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978-0-521-09185-5 - The Forms of Action at Common Law: A Course of Lectures

F. W. Maitland

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## LECTURE I

Why obsolete procedure has importance (p. 1). Maine's phrase 'Substantive law . . . secreted in the interstices of procedure' (1). Until 1830 choice of form of action will determine the competency of the court, process to make defendant appear, process in the event of contumacy, whether judgment by default is possible, forms of pleading (e.g. general issue), mode of trial, form of execution, punishment of beaten defendant, summary or dilatory nature of procedure (1-3). Choice of action is made at plaintiff's peril (3). Keynote of form is struck by writ. Modern writ contrasted with old writs (4, 5). Certain forms of action are given and causes of action must be deduced from them (5).

By 1830 many forms had become obsolete and the whole were overlaid with fictions (5). Actions were (1) Real, (2) Personal, (3) Mixed (5, 6).

Main steps by which the forms of action were abolished between 1832 and 1875 (6, 7).

Since 1875, Judicature Acts have established a Code of Civil Procedure. Causes of action can be classified rationally. Forms of action belong to the past (6, 7).

The forms of action, the original writs, were the means whereby justice became centralised, whereby the king's courts drew away business from the feudal courts (8, 9).

## LECTURE II

At the beginning of the 12th century England was a network of local courts (10). Jurisdiction of the king's courts (10). Gradually increasing idea of the king's peace (10). Royal jurisdiction on denial of justice (11, 12). Not till Edward I did the modern theory prevail, that the king's courts were open to all litigants (11, 12).

Constitution and Procedure of inferior courts. Shire and hundred courts, Lord's courts. Judgment preceded proof. Proofs are by oath of helpers or by ordeals, or by battle, God will show the truth (12-13).

Superiority of king's court to local courts. It had professional judges for about a century before Edw. I (13). Formal modes of proof known; ordeal till 1215, battle till 1819, wager of law till 1833; their unreasonableness only slowly recognized, but to a great extent the history of forms of action is the history of devices to evade wager of battle and wager of law and of the procedure which becomes trial by jury (14). Short account of jury, inquests of Frankish kings, right to inquest given or sold as a favour (14, 15). Domesday Book. Inquest becomes a royal prerogative. King's courts have advantages over local courts of better procedure and greater power. The jury are impartial neighbour-witnesses (15).

## LECTURE III

Sketch of the order in which forms of action developed. Periods: (I) 1066–1154. Litigation still mainly in local courts. King's court has (1) pleas of the crown, (2) suits between tenants in capite, (3) complaints of default of justice in lower courts (16, 17).

(II) 1154–89. Reign of Henry II, Glanvill's book. Writs assumed distinct forms, each begins a particular form of action (17).

1. **The Writ of Right.** Henry ordained that no man need answer for his freehold without royal writ (17). A man disseised of his freehold unjustly and without judgment has action in the king's court (17). This means that all litigation about freeholds in the local courts must begin by the king's writ (18, 19).

**Breve de recto tenendo** orders a lord to do justice (18).

**Praeceptum quod reddat** or *praecipue in capite* used where the king's court had jurisdiction (18). Term 'Writ of Right' comes to include both forms (19). Action by Writ of Right slow and dilatory (19). Essoins (20). Trial by battle or the 'Grand Assize', i.e. twelve knights (21).

2. **The Three Possessory Actions**, traceable to Roman interdict (22).

(a) **The Assize of Novel Disseisin** (22, 23).

(b) **The Assize of Mort d'Ancestor** (23). Where a man has died seised as of fee his heir will be put into seisin. Action limited to 'the degrees' (25). This defect remedied by supplementary actions of **Aiel**, **Besaiel** and **Cosinage** with more modern procedure (25).

(c) **The Assize of Darrein Presentment.** Principle, that he who last presented to a benefice or his heir should do so again (25, 26).

A fourth assize: (d) **The Assize Utrum** to decide whether land was lay fee or ecclesiastical (26, 27). Later this action changed into 'the parson's writ of right' (27).

Certain questions begin to be tried by 'jurata' (28). Recognitions (28). Differences between a 'jurata' and an 'assisa' (28).

Dower: two actions, the **Writ of Right of Dower** bidding the lord do justice in his court, and the **Writ of Dower unde nihil habet** brought in the king's court (29, 30). A third action, the writ of **Admeasurement of Dower** (30).

