TORT AND CONTRACT—THE ORIGINS OF THE ACTION OF TRESPASS AND CASE

1. Property, tort and contract in modern legal thought

2. Trespass takes over (dates approximate at best)

1300—debt, detinue, covenant, account, and trespass *vi et armis*

1370—trespass *vi et armis*—>action on the case

1500—action on the case in *assumpsit* substitutes for covenant

1550—trespass *vi et armis* in ejectment substitutes for real actions

1600—action on the case in *assumpsit* substitutes for debt

1600—action on the case in trover substitues for detinue

3. Where shall we seek the origins of trespass?

Anglo-Saxon origins of trespass

18th century origins of trespass

Mid–13th century origins of trespass

Entries 16 & 18 (p. IV–31) in the Polstead saga: "Walter de Grancurt brings a plea against Hugh de Polestead about why (*ostensurus quare*) he made his grandaughter a nun."

Writ of trespass from the register (p. VII–17): "If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore (*ostensurus quare*) with force and arms (*vi et armis*) he made an assault upon the same A. at N. and beat wounded and ill-treated him so that his life was despaired of, and other outrages there did to him, to the grave damage of the same A. and against our peace (*contra pacem*)."

Bracton's Notebook – appeals of novel disseisin

Bill procedure in King's Bench

Res addiratae in local courts

Actions for wrongs in local courts and loss of honor (*iniuria*)

4. Trepass—the tyranny of a word

"forgive us our tespasses"

felonious or non-felonious (trespass->misdemeanor)

plea of the crown or not (*contra pacem*, usually *vi et armis*

public proceedings (indictment) vs. private proceedings (appeal)

appeal of felony vs. appeal of trespass (if an appeal of trespass is also a plea of the crown it must be heard in the central royal courts because c. 24 of Magna Carta (p. V-4) says "The sheriff shall not hear pleas of the crown."

5. Early 14th century obscurity

Statute of Gloucester (1278) limits trespass in the central royal courts to cases involving more than 40 s.

Special trespass writs

the general issue is not guilty, personal attachment—*capias ad respondendum, capias ad audiendum judicium, capias ad satificiendum*

Ferrers v. Dodford (1307 *Mats*, p. VII–18): "whereas lately the king had by his letters ordered his beloved and faithful John de Ferrers to come quickly to him with horses and arms on his Scottish expedition to assist him with his aforesaid expedition and the same John, getting ready to come to the aforesaid parts, had bought at Dodford a certain horse for a certain great sum of money from the aforesaid John, vicar of the church of Dodford, trusting in the same John's words, for he put that horse up for sale under guarantee, affirming by corporal oath taken at Dodford before trustworthy men that the same horse was healthy in all its limbs and unmaimed."

The Humber Ferryman, (1348 *Mats.*, p. VII–19): "John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B. upon Humber had undertaken to carry his mare in his boat across the River Humber safe and sound, and yet the said [Nicholas] overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage."

Brainton v. Pinn (1290, *Mats.*, p. VII–17): "Why they burnt the houses of Walter at Howley and his goods and chattels to the value of 200 pounds. (bill)

> "By their foolishness and lack of care and through a badly guarded candle they burned the aforesaid houses, along with all his goods. (count)
>
> "If any damage happened to the houses and other goods of that Walter through fire or other means, that was by accident and not by any lack of care or wickedness on their part." (plea)
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> The steward of the plaintiff did not let the defendants put out the candle. (jury verdict)

Rattlesdene v. Grunestone (1317, *Mats.*, p. VII–19: "The defendants drew out a great part of that wine from the aforesaid tun ... with force and arms, to wit, swords and bows and arrows etc., and filled up that tun with salt water in place of that wine thus drawn out, whereby the whole of the aforesaid wine perished etc."

