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.

transgressio. It would include even such a serious thing as a felony. But in a narrower sense it was contrasted with felony and signified a less grave wrong. Trespasses were either criminal or civil, if one may anticipate the technical distinction between crime and civil injury which at that period was not at all clearly drawn; indeed it was not until 1694 that the defendant in trespass ceased to be liable to fine and imprisonment, though by that date this was only theoretically true. Criminal trespasses were what we should now call misdemeanours and were punishable upon presentment either before local courts or before the royal justices.[1] As to civil trespasses, an allegation that they were committed *vi et armis* was necessary, though the "force and arms" need be but very slight. They might be (i) trespasses to the person and from these sprang assault and battery and torts of the like nature; (ii) trespasses against goods, or trespass *de bonis asportatis*; (iii) trespasses against land, such as *de clauso fracto*, or breaking another man's "close". Now the writ of trespass was well enough so far as it went, but its limitation is that it applies only to direct harm. And here it was supplemented by the well-known writ of trespass upon the special case. That would cover injury that was indirect or consequential. The trite illustration of the difference between trespass and case is that if I throw a log upon another man's land, that is trespass, for the injury is direct; but if he stumbles over it when it is there and is hurt by it, that is trespass upon the case. The injury is indirect or consequential. Maitland placed the date of the origin of this writ as about 1400. Professor Plucknett points out that as early as 1390 trespass and case are distinguished in a Year Book of Richard II.[2] Moreover, long before

[1] Pollock and Maitland, ii, 510–511. Maitland, *Equity*, 343.

[2] *History of the Common Law* (1929), 283. *Year Books 13 Richard II* (Ames Foundation, 1929), 104. Maitland, *Equity*, 360.

this, the Statute of Westminster II, 13 Edward I, c. 24 (1285), commonly called the Statute *in consimili casu*, had not only emphasized the need of new writs, but had established means for creating them, subject to one notable limit. The words of the translation of the Statute must be given in full, for there is one puzzling point about their interpretation which seems never to have been realized, much less solved.

> And whensoever from henceforth it shall fortune in the Chancery, that in one case a writ is found, and in like case falling under like law, and requiring like remedy [is found none], the Clerks of the Chancery shall agree in making a writ, or shall adjourn the plaintiffs until the next Parliament, and the cases shall be written in which they cannot agree, and be referred until the next Parliament; and by consent of men learned in the law, a writ shall be made [that it may not hereafter happen that the King's Court shall fail] in ministering justice unto complainants.[1]

The clerks of the Chancery, the *officina brevium*, had evidently been turning away people who applied to them for the only thing by which a civil action could be begun—a writ.[2] Henceforward they can vary existing writs to cover claims analogous to them, but, if they cannot agree, they must refer such cases to the next Parliament. It seems to be implied, though it certainly is not expressed, in the Statute that the clerks are also to refer to Parliament cases where no analogy to an existing writ exists, as well as cases upon which they cannot agree. Maitland thought that little use was made of the power given by the Statute to the clerks of the Chancery except to vary the writs of trespass so as to suit special cases.[3] But this is somewhat inconsistent

[1] *Statutes at Large.*

[2] Sir Frederick Pollock, however, considers that the Statute did not confer new power, but regulated and restrained an indefinite power of framing writs which had been claimed by the royal officers. *Torts* (13th ed.), 551 note *a*.

[3] *Equity*, 345–346.

with the rapid growth of *Registrum Brevium* between 1285 and about 1390 when the distinction between trespass and case is emerging. If the Register was not swelled by writs of trespass on the case until this latter date, what sort of writs did account for its increasing size? It is submitted that many of them must have been due to adaptations made under the Statute of 1285, and indeed close personal acquaintance with the development of one particular writ—that of conspiracy—confirms this suggestion.[1] The point, though its importance is historical only, is that it has been rather hastily assumed that some actions in tort are traceable to trespass upon the case when it is possible that they are directly due to the Statute of 1285, instead of coming from it indirectly by way of trespass upon the case.[2] In other words, the Statute may well have been their parent and not their grandparent. One of these doubtful instances is the modern tort of deceit. In early times deceit merely indicated swindling a court of justice in one way or another, but in the modern form in which we know it, it was recognized in *Pasley* v. *Freeman* (1789).[3] Whether it is to be regarded as remedied by an action upon the case or by an action of trespass upon the case is not clear. In *Pasley* v. *Freeman*, Lord Kenyon C.J. and Grose J. regarded the old writ of deceit as independent of trespass upon the case. Fitzherbert in his *Natura Brevium* is confusing upon the point, but his classification of writs is little more than by rule of thumb. Maitland puts deceit under trespass upon the case,[4] but he

[1] Winfield, *History of Conspiracy* (1921), chap. II. See too the author's article on "Writ" in the current ed. of *Encyclopædia Britannica*.

