

# YALE LAW JOURNAL

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Vol. XXXIII

JUNE, 1924

No. 8

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## THE ORIGINS OF THE ACTION OF TRESPASS

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Much has been written on the early history of trespass, but the actual origins of the action in its different forms have received such scant attention from the writers, that what they have said relative thereto can be regarded as hardly more than suggestions of possibilities or probabilities. Certain statements of Professor Ames, and the frequent reiteration of these statements by subsequent writers, have led to the very general belief that the action of trespass came into the king's courts from the old popular courts of the hundred and the county, either directly or through the appeal of felony.<sup>1</sup>

The subject is one which is very obscure, so obscure in fact, that it may never be possible to determine the origin of trespass on the basis of incontrovertible historical evidence. But of a few things con-

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<sup>1</sup> Ames, *Lectures on Legal History* (1913) 44, 56, 224, 41, 179. Though Ames says that several cases of trespass from the reign of Henry I are collected in Bigelow, *Placita Anglo-Normannica* (1879), it should be noted that in his index Bigelow refers to these cases as "Trespass, suits in the nature of." This is more correct than his reference in the text to one of them as the "prototype of the writ of trespass *quare clausum fregit*" and to another as a "prototype of trespass *vi et armis*." They are not writs of trespass, as the merest glance at them will show. From this point of view the most that can be said for them is that they are writs issued to remedy wrongs of a type that would later be remedied in an action of trespass. Maitland, *Select Pleas in Manorial Courts* (1889) 1vi and note 2, makes the suggestion that perhaps some ordinance not now known to us was responsible for the action of trespass. This will be discussed later. See also Maitland, *The Register of Original Writs* (1889) 3 HARV. L. REV. 177-179. It is noteworthy that the statement made here in regard to trespass in the local courts does not reappear in later writings by the same author. See further Bordwell, *Property in Chattels* (1916) 29 HARV. L. REV. 507; Maitland, *The Forms of Action* (1913) 342; 2 Pollock and Maitland, *History of English Law* (2d ed. 1905) 108, 166, 525, 526, 572. This work will hereinafter be referred to as *P. and M.*

cerning it we may be quite sure. One of these is, that with a few exceptions any statements at all specific in regard to the actual judicial business of the early popular courts can rest upon little more than mere assumptions.<sup>2</sup> In the first place, these courts were not courts of record, they had no series of written documents which have come down to us; much of what occurred in them must be inferred from indirect evidence which is often of the scantiest description.<sup>3</sup> As the thirteenth century went on, an increasing number of cases, largely from the county courts, came up to the king's court for a further hearing—the county court though it had no record could make one when commanded, a sort of deposition as it were.<sup>4</sup> But these records sent up by the county to Westminster or elsewhere, had to do largely with writ of right cases, and there are no trespass cases among them, certainly not until after the action of trespass is firmly established in the king's court. The jurisdiction of the hundred courts comes to be more and more administered by private persons who have acquired that jurisdiction either through usurpation or through the gift of a franchise.<sup>5</sup> Usually the old hundred court business is carried on at the same time as, though it is not confused with, the business of the manorial court. About the middle of the thirteenth century these courts of the lords of manors began to keep records which have come down to us, and which teem with trespass cases; but the earliest of these rolls is comparatively very late as far as the origins of trespass are concerned, and the courts themselves have become so affected by what goes on in the king's court—as witness the very matter of record keeping itself—that they but imitate its procedure to as great a degree as they may.<sup>6</sup> Consequently the material from this source is too late to tell us anything of what went on in these courts before the influence of the king's court became supreme. Not only is there no evidence to

<sup>2</sup> "Of what went on in the local courts about the year 1200 we know very little." 2 *P. and M.* 107.

<sup>3</sup> A few fragments recently discovered may be remnants of late fourteenth century county plea rolls. See Jenkinson, *Plea Rolls of the Medieval County Courts* (1924) 1 *CAMB. HIST. JOUR.* 103.

<sup>4</sup> The "record" did not need to be in writing, but sometimes was. Many instances of this procedure will be found in Maitland, *Bracton's Note Book* (1887). See especially pleas 40, 212, 1436, 243, 955, 1360, 824. This work will hereinafter be referred to as *Note Book*.