Action to recover a serf by writ **de nativo habendo**. Writ **de libertate probanda** given to alleged serf calling on the would be lord to prove his case in the king's court (30).

Personal actions in Glanvill's day are mostly in local courts (31).

**Debt or detinue of chattels**, writ similar to *Praeceptum in capite*, little distinction between 'I own' and 'I am owed'. No jury or grand assize (31).

Gages of land made usually by demise of a term. This gave rise to several writs. Writ for gagee calling gagor to pay; and writ for gagor calling on gagee to take his money and return the land. This latter (form given) is a *Praeceptum* for land with a reason and is the forerunner of the writs of Entry (31, 32). If the tenant says he holds in fee either party can have a 'recognition' to decide the question 'fee or gage'. But otherwise battle or the grand assize will decide the main question (32). Certain rules as to sealed charters exist but means of proof are not explained (32).

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## LECTURE IV

(III) 1189–1272. Third Period. Ric., Joh. and Hen. III. Rapid growth of writs *de cursu*. Registers formed (33). Between proprietary and possessory actions there grow up **Writs of Entry** alleging some particular flaw in the tenant's title; very numerous; originally limited by the 'degrees'; restriction abolished by Stat. of Marlborough 1267, creating writs in the *post* (33).

Confusion of English real actions due to these writs (34). Until death of Henry II all is simple. The proprietary and possessory actions are distinct. Then come Writs of Entry, extended by 1267 to every flaw in title. They are possessory in origin but proprietary in working (35). Blackstone thought them older than the assizes (36).

Other gaps are filled, writs of **Aiel**, **Besaiel** and **Cosinage**, also new writs relating to advowsons, wardships and marriages, easements, common rights and nuisance, frequently two forms—one regarded as proprietary the other as possessory (37).

Remedies of termors under the new writs. At first termor's sole remedy by **Covenant**: recovers the land but only against lessor (37, 38). About 1237 writ **Quare ejecit infra terminum**, invented by Raleigh. It gives termor a protected 'possession', subsequently distinguished from 'seisin'. But it is held to lie only against persons claiming under the lessor (38).

Personal actions make their appearance. **Debt-Detinue**, differentiated in the 13th century. In Detinue there is no specific restitution, hence Bracton says there is no real action for chattels (38).

**Replevin** for chattels distrained: invented *temp.* John (39).

**Covenant**, early 13th century, restricted to the recovery of terms of years and sealed writing required (39).

**Account**, appears *temp.* Henry III, a rare action and only against bailiffs (39).

**Trespas**. This is the most important. Instances *temp.* John, but it became a writ of course, late *temp.* Henry III. It originates in criminal law (the appeal of felony) (39). The defendant if found guilty is fined and imprisoned, not merely amerced. If he will not appear he can be seized or outlawed (40). At first real 'force and arms' probably necessary but later the least wrongful force is held to be enough (40).

Trial by jury is becoming normal trial for disputed facts and is slowly superseding the older forms, but compurgation survives in Debt and Detinue (40).

(IV) 1272–1307. Fourth Period. The reign of Edward I (41). Period of Statutory activity. Stat De Donis gives **Formedon in the Descender**. Writs *in consimili casu*. The tale of non-statutory actions complete. The king's courts have come to be omniscient, working all civil justice through these forms of action (41, 42).

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(V) 1307–1833. A long period but difficult to break up. Chief interest lies in development of **Trespass** (43).

Trespass *vi et armis* common from Edw. I's day. Main varieties (1) assault and battery, (2) *de bonis asportatis* and (3) *quare clausum fregit*. Unlawful force essential (43). Trespass can protect possession of land (43). **Trespass quare clausum fregit**. This writ given to the tennor in 15th century (43); 'possession and seisin' (45). Tenant in Villeinage gets protection; by end of 15th century even against his lord (45). At end of 14th century action merely gave damages. *Temp. Hen. VII* the land itself can be recovered (45). *Quare ejecit infra terminum* not to be confused with *Trespass de ejectione firmæ* (46). Latter become; **Ejectment** and is extended by fiction to all claimants of land (46). Reasons for this (46). Description of the fiction of Ejectment (47, 48). During Tudor reigns Ejectment supplants the real actions (48). In some cases, e.g. where entry 'tolled', Ejectment not available (48). Ejectment was remodelled by C.L.P. Act, 1852, and was in use until 1875 (49).

