# Chapter I

## THE DEFINITION OF TORT. GENERAL REMARKS

IN dealing with many branches of English law one regrets that definition should be necessary at all. It is not because one objects to definition on principle, but because our system has at the back of it a long unscientific history which makes a neat framework of it almost impossible. This is peculiarly true of the topic of these lectures—so true that a quite legitimate question at the outset is, "Why need any definition be attempted?" There is no doubt that the law of tort has been well taught and understood with tolerable ease for a long time, though no two teachers or writers of textbooks are agreed as to its exact contents. Moreover, it is a branch of the Common Law which has, as a matter of practice, been adequately kept in touch with the needs of the community. Is there any reason, then, theoretical or practical, why one more effort should be made to determine its province? The answer to this may be taken under the two heads indicated. For theoretical purposes, it is advisable in order to make exposition in teaching more scientific. There is no need to labour the point that a student has a right to know at the beginning of his reading what it is that is under discussion and how he is to distinguish it from other chapters of the law. Besides, every law school worth the name nowadays makes jurisprudence a part of its course and, if the form of the law is to be improved, the analysis of tort will be forced on the student's attention there, whatever attitude of *laissez faire* may be adopted by writers on the law of tort. A case is therefore made out for definition so far as theory goes. On the practical side, arguments in favour of it

are quite as strong, if not stronger, and it is singular that this point should have been somewhat ignored hitherto. There has been no lack of perception that a tort is different from a crime, or, according to another line of analysis, that a civil proceeding is different from a criminal proceeding; or, again, that a tort differs from a breach of contract and from a breach of trust; but little trouble has been taken to explain *why* there is any practical need to distinguish a tort from the two last-named divisions of the law. Again, the relation of breach of bailment to tort and to breach of contract has been treated too brusquely, and it was not until Sir Frederick Pollock's book on the *Law of Torts* that real light was thrown upon the puzzling way in which the law of tort and the law of property overlap. But more lamentably neglected than any other boundary has been that between quasi-contract on the one side and tort on the other. In the United States the reproach is much less merited, for two monographs of good repute exist on the subject and a special course is given on it in the Harvard Law School and in many other American universities. If its scientific treatment has been scanty in England, we can plead in excuse, if not in justification, the intricacy of its history; indeed that has been so exasperating in its judicial hesitations and blinking of facts that one is tempted to deny any possibility of treating it scientifically. Finally there are regions of the law scarcely named, much less fully explored, that lie beyond the law of tort, but are yet closely akin to it. Such is quasi-tort or quasi-delict—terms that are almost total strangers to the Common Law, and that encounter quite as much abuse at the hands of the theorists as ignorance on the part of the practitioners.

Now the practical reasons for separating liability in tort as sharply as possible from liability arising from crime, from contract, from trust, from bailment, from

the law of property, from quasi-contract, and from quasi-tort will appear in greater detail on a further examination of each of these branches of the law in relation to the law of tort. But, without anticipating the matter of later lectures, it is enough to pick out some salient practical differences which pervade the majority of such topics when contrasted with tortious responsibility. First, there is the variation in remedies. We shall see that an action for unliquidated damages is the characteristic remedy for a tort. Criminal redress has nothing in common with this, though it will be seen when we come to deal with it that in one respect there is a startling resemblance between the two. And though actions for unliquidated damages are quite possible in other branches of the law, yet there are other modes of getting satisfaction as well, and sometimes damages are not appropriate at all in such branches.

Secondly, statutes of limitation often fix different periods of time for barring a remedy or (where that is their effect) for extinguishing a right. Tort, crime, trust, contract and property differ notably here, and one of the first things that any practising lawyer has to consider is whether his client's claim is too stale or not.

Thirdly, the law of status, or, if that term be regarded as too full of ambiguity, the law relating to variation in personal capacity, is not by any means the same in tort as in some other parts of the law. Kings, trade unions, lunatics, minors, corporations, and married women are all subject to different rules under different headings of the system.

These examples will serve, but they are certainly not exhaustive. Death has different effects on different kinds of liability. Again, vicarious responsibility, if not peculiar to the law of tort, occupies a much larger space in it than elsewhere. Then a right of action in tort is in general incapable of assignment. There seems, there-

fore, to be no lack of practical reasons in support of the necessity of defining liability in tort. But there is yet another consideration which hovers on the border line between the theoretical and the practical. It is well known that for some years past the case law of the United States of America has been in process of semi-official restatement. This must be sharply distinguished from codification. Restatement of case law takes no account of statute law and is thus not concerned with the whole law. Nor does it profess to do more than to state in reasonable compass and in systematic order rules which the Courts of the separate States and the intermediate and final Courts of Appeal may adopt, if they think fit, as fairly representative of existing judge-made law. Several parts of the law have already been almost completely epitomized in this way. Much of the law of tort has been restated, and it is not without significance that the preliminary part of it, which will presumably contain the essentials of tortious liability in general, has yet to come. Now something of the same sort may be done at some future time in England and, if we try now to mark the bounds of the law of tort, that will be of some help to draftsmen who may have to restate, or perhaps even to codify, the law. It should be added by way of emphatic protestation that the English law of tort is not at present in a condition in which it can be profitably codified or restated, and that the urgency of the problem is nothing like so great as it is in the United States, where some fifty jurisdictions of first instance staffed by judges of very varying ability have made the case law so enormous in bulk and so difficult to ascertain that there is a serious risk of resorting to the curious mode of assessing juristic opinions which was adopted by the Valentinian Law of Citations.