<sup>5</sup> For the general subject see Ault, *Private Jurisdiction in England* (1923).

<sup>6</sup> "The lords of these halmotes borrowed freely from the forms of procedure used in the king's courts." Ault, *op. cit. supra* note 5, at p. 343. "We approach our rolls therefor with a suspicion that the courts which they reveal will be undergoing a transformation, will be suffering the intrusion of new elements, presentments by jury and trial by jury, elements hardly compatible with their old constitution. We shall not be disappointed." Maitland, *Select Pleas in Manorial Courts* (1889) lxviii. "Unfortunately the records of our local courts do not begin until the influence of Westminster is supreme and its action for damages is well known throughout the country." 2 *P. and M.* 526.

show that there was any action of trespass in the local courts before it became an action in the king's court, or that it came from the former to the latter, but such evidence as we have points directly the other way.<sup>7</sup>

As to a connection between the action of trespass and the appeal of felony, there are, of course, certain points of similarity as well as points of difference. Hitherto the similarity has been emphasized and the difference neglected, doubtless more or less unconsciously, and because the external resemblance is so very obvious in many particulars. Such likenesses as actually occur have sometimes been unduly magnified and accentuated by the finding of supposed likenesses where in fact none exist, as in the matter of damages for instance. From this point of view it is unfortunate that Professor Ames, after having stated correctly that appeals of felony were purely for vengeance,<sup>8</sup> should later have made a classification of appeals that included the so-called "compensatory appeals" (battery, mayhem, imprisonment) in which he said that damages were recovered by the appellor.<sup>9</sup>

After 1166 only minor offences would be tried in the local courts, which would initiate business that the itinerant justices would finish; the king's courts took over more and more of the business of the local courts. But it is nearly one hundred years more before trespass becomes an important action in the king's courts, and this notwithstanding the fact that breach of the king's peace has been a plea of the crown since the time of Cnut.

The reading of several thousand twelfth and thirteenth century cases covering a period from 1194 up till the time that the action of trespass became established, has failed to reveal a single instance of damages being recovered in an appeal.<sup>10</sup> Nor do the authorities cited to prove

<sup>7</sup> The meaning of trespass (*transgressio*) at different periods will be discussed later. The technical meaning of the word was slow in forming. See note 1 *supra* as to the alleged writs of trespass in Bigelow.

<sup>8</sup> It may well be asked if many appeals were not brought for the sole purpose of being compromised. This is discussed below. Theoretically, however, they were brought for vengeance. See Ames, *op. cit. supra* note 1, at p. 47.

<sup>9</sup> Ames, *op. cit. supra* note 1, at pp. 48, 41.

<sup>10</sup> There is one case in Maitland, *Select Pleas of the Crown* (1888) 16 (hereinafter referred to as *Select Pleas of the Crown*), from the year 1201, in which a woman appellor seems to recover three pence from the appellees who have taken her cloak. But the cloak had been pawned for two gallons of wine (worth three pence), and the judgment was "that Robert do give her three pence in respect of the wine and do go quit." That is, this was not damages, but the return of the cloak; with the three pence the woman would be able to redeem her cloak. We have found two other appeals in which there is mention of damage, *Eustace v. Smith* (1198) in 1 Palgrave *Rotuli Curiae Regis* (1835) 203 (hereinafter referred to as *Rot. Cur. Reg.*), and *Hatfield v. Hatfield* (1200) in 1 *Curia Regis Rolls* (1923) 221 (hereinafter referred to as *C. R. Rolls*). The first of these cases is discussed at length below; in the second an entry upon land is also alleged, and damages may be mentioned in this connection. In both cases the appellor may be merely trying to make out an act of sufficient gravity

the payment of damages in "compensatory appeals" contradict these cases.<sup>11</sup> As a matter of fact the appeal was older than any idea of damages, in the modern sense, in English law, while the action of trespass was an outcome of that idea. One of the great points of difference between the appeal of felony and the action of trespass is this very element of damages; no damages were recovered in the appeal, while trespass was pre-eminently an action for damages.<sup>12</sup>

This element of damages seems to have been the chief invigorating force behind the origin and development of trespass, and also the main cause of that remarkable development of writs and the forms of action which took place in the thirteenth century and included much else in addition to trespass.<sup>13</sup> If we can find the time at which the idea of the recovery of damages comes into English law, we shall have discovered the earliest possible date for the origin of the action of trespass.