*Personal Actions* (49).

**Replevin**, action for wrongful distraint (50).

**Detinue**, damages always alternative to return of goods. Hence chattels not 'real' property (50, 51). Ancient and modern views as to property in chattels (51). **Wager of law** (51).

**Debt**, originally purely recuperatory, later used to enforce all contracts for a fixed sum of money, and all fixed sums due (51, 52). But Debt admits of wager of law (52).

**Account**, originally for bailiffs only, superseded by Chancery Bill for account (52).

**Covenant**. Lessee's only remedy at one time; he recovers the land itself by the action of covenant real. In 13th century the seal becomes a necessity for covenant (52).

## LECTURE VI

**Trespass**, appears about 1250. *Vi et armis contra pacem* (53). Trespass is to (1) land, (2) body, (3) chattels (53). Vanquished defendant in *miser cordia* and liable to *capias pro fine* (53). Statute of Westminster II, writs in *consimili casu* result in the extension of trespass (53, 54).

**Trespass upon the Special Case or Case**, where the words *contra pacem* are left out. Falls apart during 15th century (54). Slander and Libel and Negligence and Deceit grow up within Case which becomes a sort of residuary action (54). *Capias pro fine* abolished (55). Distinction between Case and Trespass (55).

**Assumpsit** an offshoot of Case (55), involved the ideas of misfeasance and deceit (55, 56). Earliest are cases of misfeasance, then of negligence by bailees, then of breaches of warranty, then of non-feasance and Assumpsit becomes a separate action (beginning of 16th century) (56). Assumpsit then begins to do the work of Debt. **Indebitatus Assumpsit** (56, 57). This extended to implied contract and quasi-contract (57).

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**Trover** (57): another branch of Case. Comes into existence about the middle of 16th century. Action supplanted Detinue (58). Since C.L.P. Act, 1854, courts have had power to order specific restitution of the chattel. Old option of paying the value no longer a right of the defendant (58). Thus Trespass and its offspring, Ejectment, Assumpsit, Trover and Case are substantially the only actions in common use (58). Replevin still used against a distrainor (58). Account and Dower practically superseded by Chancery remedies.

## LECTURE VII

Attempts to classify Actions. Justinian's classifications (59). Do not well fit the English Actions. Bracton lays down that there is no action *in rem* for moveable goods because the possessor has the option of paying damages instead of giving up the thing. From this distinction come the terms 'Real' and 'Personal' property (60). Hence the extension of idea of Tort in England far beyond the Roman *maleficium* because it is conceived that all 'personal' actions must be founded either on contract or tort (60). Mere possession by the wrong person however honest is held a tort (61). Distribution of all actions between Contract and Tort never very easy or very successful (61). Position of Detinue (61). Mesne process is used by Bracton as the test of a real or personal action (61, 62). In later times however the final result attained becomes the test (62). Position of Ejectment and Covenant Real (62). The Action for mesne profits originated in this idea of mere possession, however honest, being a tort done to the true owner (63).

Past importance of procedure (63). The great textbooks were treatises on procedure. Formal decay set in soon after Edward I but a great development of substantive law was brought about by fictions (63, 64). This is a long process with two stages. (1) The stage of evasory fiction. Trespass usurps the work of other actions. Again steps in procedure are omitted or are feigned (64). Even the original writ was omitted unless the record had to be made up (64). Capture of Common Pleas jurisdiction by King's Bench and Exchequer (64). The King's Bench fiction, all actions begun by an action of Trespass and the arrest of the defendant: the Exchequer fiction—the *quo minus* (64). The reason for this stealing of business; partly due to the monopoly of Serjeants-at-law in the Common Pleas (64, 65). The Order of the Coif (64).

(2) End of the forms of action:

The Unification of Process Act, 1832 (65).

3 and 4 Will. IV, c. 27, sec. 36 abolishing Real and Mixed Actions (65).

3 and 4 Will. IV, c. 42 abolishing wager of law (65).

The Common Law Procedure Act, 1852. No form of action was thenceforward to be mentioned in the writ (65).

The Judicature Acts. Forms of action are finally abolished (65), this results in greater clearness of exposition, greater attention to the real substance of the law itself (66).

## SELECT WRITS

Beginning with those relating to land (67).