[2] Blackstone's attribution of writs of trespass upon the case to both the Common Law and the Statute of 1285 (*Comm.* iii, 122–123) is a mere guess.

[3] 3 T. R. 51.

[4] *Equity*, 346. *Contra*, Jenks, *History of English Law* (4th ed. 1928), 139. Ames, *Lectures on Legal History* (1913), 442–443, is ambiguous; but possibly because the point is not in his mind. Blackstone, *Commentaries*, iii, 123–124, speaks merely of "an action on the case".

cites no authority for so doing. We should incline to the other view, and prefer to reckon deceit and trespass upon the case as distinct in origin and to hold that variations of the writ of deceit were quite possible by virtue of the Statute of 1285 and that they actually occurred.[1] There is no reason to suppose that other writs were not evolved in similar fashion. Trespass upon the case has unquestionably been responsible for many of our modern torts; but action upon the case in its simplest form, without the intervention of trespass and based merely upon the Statute *in consimili casu*, was perhaps a more fruitful source of new wrongs than has been commonly supposed. However, it would be unprofitable to decide between the competing claims of these two roots of legal development, and in fact there is not enough material to make nice discrimination possible. When once the writ of trespass upon the case was recognized, the clerks of the Chancery, if they were willing to allow a variation of a writ, would scarcely trouble themselves to answer the theoretical question, "If we issue this writ, are we adapting the writ of trespass upon the case, or are we acting upon the Statute of 1285 as our primary authority?" The numerous Abridgements and Digests of the law from Statham onwards leave us equally puzzled as to whether the caption "Action upon the case" had any exact meaning to the compilers. With most of them it seems to have included actions of trespass upon the case, but that throws no light on the historical problem which has just been mooted.

Between the two of them, however, it is safe to say that to trespass upon the case, and case *simpliciter*, we owe most of our law of tort. The part which the former played in the development of the law of contract need be noticed here only to remind us that *assumpsit* was

[1] Holdsworth, *op. cit.* iii, 429, regards the boundaries of trespass and deceit on the case as a little difficult to define.

established about the year 1500. Later, more must be said of this in differentiating tort from contract and quasi-contract.

One or two important illustrations may be given of nominate torts which have sprung from one or other of these sources. The tort of conversion is, of course, traceable to trover, and trover in its turn goes back to detinue *sur trover*. This was the "new found haliday" that upset the conservative Littleton in 1455.[1] Now detinue in origin has nothing to do with trespass, and it follows that the germ of trover must be "case" and not "trespass upon the case". It must be confessed that a student will find it hard to reconcile some of the statements as to the growth of trover into conversion, but that does not concern us here.[2] Another tort which is of late origin was born of either "case" or trespass upon the case. Which of these was the parent is a problem of no importance and it is very improbable that it can be solved. For negligence as an independent tort came into being in the early nineteenth century[3] and by that time the centre of gravity in legal procedure had shifted almost entirely from the writ to the declaration. The framing of new writs had ceased, and what the Courts concentrated attention on was not so much the document which summoned the defendant as the details of

[1] Y.B. Trin. 33 Hen. VI, ff. 26–27, pl. 11. Ames, *op. cit.* 82 and note 4; and 83.

[2] It is difficult to ascertain from the historians the date at which trover may be regarded as established. Maitland, *Equity*, 365, says it "begins to appear about the middle of the sixteenth century". Holdsworth, *op. cit.* iii, 351, says it was settled by that time that an action of trespass on the case [trover] lay against a bailee and one who was a finder or who had come by the goods otherwise. His citations do not support this; nor, as to the finder, is this consistent with Ames, *Lectures*, 85 (*Eason* v. *Newman*). What seem to be confused are the *origin* of trover and the development of its *scope*.