Though there was a clear enough general idea of damage (*damnum*) in early English law, there was no action in which damages as such<sup>14</sup> could be recovered. The contrary of this statement has generally been

or injury for an appeal—for the act complained of must be of some magnitude if words of felony are to be properly attached to it, as see *Bracton* f. 145, f. 101b-102. At any rate these cases prove nothing as to damages being recovered in an appeal, for both appeals were quashed and came to nothing, except that the appellor was amerced for his "false" appeal.

<sup>11</sup> Ames, *op. cit. supra* note 1, 47, note 2, 48, note 1. Britton and Fleta were both written at least a generation after the writ of trespass became a writ of course. Moreover, the *lex talionis* advocated by Britton and accepted by Ames was certainly not the law—"here he (Britton) is hebraizing and introducing an element that is foreign to the law of our race." 2 *P. and M.* 489 and note 2.

<sup>12</sup> Cf. 2 *P. and M.* 523. We are speaking of the appeal of felony at the time when the action of trespass was developing. In later times the latter becomes overmastering in its influence and clearly affects the appeal. Trespass was not always an action for mere damages (*cf.* Ames, *op. cit. supra* note 1, at p. 59); during one period at least the *res*, or its value, plus damages could be recovered. *Abbreviatio Placitorum* (1811) 132b (hereinafter referred to as *Abbr. Plac.*) Essex, *Buletel v. the Abbot of Wantham* (1253); and *cf. ibid.* 336b-337 (1320), 346b-347 (1324); *Northumberland Assise Rolls* (1890) 182 (hereinafter referred to as *N. A. R.*), *Elaund v. Crammelyngton* (1269); Phillimore, *Coram Rege Roll of 1297* (1898) 95-96; Rogers, *Oxford City Documents* (1891) 225, 227.

<sup>13</sup> For the growth of the forms of action, see 2 *P. and M.* 564.

<sup>14</sup> "No one of the oldest group of actions is an action for damages." 2 *P. and M.* 523, and note 1, which indicates that there were no actions for damages in Glanvill's time. For "the days before damages" see *ibid.* 525. In spite of what has been written by high authority elsewhere—Sedgwick, *Damages* (9th ed. 1912) secs. 7-ff., we can not agree that the origin of our damages is to be found in the pre-appointed *bôt* of Anglo-Saxon times. These *bôts* were not damages, but penalties paid to the one injured. Moreover, "the early disappearance from English law of the pre-appointed *bôt* is remarkable." 2 *P. and M.* 525. The subject is one shrouded in historical mists. See 2 *P. and M.* 524. For early references to damage see Bigelow *op. cit. supra* note 1, at p. 170, and Hall, 2 *Red Book of the Exchequer* (1896) app'x A. no. 46.

assumed, with the result that—as far as we are aware—no explanation of the actual fact has hitherto been attempted. Yet the explanation seems comparatively simple if one is willing, laying aside preconceived modern notions as to the necessity of an action for damages, to stick to historical facts. There was for a long time no action for damages in English law because there was no need of any. Though the idea of an action for the recovery of damages was seemingly foreign to the legal consciousness of the Anglo-Saxon race, another idea took its place, and through a different procedure produced the same general result. This was the compromise, one of the most fundamental ideas in Anglo-Saxon law and procedure as we know it. “A compromise was always effected where compromise was possible. Arbitration was, perhaps, the habitual mode of settling disputes among the Anglo-Saxons.” “In a legal system so crude that it was almost an invariable habit not to press suits to a conclusion, but to compromise them, in order to escape the consequences, the delays, or the uncertainties of strict law, arbitration was a more attractive resort, in nine cases out of ten, than the ordinary judgment of a regular tribunal.”<sup>15</sup> And we may say that this same method of compromise or arbitration was the habitual way of settling disputes in England well into the thirteenth century. This was true in the case of both civil and criminal actions.<sup>16</sup>

Out of the many hundreds of cases available to prove this point we select two which are instructive enough to be given in full. The first, from 1208, is as follows:<sup>17</sup>

“By the king’s license it is convenanted between John Chamberlain the appellor and Herbert of Pattesley the appellee touching the death of Drogo, John’s brother, to wit, that Herbert shall go to the Holy

<sup>15</sup> Adams, *Essays in Anglo-Saxon Law* (1876) 26, 53.