The Farrier's Case (1372, *Mats.*, p. VII–22): "Trespass was brought against a farrier for that he had lamed his horse, and the writ contained the words 'Why he fixed a nail in the foot of his horse in a certain place by which he lost the profit of his horse for a long time', etc.

> "*Persay*. He has brought a writ of trespass against us and it does not contain the words *vi et armis*: judgment of the writ.
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> "FINCHEDON, C.J. He has brought his writ on his case so his writ is good.
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> "*Persay*. The writ should say *vi et armis* or 'he wickedly fixed it', and it has neither the one nor the other: judgment. Also he has not supposed in his count that he bailed us the horse to shoe; so otherwise it should be understood that if any trespass was done, it should be against the peace; wherefore judgment.
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> "And then the writ was adjudged good, and issue was joined that he shod the horse, without this, that he lamed it, etc."

6. <u>Later 14th century developments</u>

The Miller's Case (1367, *Mats.* p. VII–20): "A writ of trespass on the case was brought against a miller, and the plaintiff counted that, **whereas** he was accustomed to grind his grain at the mill of

T. for himself and his ancestors for all time without fee (toll) and he had brought his grain there to be ground, the defendant came and took two bushels' weight with force and arms, etc. And the writ ran: That whereas the aforesaid John, etc, and his ancestors from a time the memory of which runneth not to the contrary could grind without fee (toll), etc., the aforesaid defendant, etc., impeded the aforesaid complainant from grinding without fee (toll) by force and arms, etc.

> "*Cavendish*. You see well how the writ runs, that he will not suffer him to grind without fee (toll), and he has declared in his count that he took a fee (toll); and in this case he should have a general writ that he carried off the corn with force and arms, and not this writ: judgment of the writ.
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> "*Belknap*. The writ is taken on my matter, and, if he has taken a fee (toll) where he should not have taken it, I shall have a writ against him.
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> "THORPE, C.J. You shall have *quod permittat* against the tenant of the soil and thus it shall be tried, and not on a writ against the defendant. [*Quod permittat*: 'The king to the sheriff greeting. Command B. that justly etc. he permit A. to grind his demesne wheat at the mill of the said B. quit of multure as he ought to do, as he says. And if he does not etc. Witness etc.' *Early Registers of Writs*, G.D.G. Hall, ed. (SS no. 87, 1970) CC 120 at 96.]
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> "*Belknap*. If a market be set up to the nuisance of my market, I shall have against him such a writ of *quod permitat*; but if a stranger disturbs folks (*gents*) so that they cannot come to my market, I shall have against him such a writ as this and shall make mention of the circumstances; and so here I shall have a writ of trespass against him, because I cannot have *quod permittat*.
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> "WICHINGHAM, J. Suppose he had taken all your grain (corn) or the half of it, should you have such a writ as this, because he had taken more than he should take by way of toll? You should not have it, but a common writ of trespass; and so you shall have here. Therefore take nothing by your writ."

The *Innkeeper's Case* (1368, *Mats.* p. VII–21): "Trespass was brought by one W. against one T., an innkeeper, and his servants; and he counted that, whereas throughout the whole kingdom of England it was the custom and use, where a common inn was kept, that the innkeeper and his servants should keep the goods and chattels which their guests had in their rooms within the inn while they were lodged there, the said W. came there on such a day, etc., into the town of Canterbury to the said T. and there lodged with him together with his horse and other goods and chattels, to wit, clothes, etc. and twenty marks of silver in a purse, and he took a room there and put these goods and chattels and the silver in the room, and then went into the town for other things; and while he was in the town, the said goods and chattels and silver were taken out of his room by evildoers through the default of the innkeeper and his servants in keeping them, wrongully and against the peace, to his damage, etc. And he had a writ on all the matter according to the case.

> "And the innkeeper demanded judgment, because he had not alleged in his count, nor in his writ, that he had delivered to him the goods and silver, nor that the goods were taken by them, so that he had supposed no manner of blame in them; and also he had delivered to him a key of his room to keep the goods therein; and he asked judgment if this action lay; and on this matter they demurred.
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> "And it was adjudged by KNIVET, CJ, that the plaintiff should recover against them. And the court taxed the damages, and he will not get the damages just as he counted them."