[3] 42 L.Q.R. 184, 195.

the claim which was made against him.[1] Much the same applies to other nominate torts which have come into being during the eighteenth and succeeding centuries. But of these we can speak more fully when we have marked the stages by which the English system has advanced from a period in which isolation of tort as a separate branch of the law was impossible to a period in which it is discernible, if not completely definable. We need go no farther back for the first of these periods than Sir Henry Finch's Νομοτεχνία, which was first published in law-French in 1613. It deserves serious attention, for not only did Blackstone owe a good deal to it, but it also represents the only attempt at a scientific discourse on the law in the century between St German's *Doctor and Student* (1st ed. 1523) and Coke's *Institutes* (1628–1641). Finch's style is crabbed and much of his arrangement appears to be confused. But these are faults which start to the eye of a modern critic whose duty it is to recollect the difficulties inherent in Finch's task. Nothing will be gained from his book, and a wrong value will be set upon it, unless it is borne in mind that any attempt to give a rational account of our law as it stood at that time shewed conspicuous courage, and that the very reason why his effort was successful in his generation was because later standards would judge it to be a partial failure. For if it had presented a satisfying scientific plan of our law, it would have been useless as a practical demonstration of it. Finch did his best with matter that was in several respects intractable. Where he broke down, no man could help breaking down. He was not writing jurisprudence *in vacuo*, but was endeavouring to elicit some theory of a body of law of which he was a distinguished practitioner.[2]

[1] *Encyclopædia Britannica* (current ed.), article "Writ". Holdsworth, *op. cit.* viii, 248–249.

[2] Winfield, *Chief Sources of English Legal History*, 330–332.

The book was translated by its author and republished in English in 1627 after his death. This is no mere matter of bibliographical curiosity, for there are serious differences between the two editions. It has been said that the English version, being the product of second thoughts, is a great improvement on the French,[1] but this is by no means invariably the case.[2] The treatise is in four books. The first takes a general view of the law. The second is taken up chiefly with "Possessions" and as a possession is "whatsoever may be injoyed", we can roughly identify it with "property". The third book comprises "justice in the punishment of offences"; the fourth begins with courts, passes to writs, and handles the divisions of actions. It is with these last two books that we are mainly concerned, and it will simplify discussion if analyses of them be appended. They are founded on the 1627 edition with a record of the more serious variations in the earlier publication.

In order to assess the value of Finch's classifications, it is necessary to look at them from two points of view:

(1) The substantive law.

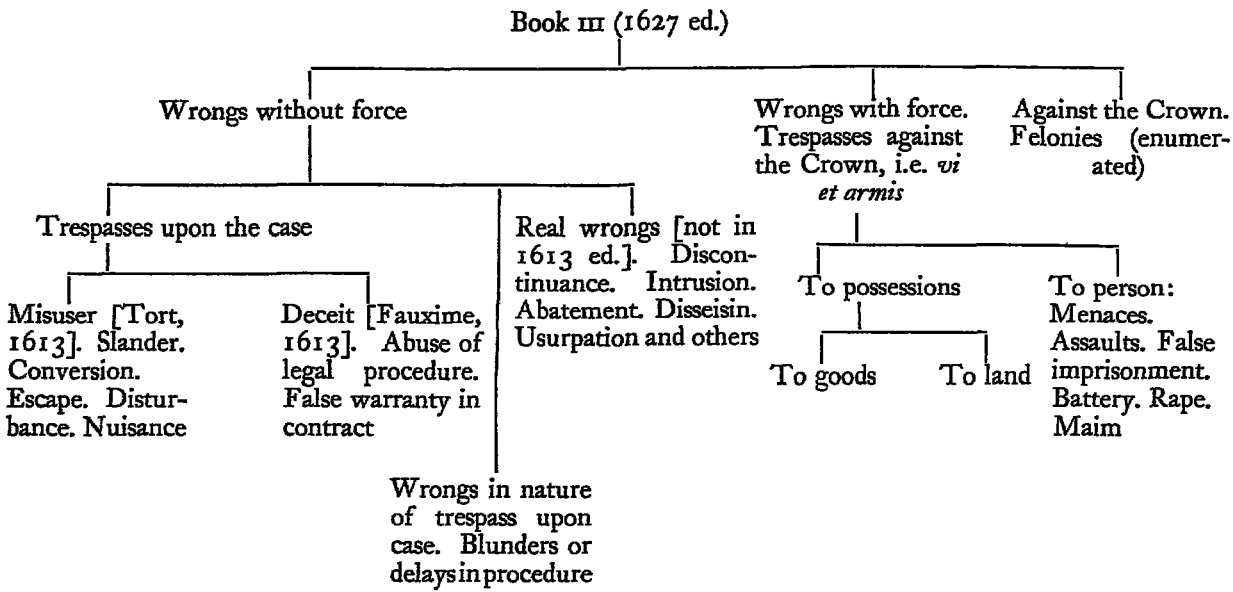
(2) The law of procedure.