<sup>16</sup> We are not now referring to those numerous collusive suits brought merely that the enrollment of a final concord might give a good title to land, but to bona fide compromises. For the final concord see 2 *P. and M.* 94 ff; *Glanvill*, lib. viii.

<sup>17</sup> *Select Pleas of the Crown*, no. 102. See Maitland, *Pleas of the Crown for the County of Gloucester* (1884) no. 101, for an attempted compromise without the king’s leave following an appeal of homicide in 1221. This was allowed by local custom in some districts. *Note Book*, pl. 1474. For another compromise without leave (1243) and the process which compels the parties to come and fine with the king, see Healey, *Somersetshire Pleas* (1897) no. 864. For other cases of the parties coming to an agreement see (1243) *ibid.*, nos. 934, 1001, 1067, 1115, 1118 and 1218. This last was an appeal of robbery. “The jurors testify that they (appellees) are not guilty, but they say that the parties are agreed; therefore they are in mercy (for agreeing without leave).” As late as 1279, long after the action of trespass was well established, appeals were still being brought, and the parties thereto were compromising without leave with the same old result. *N. A. R.* 323-324. When for any reason the appellor failed to prosecute, the appellee was arraigned at the king’s suit. In such cases the jurors were careful to say whether or not there had been a compromise between the parties. *Ibid.* 314, 324 bis, 366.

Land and remain there in the service of God for the soul of the slain for seven years, the time spent in journeying there and back being reckoned part of that term, and if within that term he shall return, let justice be done to him as though he were convicted of the said death, and he shall begin to move from his house forty days after the Tuesday next before S. Mārgaret's day in the tenth year of King John. Also Thomas of Ingoldsthorpe shall for the soul of the slain procure one of the slain man's family to be made either a monk or a canon, and if he is to be a monk, then he shall be a monk in one of these three houses, to wit, Norwich, Castleacre, or Binham, but if a canon, then at Thetford, Coxford or Walsingham, and the said clerk shall be presented to the said Thomas and his friends on the Sunday next after S. Mary Magdalene's day in the tenth year, and shall take the habit before Michaelmas, and further the said Thomas shall give the kinsfolk of the slain forty marks, whereof he shall pay ten marks, on the Sunday next after S. Mary Magdalene's day, and ten marks at Martinmas, and ten marks a week before Christmas, and ten marks at Lady Day. And of this the following are Thomas of Ingoldsthorpe's pledges, [five names]. And Thomas grants that the court may distrain him to perform this agreement. And Thomas gives the king forty marks for the license to compromise, for which sum the above named persons are pledges."

Such notices of compromises are common in the plea rolls.<sup>18</sup> Not infrequently the chance addition of *concordati sunt* in the margin of the roll tells the same tale; but from the very nature of things, many of these private agreements would hardly be enrolled in documents, the express purpose of which was but to serve as a record of the official work of the royal justices. It is very noticeable that what we may call the lesser appeals—wounding, mayhem, imprisonment, battery—often come to very little as far as the accounts on the plea rolls are concerned.<sup>19</sup> Sometimes compromises are noted, more frequently they are not. In cases of this latter type, the explanation which on the face of all the facts appears most reasonable is that there have been unrecorded compromises between the parties as a result of the appeals. In fact, we cannot but strongly suspect—what the cases just fail to prove, and a knowledge of human nature would lead us to believe—that in the case of these lesser appeals at least, the appellor was moved less by a desire for vengeance than by the hope of pecuniary and other gains that might result from a compromise. In other words, it seems that appeals of this kind were brought, if not usually, at least often, merely for the purpose of being compromised. The case given in full above shows the pecuniary possibilities of the compromise in even an appeal of homicide, and it is a remarkable fact that the royal pardons for acci-

<sup>18</sup> For other early cases of compromise in criminal actions see *Select Pleas of the Crown*, nos. 49, 73, 79, 82, 192.