Waldon (1370, *Mats.*, p. VII–22) (it is unlikely that we will do much with this case in this class. Hang onto it for Wed.): "William Waldon brought a writ against one J. Marshall [the word means horse doctor, i.e., veternarian], and alleged by his writ that the aforesaid John took in his hand the horse of the aforesaid William to cure it of its infirmity, and afterwards the aforesaid John so negligently did his cure that the horse died.

"*Kirton*. We challenge the writ, because it makes mention of *contra pacem*, and in his count he has counted of his cure so negligently so that the horse died, so that he should not have said 'against the peace.'

"And the judges were of opinion that the writ was ill framed. And then the writ was read, and he had not said *contra pacem* in the writ, and the writ was held to be good.

"*Kirton*. Because he has counted that he had undertaken to cure his horse of his malady, for which he should have had an action of covenant, judgment of the writ.

"*Belknap*. That we cannot have without a deed (a writing under seal); and this action is brought because you did your cure so negligently that the horse died, wherefore it is right to maintain this special writ according to the case; for we can have no other writ.

"*Kirton*. You could have a writ of trespass, that he killed your horse, generally.

"*Belknap*. A general writ we could not have had, because the horse was not killed by force, but died by default of his cure. ...

"And then the writ was adjudged good. ..."

The Farrier's Case (1372), *Mats.*, p. VII–23 (again)

Surgeon's Case (1375), *Mats.*, p. VII–24 (it is unlikely that we will do this case in this class. Hang onto it for Wed.): "A man brought a writ of trespass on his case against one J. M., surgeon, and the writ ran thus, that, whereas the plaintiff's right hand was wounded by one T. B., the defendant undertook to cure him of his malady in his hand, but that by the negligence of the said J. and his cure, the hand was so injured that he was maimed wrongully and to his damage. And note that in this writ there was no mention in what place he undertook, etc., but in his count he declared that he undertook in London in Tower Street in the parish of B. And the writ was not *vi et armis* nor *contra pacem*, etc.

"*Gascoigne*. He did not undertake to cure him of the malady, as he has alleged: ready to wage our law.

"*Honnington*. This is an action of trespass and of a matter which lies within the cognisance of the country, in which case wager of law is not to be granted: wherefore, for default of answer, we demand judgment and pray our damages.

"CAVENDISH, C.J. This writ does not allege 'force and arms' nor 'against the peace,' so that wager of law is to be allowed. ... And this is the opinion of the whole court. ..."

[The case was then adjourned.]

"Afterwards he waived the tender of law and said that he did not undertake to cure his hand: ready, etc.

"Issue was joined on this.

"*Gascoigne*. Now, Sir, you see well that the writ does not mention in what place he undertook to cure him, so that the writ is defective in this matter, for the court cannot know from what neighbourhood the jury shall come.

"*Persay*. He has not defined the place in his writ; wherefore we demand judgment of the writ.

"*Honnington*. Because we have assigned in our count the place where he undertook our cure, therefore, though it is not mentioned in the writ, it is yet sufficient to bring together the jury from the place where we have affirmed the undertaking to have been made. Wherefore judgment if our writ be not good.

"CAVENDISH, C.J. At this stage it is seasonable to challenge the writ for that he has not assigned the place of the undertaking, because it is necessary to summon the jury from that place; but if he had waged his law according to our first issue, then it would not have been necessary to have assigned a place in the writ. Moreover, this action of covenant of necessity is maintained without specialty, since for every little thing a man cannot always have a clerk to make a specialty for him. ...

"And then, because the place was not named in the writ where the cure was said to have been undertaken, the action abated. And the plaintiff was in mercy."