If he had attempted to deal with (1) without trying to co-ordinate it with (2), he would have spoiled the book as an account of both theory and practice, whatever merit it might have achieved as a development of theory only. Procedure was, at the period of which he wrote, not so much a vehicle for carrying the plaintiff's claim to success as an integral part of the claim itself. Or, to vary the metaphor, it was rather what its skin is to an animal than what clothes are to a human being.

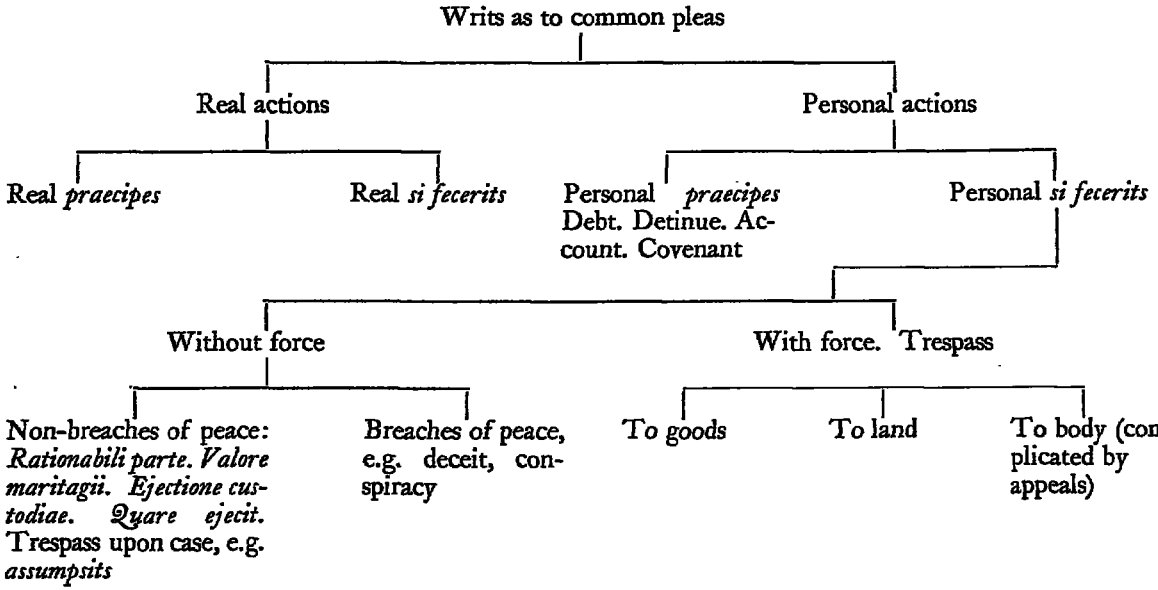
Now Finch attained useful results in working out the scheme of (2) in connection with that of (1).

[1] Holdsworth, *op. cit.* v, 399.

[2] E.g. Book II, chap. XVIII, is much more intelligible in the earlier, than in the later, edition.


Book III (1627 ed.)
Wrongs without force
Wrongs with force. Trespasses against the Crown, i.e. *vi et armis*
Against the Crown. Felonies (enumerated)
Trespasses upon the case
Real wrongs [not in 1613 ed.]. Discontinuance. Intrusion. Abatement. Disseisin. Usurpation and others
To possessions
To person: Menaces. Assaults. False imprisonment. Battery. Rape. Maim
Misuser [Tort, 1613]. Slander. Conversion. Escape. Disturbance. Nuisance
Deceit [Fauxime, 1613]. Abuse of legal procedure. False warranty in contract
To goods
To land
Wrongs in nature of trespass upon case. Blunders or delays in procedure

Book IV (1627 ed.)



1613 ed. omits subdivision "praecipes" and "si fecerits".

As to (1), most of what we should call "torts" appear in his "Wrongs without force" and "Wrongs with force" (*ante*, 19). When he dealt with the procedural side of law, he forged a link between (1) and (2) in his "Personal actions" under the sub-heading "Personal *si fecerit te securums*". The characteristic of a personal action is that it claims damages.