<sup>19</sup> Note 18 *supra*; 2 *P. and M.* 489, note 3. But there are exceptions. Thus in 1221 an appeal for wounds led to a duel in which the appellee was worsted; after this he was blinded and emasculated. Maitland, *Pleas of the Crown for the County of Gloucester*, no. 87.

dental killings seemed to regard such compromises as the natural result of homicide by misadventure.<sup>20</sup> In by far the larger number of thirteenth century appeals of rape which we find on the rolls, the woman fails to prosecute her appeal to a conclusion. The records make it clear that this is often due to a compromise, and in all probability practically all the rest of these unprosecuted rape cases should be explained on the basis of compromises made but not recorded in the plea rolls.<sup>21</sup> Compromises in the case of crimes were not confined to the royal courts. They were recognized and provided for by borough customs and by the local courts.<sup>22</sup> As far as we are able to judge, in all courts and among all classes, the notion of compromise was fundamental, and permeated the whole theory of criminal law.

In regard to civil actions the situation was the same. Thus in the Cornish Eyre of 1201:<sup>23</sup>

"The Assise comes to recognize if Gilbert, the uncle of Richard, was seised in his demesne as of fee of four hides of land with the appurtenances in Kandell on the day that he died, etc., which land Hugh de Milborne holds. Hugh says that the aforesaid Geoffrey was the son of a deacon, and so was a bastard, and therefore Richard can not be his heir, nor any other, except one begotten of his body. And Richard admitted this. A day is given them in one month from Michaelmas, not to hear their judgment, because that is obvious, but for having the counsel of the justices, and in order that they may be able to make a (the?) compromise."

This case is remarkable in that it shows us that the judges, even if not practically forcing the litigants to arbitration, at least took it for granted that the parties would need their counsel in an agreement which seems to have been regarded not only as the normal, but even as the inevitable, procedure in a case of this sort. Perhaps more than we realize it was part of the usual work of the judges to do just this sort of thing—their duty, we may rather say, for the duty of the justices was not only to administer the law, but also to increase the

<sup>20</sup> Thus in 1231 the king pardons H. K., "as much as to the king pertaineth," the death of J. D. whom H. K. killed by mischance and not with malice aforethought, as the king was informed by an inquest; "so nevertheless that he (H. K.) make peace with the friends and kinsfolk of said J. D., and that he stand to right if any one desires to bring action against him, according to the law and custom of the realm." *Patent Rolls, 16 Hen. III, 456.*

<sup>21</sup> In 1201 "by leave of the justices they make concord on the terms of his espousing her." *Select Pleas of the Crown, no. 7.* Marriage may well have formed the basis of many of the agreements made without the leave of the justices. Cf. Healey, *op. cit. supra* note 17, nos. 934, 1067, etc.

<sup>22</sup> This idea may have been borrowed by the local courts from the royal courts; the records are not older than the middle of the thirteenth century. Illustrations will be found in 1 Bateson, *Borough Customs* (1904) 30-31; Dobson and Harland, *History of Preston Guild, 76*; Maitland, *op. cit. supra* note 6, at pp. 15, 16, 17.

<sup>23</sup> Baildon, *Select Civil Pleas* (1890) no. 205. Cf. *ibid.* nos. 9, 14, 26, 44, 46, 51, 120, 167, 217, 230, etc.

royal revenue, and litigants had to pay the king money, had to "fine" with the king as the expression is, for the privilege of coming to an agreement.<sup>24</sup>