But if there are practical reasons in plenty for constructing a definition of tort, there are also practical

difficulties in the way of doing it. No completely satisfactory definition has yet been given, and it would be either vanity or optimism to expect complete success where every one else has achieved less than that. The impossibility of it has been pointed out on both sides of the Atlantic. "It is well to state at the outset", said Mr Addison in his *Law of Torts*, "that there is no scientific definition of a tort."[1] So too the learned editor of the late Sir John Salmond's *Law of Torts*.[2] Clerk and Lindsell open their *Law of Torts* with a definition, but they add in the next breath that it is impossible to define the general term, tort, otherwise than by an enumeration of particulars, and they say later that it is also impossible to lay down any general principle to which all actions of tort may be referred.[3] American writers are even more emphatic. Mr Street says in his *Foundations of Legal Liability*:

> No definition of tort at once logical and precise can be given. The reason for this is found in the fact that the conception belongs to the highest category in legal thought. Any logical definition of tort must specify the conditions under which delictual liability arises. But there is no typical tort, and in the nature of things it is impossible that a specification of the circumstances under which delictual liability is imposed should have finality.[4]

On the other hand, some of the boldest plans for reconstructing the framework of the law of tort have originated in the United States.[5] It must be confessed that in certain instances they have gone so far beyond anything that practitioners are at present likely to accept that it would be perilous to teach them in the law schools here.

[1] 8th ed. (1906), 1.
[2] 7th ed. (1928), 7 note *g*.
[3] 8th ed. (1929), 1, 3.
[4] (1906), vol. i, Introd. xxv.
[5] E.g. Jeremiah Smith in 30 *Harvard Law Review* (1917), 241–262, 319–334, 409–429.

But they do at least mark progressive thought, and that is preferable to the view which deprecates definition because exactness in it is impossible. The real obstacles are of two kinds. The first, which has been already noted and of which more will be said almost immediately, is the dead hand of history. It still rests upon the law, but since the copious statutory reforms in procedure of the nineteenth century its burden is much less. The second is more subtle and troublesome because it is not so perceptible. It is that no clear-cut exclusive definition of tort is possible until the complementary task of settling the limits of other fields of the law has been accomplished. This is particularly true of the law of property and far more so of that equatorial belt between contract and tort which shades off into quasi-contract on the one side and into quasi-delict or quasi-tort on the other. As to the former, the law of tort overlaps the law of property and no property lawyer seems to think that it is quite as much his duty to map out what belongs to him as it is incumbent on his brethren in the law of tort to settle the extent of their own claims. As it is, what can a jurisprudent say of the law of personal property? When Joshua Williams wrote his *Law of Real Property* in 1845 he gave the legal profession a classic, but when he followed it up three years later with the *Law of Personal Property* he presented them with a legal pound filled with an incongruous collection of strayed topics—limited companies, ships, bankrupts, actions *ex delicto*, common carriers and the like, or, rather, the unlike. If he had been a man of less learning, the book, or at least its choice of subjects, might have perished with the first edition. But his reputation carried it as an *hereditas damnosa* to the present generation and inspired several other learned lawyers to produce books with the same title. As to quasi-contract, in England, it is not so much an *hereditas damnosa* as an *hereditas jacens*. There is

much work still to be done upon it, though Harvard has ably shewn us the way. At present it is regarded here as territory which is more useful for the deportation of undesirable ideas than for colonization. Until it is properly settled there is not much prospect of completely defining tort.

But these difficulties are not insuperable, and even if it is too much to expect complete definition, useful working ones have been put forward. The very critics of them have helped towards something better by pointing out that there is less fault to find with some definitions than with others. None can yet be claimed as canonical, and indeed portions of the subject-matter are at present too intractable to be forced into any mould. Some of this intractability is historical, and this leads us to a brief general historical outline of tort, reserving special matter of this kind for particular topics which are to be distinguished from the law of tort.