Of any definition of "tort", Finch is quite innocent. He divided the law (if we may paraphrase his arrangement) into Property, Wrongs, and Procedure. If he had been pressed to say what "tort" meant, he would probably have replied, "any unlawful injury to person or to property". In his mind no technical signification attached to it. It was a mere doublet of "unlawful wrong". We shall find many ragged edges in Finch if we seek to mark off torts, as we understand the phrase, from crimes, breaches of contract, breaches of bailment and breaches of trust.

(i) First as to crimes. A broad view shews that his "Offences against the Crown" may be segregated as pure crimes. They are felonies. The only complication with respect to them is on the procedural side, and that is due to the fact that appeals of felony were in the nature of private litigation. At the opposite pole, one can isolate as civil wrongs his "Wrongs without force". The hitch here is that wrongs like deceit and conspiracy were breaches of the peace. Midway between these poles are "Wrongs with force". They are capable of being treated either as wrongs against the Crown or as wrongs against a private person. As Finch says of Trespasses, "The torts here...are all manner of trespasses... *vi* or *contra pacem*; for, though at the suit of the King they are offences against his crown and dignity, yet as regards the party, they are mere personal torts".[1]

[1] 1613 ed. Book II, chap. XIV.

It thus appears that there is a considerable overlap of crime with tort. But after all that is so at the present day. Where we are more fortunate is in the sharper separation of civil from criminal remedies.

(ii) Breaches of contract and breaches of bailment. Here Finch simply reflects the confused thought of his era about a legal idea—contract—which was perplexing because of its rapid growth.

He classed contracts and bailments under "possession" and, in effect, under a sub-heading, "Transfer of personal chattels".[1] From Book II, chap. XVI, the title of which is "Of personal charges, and torts", we learn that acts (i.e. transfers) special to them are their pledging or their receipt to the use of another, and that receipt to the use of another is by bailment or otherwise. His description of bailment bears a resemblance to the present definition of it.[2] Then comes what he has to say about contract. "Personal charges are obligation and covenant, both by deed; and *assumpsit* which is by parol." For *assumpsit* there must be good consideration. He develops this, and says that "the torts are in detaining the goods, not rendering an account, not performing a contract, covenant, *assumpsit*, or the like". He slips in at the end of his discussion of bailments and contracts a reference to "certaine (as it were) contracts in law, though not arising from the speciall agreement of the parties". They are what would now be called quasi-contracts.

One might have expected that Finch would have added more about *assumpsit* in Book III under "Trespasses upon the case", but there is nothing approaching it except a few words about "if a smith cloy my horse";[3]

[1] Here the 1627 ed. makes such intricate nonsense of the 1613 ed. that one suspects posthumous garbling by the publisher or editor.

[2] It is much the same in both editions.

[3] The reference is to Y.B. Hil. 48 Ed. III, f. 6, pl. 10.

and in Book IV there is a bare reference to *assumpsits*.[1] Indeed, in handling contract and bailment, Finch made little further progress than St German who wrote nearly a century earlier.[2] Both authors seem to telescope property and obligation, or rights *in rem* and rights *in personam*.

(iii) Breaches of trust. Finch is almost silent about trusts, and that has been noted as one of the defects of his book.[3]

To sum up, the only characteristic of Finch's equivalent to modern "torts" is that they were redressible by personal actions, and the mark of a personal action was its claim for damages. Usually, too, the particular form of personal action applicable to torts is a *si fecerit te securum*, not a *praecipe quod reddat*. The *si fecerit* writ proceeds upon the assumption that the defendant has already done something wrong, while the *praecipe* merely tells the sheriff to bid the defendant to do or permit something and no further steps against him would be taken if he obeyed. But here again there are loose ends in Finch's classification. First, some torts are redressible, at least primarily, by "real actions". These are what he calls "real wrongs" and they include "Discontinuance", etc. The difficulty of classifying them was due to the possibility of claiming not only restitution but, in some cases, damages as well.[4] Secondly, the

[1] Ed. 1627, p. 304. See table *ante*, p. 19.

[2] *Doctor and Student* (ed. W. Muchall, 1787), Dialogue II, chaps. XXIV, XXVIII: "It is not much argued in the laws of England what diversity is between a contract, a concord, a promise, a gift, a loan, or a pledge, a bargain, a covenant, or such other. For the intent of the law is to have the effect of the matter argued, and not the terms". Dial. II, chap. XXIV, p. 176.

[3] Holdsworth, *op. cit.* V, 401.