This financial interest of the crown in the matter of compromises between parties to an action—abundantly testified to by the records<sup>25</sup>—coupled with the generations old tradition and practise of such compromises in both civil and criminal actions, kept alive a form of procedure which in large measure took the place of actions for damages. So deeply rooted was this idea of arbitration that it persisted long after actions for damages became usual.<sup>26</sup> Even actions for damages themselves were sometimes settled in this good old English way.<sup>27</sup> And we may go one step further yet: from 1234 comes what we must regard as a perfectly good action of trespass, in spite of its early date—there is a complaint alleging the asportation of chattels *vi et armis* and against the king's peace, with a claim for damages, and the production of suit; the defendant denies tort and force and the asportation, and puts himself on the country (jury); the plaintiff answers the defendant's plea and prays judgment; and then "afterwards with leave they make a compromise, and Hugh gives to him Henry one hundred shillings for the damages of the said men, and Henry holds himself satisfied, and therefore without day etc."<sup>28</sup> This persistence of the compromise procedure so long after actions for damages became customary, should be emphasized. It shows us that this method of settling disputes worked well, or at least well enough to make the men of that time not too anxious to discard it for the newer procedure in actions for the recovery of damages. It would seem to indicate just as clearly that the action for damages was not an altogether indigenous product of Anglo-Saxon or early English law. We are therefore confronted with the question as to the source and origin of the action for damages in later English law. Here again it probably never will be possible to give a complete answer; but some facts which bear on the answer are quite plain—it was an action which developed in the royal courts, not in the popular or local courts, and its beginnings go but little farther back than the beginning

<sup>24</sup> For the financial side of the justices' duty see Bolland, *The General Eyre* (1922). For cases of agreement without the necessary license see *supra* note 17.

<sup>25</sup> For the earlier plea rolls see the cases in Maitland, *Rolls of the King's Court in the Reign of Richard I* (1891) 17, 20, 21, 24, 25, 26, 28. For compromises of earlier date than our plea rolls see, for Anglo-Saxon times, Adams, *op. cit. supra* note 15, app'x; for Norman-Angevin times see Bigelow, *op. cit. supra* note 1, index *sub tit.* "concordes."

<sup>26</sup> *Note Book*, pleas 610, 634, 702, 778, 803, 1107, etc. For a later date see Healy, *op. cit. supra* note 17, index *sub tit.* license to agree—some seventy cases covering the years 1225-1254; *N. A. R.* (for 1256) 2, 3, 4, 5, 11, 12, 13, etc., (1269) 140, 144, 146, 150, etc., (1279) 228, 235, 241, 242, 243, etc.

<sup>27</sup> *Note Book*, pleas 482, 792.

<sup>28</sup> *Note Book*, pl. 1121.



of the twelfth century. Without much doubt, also, the medium through which the idea and the action developed was the assise of novel disseisin. Probably too, as the evidence seems to indicate, though it does not actually prove, the source of the idea on which the action was based was the Roman law.

These statements rest on the following facts. In 1166 there was instituted by royal ordinance a new action in English law for the protection and recovery of the possession of land, the assise of novel disseisin.<sup>29</sup> It was based, either consciously or otherwise, upon the *actio spoli* of the canonists, which was itself an adaptation of the old Roman law interdict *unde vi*.<sup>30</sup> Glanvill's discussion of the assise of novel disseisin, written some twenty years after the institution of that action, gives us our earliest account of it, but says nothing about damages in connection with it. He does, however, say that pending the outcome of the action the tenement is to be resealed of its chattels, and that the disseisee may have the fruits of the tenement—facts which should be kept in mind as we proceed.<sup>31</sup> Within seven years at the most after Glanvill wrote, the plea rolls begin; novel disseisin entries therein are frequent from the first, but there is no mention of damages being recovered in this action until the year 1198.<sup>32</sup> From that date on damages are regularly noted in the novel disseisin cases.<sup>33</sup> Before another year is out the matter of damages has seemingly become so

<sup>29</sup> As to the date of this assise see 2 *P. and M.* 145-146.

<sup>30</sup> 2 *P. and M.* 46; 2 Holdsworth, *History of English Law* (3d ed. 1923) 204; 3 *ibid.* 8. For the relation of the *actio spoli* to the earlier interdict see Ruffini, *L'Actio Spolii* (1889) 395 ff; for the *actio spoli* and lay legislation in general, *ibid.* 425 ff; as to novel disseisin, *ibid.* 443-445.