# Chapter II

## GENERAL HISTORICAL OUTLINE

THE segregation of the law of tort from other parts of the law is quite modern. We know of only one monograph in England on the topic earlier than Addison's book which was first published in 1860. In 1720 an anonymous publication appeared entitled, "Law of actions on the case for torts and wrongs, viz. 1. Trover and conversion of goods. 2. Malicious prosecutions. 3. Nusances. 4. Disceits or warranties. 5. On the common custom against carriers, innkeepers, etc. With select precedents". It seems to have been a small book of no special reputation.[1] Indeed, until the latter half of last century no literary effort worth the name was made in England, and the same tale comes from the United States. There, as late as 1853, a legal author of high standing could find no law-book publisher willing to issue a book on the law of torts. He was told that there was "no call for a work on that subject, and there could be no sale for it".[2] Six years later, Francis Hilliard seems to have overcome this objection. In 1859, his work on the *Law of Torts or Private Wrongs* was published in Boston.

But if tort was late in its development as a compartment of the law, the word was familiar early enough. As the Old French "tort" in the eleventh century it has equivalents in Provençal, Spanish and Italian. Derivatively it signifies "wrong" and springs from "tortus" meaning "twisted" or "wrung". In an entirely un-

[1] No copy is available to me. Clarke, *Bibliotheca Legum* (1819), 261, states it to be only a new title for "Law of actions. A methodical collection of all adjudged cases", 1710 or 1711.

[2] 30 *Harvard Law Review* (1917), 247.

technical sense it appears as late as Spenser's *Faerie Queene*.[1] Even in legal literature it had a convenient vagueness.[2] The treatise entitled Britton (c. 1290) is one of the earliest of our law books written in French, and one of the chapters, headed "De plusours tortz", treats of a miscellaneous collection of wrongs which vary from the construction of unlicensed castles to the cooking of stale meat for sale.[3] They have nothing in common except that none of them is particularly heinous; great offences like murder, burglary and arson have chapters of their own. Elsewhere in Britton "tort" seems to mean nothing more than "unlawful".[4]

Again, in trespass a common form plea of the defendant usually begins by a denial of "tort and force and all that is against the peace",[5] and "tort" indicates little more than "wrong". At a much later period it still retains this sense, and is equivalent to any legal wrong.[6] Coke in his commentary upon Littleton defines it in the same way,[7] and the compilers of law dictionaries in the seventeenth and eighteenth centuries and even as late as 1835 merely repeat that tort is a French word for injury or wrong.[8] The reports tell the same tale. Tort is used in a case of 1625 to cover all the wrongs alleged against the defendant in an action on the case where he

[1] "It was complaind that thou hadst done great tort
Unto an aged woman, poore and bare."

[2] Pollock and Maitland, ii, 512 note 2, 534 note 2.

[3] Ed. Nichols (1865), i, 77–85.

[4] *Ibid.* i, 296: "Car a tort apele eyde de la ley, qi a la ley est contrarie". Coke's rendering of this is justified, though he has syncopated the passage. Co. Litt. 158*b*.

[5] Pollock and Maitland, ii, 608; see many examples in *The Court Baron*, Selden Society, vol. iv (1890).

[6] See the examples of 1586, 1609 and 1622 given in the *New English Dictionary*.

[7] Co. Litt. 158*b*.

[8] Cowell, *Interpreter* (2nd ed. 1684). T. Blount (3rd ed. 1717). Giles Jacob (10th ed. 1782). T. E. Tomlins (4th ed. 1835).

is charged with having broken his contract, committed conversion and, in effect, abused a bailment.[1]

But it is not in the word "tort" that the germs of the department of law now known by that name are to be sought. "Trespass" is its earliest source. In Edward I's time this includes nearly every wrongful act or default, whether it were what we should now call a crime or a tort. It is first heard of in John's reign and it becomes common at the end of Henry III's reign just after the conclusion of the Barons' War[2] in which Simon de Montfort was so prominent and in which he lost his life. Very likely the writ of trespass was one of the agencies in restoring the kingdom to decency after the litter of lawlessness and disorder which every civil war leaves behind it. The action of trespass commenced by the writ was quasi-criminal; that is, it was aimed at serious and forcible breaches of the King's peace. Though it was begun by the injured individual, it ended in the punishment of the defendant as well as in the compensation of the plaintiff. It was more popular than the appeal of felony, because the same exactitude of pleading was not required, and the detested trial of battle was inapplicable. Its scope was also wider, and damages were obtainable.[3] Its usefulness is testified by the fact that in the fourteenth and fifteenth centuries it was deliberately borrowed by some statutes as the appropriate remedy for certain offences. Criminal appeals were obsolescent, there was no organized police force, the judges were often corrupt except in the central courts and were not always trustworthy there.[4] Hence the action of trespass developed speedily. In a loose sense almost any wrongful act or default was at first regarded as a trespass or

[1] *Whyte* v. *Rysden* Cro. Car. 20.
[2] Maitland, *Equity* (1909), 342–344; *Collected Papers* (1911), ii, 154.
[3] Holdsworth, *History of English Law* (3rd ed. 1923), ii, 364.
[4] *Ibid.* 453.