[4] Finch was not confident about his own arrangement here. "Real wrongs" do not appear in the 1613 ed. Blackstone, *Comm.* iii, 167, describes them under the general term "Ouster" and says the universal remedy is "the restitution or delivery of possession...and, in some cases, damages also for the unjust amotion". *Ibid.* 174.

inclusion of *assumpsits* under "Personal *si fecerit te securums* without force" puts *assumpsits* in some queer company, and to a modern eye emphasizes the great difficulty that the lawyers of that era had in perceiving the difference of contract from tort. Thirdly, Maitland pointed out the importance attached by Finch to the division of actions into *praecipe quod reddats* and *si fecerit te securums*.[1] No doubt Finch made this dichotomy a useful starting-point for a rough distinction between contract (debt, detinue, account, covenant) and tort; but the distinction is rough because *assumpsit* goes under tort. Nor must it be forgotten that Finch's main division of writs is "Real actions"—"Personal actions". If, as Maitland says, that cardinal division was of little account, the *praecipe—si fecerit* division was of still less for our purposes.

Of the institutional writers who succeeded Finch, Coke does not help us, for the methods which he pursued in composing the *Institutes* precluded the necessity for attempting an analysis of tort. But Blackstone in his *Commentaries* certainly improved upon Finch. He divides "wrongs" (which he describes merely as privations of rights) into public and private. Public wrongs, which in effect signify crimes, are treated in Book IV; private wrongs in Book III. But a considerable portion of this latter book would have to be redistributed to make its arrangement square with that of modern exposition. The first two chapters are taken up with the redress of such wrongs by the acts of the parties and by the operation of law. The next four are occupied with an account of the Courts. Chap. VII to XVII are those which are really cognate to private injuries as a branch of the substantive law. Chap. XVIII to XXVII conclude the book and deal with procedure in a civil action.

[1] App. A to Pollock, *Torts* (13th ed.), 586–587. Finch is responsible for these Anglicized plurals.

Chap. VII deals with private wrongs remediable in Ecclesiastical and Maritime Courts; and it certainly shews that Blackstone did not shrink from including such injuries under private wrongs, and, if we make the recovery of unliquidated pecuniary damages the test of a tort, we must admit that there were ecclesiastical torts (e.g. withholding of tithes where there was no dispute as to the right to demand them),[1] and that there were, and still are, maritime torts. This is worth noticing, for the tendency in some quarters nowadays is to exclude from the law of torts civil injuries which are cognizable in courts other than those of Common Law jurisdiction as it existed prior to the Judicature Acts. It is questionable whether this is justifiable. At any rate no support for it is to be procured from Blackstone. His treatment of the prerogative writs of *procedendo*, *mandamus*, and prohibition at the end of Chap. VII is less happy, and it will save repetition if we briefly dispose of it before we put forward our own definition of tort. *Mandamus* is often an effective writ for restoring an injured person as nearly as may be to his position before he was injured, without, however, awarding him pecuniary damages. A typical instance is that of a practitioner who alleges that he has been struck off the register, without lawful cause, by the General Council of Medical Education.[2] His chief grievance is not so much that he has suffered damages as that he is subject to very serious disabilities unless his name be restored to the register. He may succeed in doing this by procuring the issue of a writ of *mandamus* to the General Council; but he does not thereby claim damages, and the possibility of doing this is an essential element in an action of tort. However much writers disagree on other points, they are unani-

[1] *Comm.* iii. 88–89.

[2] E.g. *Allbutt* v. *General Council of Medical Education* (1889), 23 Q.B.D. 400.

mous on this one. Is a claim upon a *mandamus* therefore an exception to the general rule, and can it be said that it is founded on tort, though there is no demand for damages? No, for the writ is granted only to ensure the performance of a *public* duty.[1] It belongs to public law, whereas, vague as this division is, it is generally conceded that the law of tort falls within private law. *Mandamus* is consequently not a remedy in tort at all.

Chap. VIII and its successors handle the remedies of private wrongs in the "public and general courts of common law". At the outset of his discussion of private wrongs, Blackstone links them with the trichotomy of actions into personal, real and mixed.[2] But his development of the substantive law is not smothered by procedure. Indeed, it is surprising how clear and readable his narrative is when we recollect that most of the great procedural reforms had still to come. Most of the torts which are familiar to us are analysed with a poise and clearness that compare favourably with the jejune and highly technical descriptions to be found in Finch. This is not to say that there are not plenty of puzzling classifications in Book III. They will appear after we have noted Blackstone's definition of personal actions.

