Co. vs Biggs, 50 Ark. 169 & 178; Stringatt vs Moore, 55 Iowa, 88; Oviat vs Pond, 29 Conn. 479; Sullivan vs 8 Bradley, 263; Gravatt vs Mugge, 89 Ill. 281.

(b) 2 C. & K. 789; Richardson vs Northrup, 66 Barb. 85 Ins. Co. vs Conard, 1 Bald. 138; Braman vs Johnson 19 Me. 361.
time of refusal would be the time of the conversion; at which time the value would be estimated, so that if the value has been enhanced between the actual physical conversion and the demand and refusal, the plaintiff would be entitled to recover the enhanced value in trover (a), but not in trespass (b).

But that rule applies only in those cases where the conversion is established by demand and refusal. So in Bank vs Boyd (c), where the plaintiff's bonds were stolen, the time of conversion was held to be the time of the theft and not the time of demand and refusal.

In that class of cases where the defendant or prior convertors have increased the value of the chattel after the actual conversion, there is a conflict of opinion as to whether the plaintiff may recover the increased value. The majority of the decisions on this point make no distinction as to the form of the

(a) Dowes vs Bank, 91 U. S. 618; Trans. Co. vs Sellick, 52 Ill. 249.
(b) Ante, p.
(c) 44 Md. 47; King vs Dam, 6 All. 293.
action, and hold that where there are no questions of wilfull wrong or severance from the reality involved, the value at the time of the conversion is the correct rule (a). Some of the courts, as in Iowa for instance, disregard the distinction as to severance from the reality and hold in both actions that if the trespass was innocent the plaintiff is not entitled to the enhanced value consequent upon the defendant's labor (b), but when the trespass is wilfull the enhanced value may be recovered (c).

The question of severance from the reality enters into a number of cases in trover and trespass and the decisions conflict a great deal, rendering it difficult to determine the proper rule, hence a few remarks upon it here would, perhaps, be proper.

The early English rule was that in trespass or trover, the plaintiff might in all cases recover the value of the property as a chattel, that is, after its severance from the reality, thus giving to the plaintiff

(a) Sedgewick on Damages, vol. ii, p. 78, sec. 499, and cases there cited.
(b) Stringatt vs Moore, 55 Iowa, 88; and cases under (c) below.
(c) Chamberlain vs 45 Iowa, 429.
the value of the defendant's labor in separating the
property from the realty(a). Subsequent to this de-
cision, there was considerable conflict of opinion as to
whether the same rule applied as well to an innocent
trespasser as to a wilfull wrongdoer. This was fin-
ally settled in the case of Livingstone vs Coal Co.,
in the House of Lords(b), wherein Lord Blackburn dis-
tinguished between an innocent and a wilful trespasser
and laid down the rule briefly as follows: 'When the
trespasser is a wilful wrongdoer, he is liable for the
value of the property after severance, that is, as a
chattel; but "if the wrongdoer has acted innocently and
ignorantly, without negligence, then you should consider
the mischief that has really been done to the plaintiff
who lost it (speaking of coal mined and converted) while
it was part of the rock, and therefore you should not
consider its value when it had been severed from the
rock, but you should treat it at what would have been a
fair price if the wrongdoer had bought it while it was
yet a portion of the rock as you would buy a coal field"'.

(a) Martin vs Porter, 5 M. & W. 352.
(b) 5 App. Ca. 25, 39.
The rule of Martin vs Porter(a), was at first followed in New York(b), and is now followed in some other jurisdictions(c), the cases holding that the measure of damages is the same in trover as in trespass namely, the value as a chattel after severance, deducting nothing for the defendant's labor in converting it into a chattel(d).

In some other jurisdictions the rule is based upon the ancient distinction in forms, the plaintiff in trover being allowed to recover the value as a chattel, while in trespass he recovers the value before severance. So the court says in a Colorado case(e), 'in trespass damages for the whole injury including the diminution in the value of the land as well as the value of the property may be recovered, and the character of the entry whether wilfull or malicious, or in good faith, is an important element that cannot enter into the action of trover.'