Berden v. Burton (1382, *Mats.*, VII–24): "A man brought a writ of trespass against Davy Houlgrave and Thomas de Burton and twelve others for his house burnt and broken, his servants beaten and maltreated, twelve oxen and a hundred sheep taken and driven off, and other goods and chattels taken and carried away, and other wrongs etc., to his damage etc. …

"And as to the arson of the houses, the defendants showed how after the distress, which was taken in the morning, some of the servants came after the defendants, and others remained inside the manor; thus the burning which was done was by reason of the negligence of the servants inside, who should have watched the fire. And they asked judgment whether etc. And he also showed the court that he came at the third hour with the constable of the town without any more people.

"*Holt* (for the plaintiff). We say that they came with a great assembly and multitude of armed men and entered the manor and in the morning before sunrise, broke the doors and then entered the hall and threatened the servants, with the result that the servants were in fear of death and let the fire lie unattended and did not dare to return. Thus it was the fault of the defendants that the manor burned. And we ask judgment etc.

"*Burgh*. Now we ask judgment on the writ, for you notice how they have alleged by their writ how we burned their house in fact, and now they have pleaded nothing on that point but show how we were the cause of the burning, in which event they ought to have had an action on their case and not this action. And we ask judgment etc., upon their admission etc.

"BELKNAP, C.J. I also believe that the writ is improperly framed, for you ought to have brought your special writ upon your case, since it was not their intention to burn them, but the burning happened by accident. Even though it stemmed from their act, still it was done against their will. It is as if you broke my close and entered therein, and my animals went away through this opening and fled, so that I lost them forever; while you know nothing of this, I shall never have a writ of trespass against you alleging that you drove off my animals, but I really think that I shall have a general writ of trespass for breaking my close, with no mention of the driving away of the animals, and everything will be accounted for in the damages for the

breaking of the close, for by the breaking of the close all the damage occurred and has been fully effected. And, furthermore, if you break my houses, and you go away, and then other strangers carry off my goods without your knowledge, I shall have a writ of trespass against you for the breaking into my houses etc. and recover everything in damages, as above. But, if you should be knowledgable or plotting or willingly present when the trespass is done, you shall be adjudged a principal feasor, for in trespass no one is an accessory etc.

"And then *Holt* said that they came in the morning with certain assemblies of people, as above, and broke the doors and entered and took some straw and fired it in order to see around them, and the straw, while afire, threw sparks on the ground. Thus they burned etc.

"BELKNAP, C.J. Now you are speaking to the point, for by the firing of the straw the houses were burned; thus they are as principal feasors. And then a day was given, as above.

"And in this case it was also agreed that if your house be next to my house and my house is burned and your house as well by the accident of my house, you shall never have a writ against me alleging that I have burned your house, but rather a special writ upon your case. And, also, if I lie in your house and place a candle on the wall, and the candle falls on the straw, so that your house is burned, you shall have a special writ.

"And later the parties reached an agreement etc."

Anon. (1390, *Mats.*, p. VII–27): "In trespass brought against a man and wife, *Woodrow* counted of a horse killed at a certain place with force and arms.

"*Gascoigne*. We protest that we do not admit coming with force and arms, for we say that the wife had the horse as a loan from the plaintiff to ride to a certain place, and we ask judgment whether he can maintain this action against us.

"And this was held a good plea.

"*Woodrow*, for the plaintiff: The truth of the matter is that the wife had the horse as a loan to ride to a certain town; and we say that she rode to another town, whereby the horse was enfeebled to the point of death; then she brought him back to the place named, and there the husband and wife killed him; and we demand judgment.

"*Gascoigne*. And now we demand judgment of his writ, which says 'with force and arms,' for upon his own showing he ought to have had a writ on his case. (*Quod nota*).

"So *Woodrow* said, we wish to imparl."

8. <u>Explanations</u>

Inflation

The decline of the county

The problem of *capias*

The Black Death