"Personal actions", he says, "are such whereby a man claims a debt, or personal duty, or damages in lieu thereof: and, likewise whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be founded on contracts, the latter upon *torts*, or wrongs....Of the former nature are all actions upon debts or promises; of the latter, all actions for trespasses, nusances, assaults, defamatory words, and the like."[3]

Real actions were also remedies for some private wrongs;

[1] Shortt, *Informations, Mandamus and Prohibition* (1887), 231–232. Blackstone's definition of *mandamus* is accepted by the author; *ibid.* 223–226.

[2] *Comm.* iii, 117. [3] *Ibid.*

in them the demandant claimed title to some species of real property, but they were unpopular owing to their inordinate delays and the meticulous care needed in their management, and they were becoming obsolete in Blackstone's time.[1] They can be ignored in ascertaining his conception of the law of tort. But mixed actions cannot so easily be brushed aside. They were for the recovery of real property coupled with a claim for damages. Waste is an example and there is a good deal about it in Book III. It is one explanation of the fact that even nowadays waste is a topic in books on the law of torts as well as in those on real property.

But injuries to real property bulk more largely in Blackstone's "private injuries" than in our law of tort. Chap. X to XVI cover them, and here it was impossible for him to escape from the domination of remedies. If we are better off than he was in this respect, we seem to be just as far from deciding the relation of the law of property to the law of tort, chiefly because we cannot make up our minds whether the main basis of law is Right or Duty. However, a personal action (i.e. an action for damages) may be regarded as the main Blackstonian test for a private wrong. So far we get a fairly visible line between it and a crime, though there is no definition of tort. It is true that two possible elements of confusion occur. Blackstone inherited from Finch the distinction between private injuries without force or violence (e.g. slander, breach of contract), and those with force and violence (e.g. battery, false imprisonment), and he makes it, at least in theory, one of considerable importance.[2] But it was really a legacy that he need never have accepted. The only practical use which he makes of it is to call attention to the fact that injuries with force and violence are also crimes.[3] He

[1] *Comm.* iii, 117–118. [2] *Ibid.* 118–119.
[3] *Ibid.* 121–122.

certainly says that in strictness (presumably in the same civil proceeding) a fine ought to be paid to the King for a trespass *vi et armis*, as well as a private satisfaction to the injured party; but while that held good in Finch's time, it had long ceased to do so before Blackstone lectured.[1] Hence this blurring of the line between civil injury and crime had disappeared, for though a wrong like battery might be both actionable and indictable, the proceedings were entirely different in each case. The other intrusion of civil proceedings into criminal was the appeal of felony, but it was very little in use[2] and its employment would probably have astonished Blackstone's generation nearly as much as it did the public in 1818.[3]

But if civil injuries and crimes were distinguishable with tolerable clearness, the differences between tort on the one hand and breach of trust, breach of contract, and breach of bailment on the other were not sharply drawn. English law was not yet ripe enough for this. The jurisprudential position of uses and trusts gave Blackstone little trouble because it never occurred to him that they needed analysis in relation to other legal conceptions. They figure under modes of conveying things in his second Book and under proceedings in Courts of Equity in his fourth Book.[4] As to breach of contract, it is redressible, like any other private wrong, by a personal action; but Blackstone's account of contract is a rather scattered affair which appears not only in Book II under "Rights of Things"[5] but also in Book III under "Private wrongs".[6] Still, it is detachable from obligation arising from tort by being reckoned as a *chose in action* or a species of property.[7] This is not

[1] *Ante*, p. 11. [2] *Comm.* iv, 312–313.
[3] *Ashford* v. *Thornton*, 1 B. & Ald. 405.
[4] *Comm.* ii, 327; iv, 431, 439. [5] *Ibid.* ii, 396–397.
[6] *Ibid.* iii, 154. [7] *Ibid.* ii, 396–397.

convincing, but shortly afterwards he gets the true foundation of it as "an agreement upon sufficient consideration, to do or not to do a particular thing",[1] and this element of agreement at once marks it off from tortious liability. Bailment he regarded as merely a species of contract of common occurrence.[2] When, in a later Book, he came to develop the difference of express contract from implied contract, he got some odd results in his effort to conjure *assumpsit* into some compact shape. Express contracts were easily disposed into debts, covenants, and promises.[3] But implied contracts included two main varieties,[4] the first of which would now be relegated to a museum of political antiquities. It was the social contract, which Blackstone accepted in general as an adequate account of the relation of the subject to his ruler, and in particular as the legal reason why a man should pay a judgment debt or a penalty to a common informer. The second main variety had six subdivisions. The first two of these may now be regarded as ordinary contracts. The next, the duty to repay to another his money which has been had and received, is now reckoned as quasi-contractual. The fourth (the obligation of *A* to recoup *B* who has expended money for *A*'s use at *A*'s request) is probably contractual if it is binding at all. The fifth (account stated) is perhaps no more than an incident in the proof of a real contract. The correct classification of the sixth is still a matter of acute controversy. It consisted of what Blackstone called the "class of contracts, implied by reason and construction of law" which "arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him, to perform it with integrity, diligence, and skill".[5] Current opinion is almost