(a) Ante, p.35, note (a).
(b) Brown vs Sax, 7 Cow. 95.
(c) Coal Co. vs Long, 81 Ill. 359.
(d) Coal Co. vs Lennon, 91 Ill. 561, and R'y Co. vs Nagle, 82 Ill. 621; Coal Co. vs McMillan, 49 Md. 549, and Coal Co. vs McCulloch, 59 Md. 403; Bly vs United States, 4 Dillon, 464; Smith vs Gonder, 22 Ga. 253; Ellis vs Wire, 33 Ind. 127;
(e) Coal Co. vs Tabor, 18 Colo. 41; Skinner vs Pinney 19 Fla. 42; Foote vs Merrill, 54 N.H. 490.
But by the prevailing view, the defendant is he
acted in good faith, is allowed the value of his labor,
that is to say, the measure of damages is the value of
the property immediately before severance (a). The
rule and the reasoning supporting it are well stated in
Dorsyth vs Wells (b), which was an action of trover for
the conversion of coal by the defendant. The court
says (omitting parts of the opinion, which is quite long)
"the plaintiff insists that because the action is al-
lowed for the coal as personal property, that is after
it has been mined or severed from the realty, there-
fore, by a necessary logical sequence, she is entitled to
the value of the coal as it lay in the pit after it
had been mined. It is apparent that this view would
transfer to the plaintiff all the defendant's labor in
mining the coal and thus give her more than compensation
for the injury done ....... just compensation in a cer-
tain class of cases is the principle of the action of
trover, and a little study will show us that it is no
unyielding form, but adapts itself to a great variety
of circumstances, ..... it is continually applied in a

(a) Sedgewick on Dam. 89;
(b) Forsyth vs Wells, ante.
great variety of cases to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for the outrage and malice in the taking of them (a). Further on, speaking of trespass, the learned judge remarked: 'that the form of trespass also yields to the purpose of the remedy (b)', and then he goes on: "In very strict form, trespass is a proper remedy for a wrongful taking of personal property; and yet the trespass may be waived, and trover maintained without giving up any claim for any outrage or violence in the act of taking (c)...... but, when the law does allow this departure from the strict form, it is not to enable the plaintiff, by his own choice of actions, to increase his recovery beyond just compensation, but only to give him a more convenient form for recovering that much.......... When the defendant's conduct, measured by the standard of ordinary morality and care which is the standard of the law, is not chargeable with fraud or

(a) Dennis vs Barber, 6 S. & R. 420, 426. Berry vs Bantrees, 12 S. & R. 89, 93; Taylor vs Morgan, 3 Watts, 333.
(b) McDonald vs Scaife, 11 Pa. 331.
(c) Moore vs Schenck, 3 Pa. St. 13.
violence, or wilfull negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture, into a new species of property, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. This case, as said before, presents the general rule that where there are no circumstances of aggravation in trespass and trover, the measure of damages is the same, and this rule is quite generally followed (a).

The next and final question presented for our consideration, is as to the rule, when there are such aggravating circumstances as are mentioned in the opinion. Most of the cases previously cited, indicate that in trover as well as in trespass, exemplary damages may be given. Upon this point there is little differ-

(a) Cases heretofore cited, and Goller vs Fett, 30 Cal. 481; Iron Co., vs Iron Works, 102 Mass. 80; Thompson vs Moily, 46 Mich. 42; Tilden vs Johnson, 52 Vt. 628; Wright vs
ence of opinion, the rule is quite general and fails to obtain only in very few states (b).

We have now concluded this investigation of the distinction between the actions of trover and trespass. We have covered the most important topics bearing upon this point, and those we have neglected the reader will not miss.

(b) Wright vs Waddell, 56 N. W. 650; R. R. Co. vs Kniffin, 23 S. W. 460, and cases therein cited; Argaga vs Villaba, 85 Cal. 191; Kennet vs Adamson, 44 Minn. 121; Sullivan vs Dee, 8 Brad. 263; cases cited in note (a).