[1] *Comm.* ii, 441. [2] *Ibid.* ii, 446, 451. [3] *Comm.* iii, 154.
[4] *Ibid.* iii, 159 *seq.* [5] *Ibid.* iii, 165.

unanimous that Blackstone was wrong in calling this "implied contract", and in almost entire disagreement as to what he ought to have called it; but of these last four subdivisions, more hereafter.[1]

We can sum up the results obtainable from Blackstone by saying that he regarded what we now style a tort as a civil injury usually (but not invariably) remediable by an action for damages, that it is distinguishable in his *Commentaries* from crime and breach of contract, but that the relation of contract itself to bailment and quasi-contract is still ill-developed because the limits of these subjects were not clearly perceived—much less fixed—by the eighteenth-century courts. As for trusts, their implication with other parts of the system did not present itself to Blackstone.

We have indicated that, thanks to Blackstone's remarkable abilities as an expositor, his chapters on private injuries of a tortious kind were well abreast of the scientific side of English law. *Assumpsit* was the most refractory topic in this part of the *Commentaries*, but its treatment there, though not without difficulty for a later generation to whom forms of action are of little account, is infinitely superior to what will be found in the contemporary alphabetical Abridgments of the law. Viner, in the second edition of his *Abridgment* (1791–1794), has a single page on "Tort", and the seven references there connote no closer meaning than "legal wrong".[2] If we want anything more fruitful than this, we must seek it under quite different titles.[3] Moreover, treatises of the early nineteenth century were not a step farther forward than Blackstone. In Chitty's *Practice of the*

[1] Chap. VII.

[2] Vol. XX, 305. In Bacon's *Abridgment* there is no such title.

[3] E.g. "Actions (joinder)". Cf. Bacon, *Abridgment* (7th ed. 1832), vol. i, 58, "Actions in General (C) In what cases distinct things may be had in the same action".

Law, the author emphasizes the importance of ascertaining whether a private injury is "a tort without contract, or a mere breach of contract, or of what other precise nature".[1] He goes on to say that torts affect the person absolutely or relatively, or personal or real property, and what he includes thereunder is very much what is to be found in the law of tort now. No further separate treatment of the meaning of "tort" appears in his work. "Contracts in general" are a minor species of "Rights to personalty". In "Rights of persons" both criminal and civil remedies are inserted. So too, under other heads, remedies are a cross-section through torts and crimes. The whole work is overlaid with procedure. Still, Chitty was writing for practitioners in London, not lecturing to students at Oxford.

If we wonder why it was that for more than half a century after Blackstone there was scarcely a single effort made to work out in detail, and to improve upon, his institutional methods, the solution is not difficult. The complexity of actions in the courts has been regarded as one of the obstacles that blocked progress. No doubt there is something in this, but be it remembered that Blackstone himself surmounted it. What is much nearer the truth is that legal education had perished in the Inns of Court and was scarcely reborn in the Universities. As for the Inns of Court, a young man, "with no public direction in what course to pursue his inquiries, no private assistance to remove the distresses and difficulties which will always embarrass a beginner", was expected "to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business".[2] For the Universities, there

[1] 2nd ed. (1834), i, 12–13.

[2] Blackstone, *Comm.* i, 31.

was the Vinerian Chair at Oxford, but Blackstone's immediate successors in it were men of no great mark. At Cambridge, the Downing Professorship of the Laws of England was not founded till 1800, and its first occupant was credited with nothing more original than an edition of Blackstone's *Commentaries*. There was Bentham, of course, but he was more instructive to an ardent, not to say impatient, law reformer than to any one who wished to evolve a theory of our law that bore some relation to legal facts.

Enough has been said in this chapter to shew the general historical difficulties that have made perception of tort as a technical division of the law such a tardy affair. The special historical obstacles which make its severance from contract and other branches of the law a troublesome matter even now will be explained in their proper place.