<sup>31</sup> *Glanvill*, XIII, 33, 38, 39. In cap. 38 it is expressly stated that, "The only penalty inflicted by this constitution is an amercement to the king." From the same chapter we get the additional information that, "In no other recognition is it customary for the judgment of the court to make mention of chattels or fruits." Cf. (1199) 1 *Rot. Cur. Reg.* 377, "Yvo comes and denies the robbery, and says that he recovered a certain land by the grand assise (i. e. in a writ of right case) against A. M., and the sheriff gave him seisin by judgment of the court, and of the chattels found there." See 2 *P. and M.* 523-24.

<sup>32</sup> 1 *Rot. Cur. Reg.* 154, "The assise comes to recognise if G. F. unjustly and without judgment disseised J. M. of his free tenement in M. within the assise. The jurors say that G. F. did so disseise him. Judgment—let J. M. have his seisin and G. F. in mercy (see quotation from *Glanvill* XIII. 38 in note 31 *supra*), and the damage is forty shillings." Cf. *ibid.* 155, 177, 189. We shall probably never find any earlier cases of damages, all the extant plea roll from 1194 through 1200 being now in print.

<sup>33</sup> Thus, 1 *Rot. Cur. Reg.* 329, 350, 391, 396, 422 *bis*, 424, 430, 433, 446 *bis*, 447; 2 *ibid.* 58, 59, 60, 62, 64, 95, 135, 187, 192, 241, 246; 3 *Historical Collections Staffordshire* (1882) 47, 48, 57. At the outset there are some few exceptions to the general rule. Thus there is no mention of damages in one of the two cases (1199) in 1 *Rot. Cur. Reg.* 396. *Bracton*, f. 186b, gives the form of Glanvill's writ, but he is careful to say that the procedure has changed—the tenement is not to be resealed of its chattels, but damages are to be given instead.

fundamental in this action that the jurors will specifically state that there are no damages when such is the fact.<sup>34</sup> In other words, just about a generation after the assise of novel disseisin comes into existence, this new element of damages appears in the action and becomes permanent there.

For what were these damages given? The cases yield us no direct statement in the way of an answer; but there are three possibilities that at once suggest themselves—damages may have been given on the basis of mesne profits, or on the same general basis on which damages were given in actions of *de vetero namii*,<sup>35</sup> or as an equivalent of the crops or goods taken, many of which would normally be consumed.<sup>36</sup> Doubtless all of these considerations would shortly come into play as time went on, for all in a way merge or overlap, but the third probably exerted the greatest influence at first, because it applied directly to what must have been in the majority of instances the most striking and obvious case of loss. The disseisee would not always be restored to his original position when he was put in seisin of the land from which he had been ousted. It must often have been impossible, or next to impossible, to reseise the tenement of its chattels, and some new arrangements would have to be made to take care of those cases where the orders of the writ could not be carried out, otherwise the provision in regard to the reseisin of the chattels would in many, and probably in most, of the cases be made of no effect. Certainly it is not very long after they first appear that damages become the normal thing in an assise of novel disseisin, but there are two very early cases which strongly suggest that originally the payment of damages was an alternative of restoring the chattels.<sup>37</sup>

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<sup>34</sup> "The jurors say that R. E. disseised the complainants of a certain wood. Judgment—let them have seisin. No damage." 2 *Rot. Cur. Reg.* 65. This practice of stating that there has been no damage continues: (1227) *Note Book*, pl. 1896, "As to the damages they (jurors) know nothing, because the corn is yet upon the land;" (1235) *Note Book*, pl. 1145, "No damages, because that land has been improved by building and in other ways;" (1239) *Note Book*, pl. 1281, "Damages forty shillings. Afterwards it was testified by the jurors that he had made improvements to the value of twenty shillings, and therefore damages are remitted up to twenty shillings." So also *Bracton* f. 187b, "In truth improvements (*melioratio*) diminish the damages and discharge the disseisor in part or altogether."

<sup>35</sup> As to this more below. But see *Note Book*, pl. 477, where complainant alleges that defendant took six beasts of his plow and detained them against gage and pledge for nine weeks, "as a result of which he was not able to till his land at an opportune time."

<sup>36</sup> *Note Book*, pl. 1896 and note 34 *supra*.

<sup>37</sup> "The case of J. L. who demands against S. B. four score marks of chattels (*de catallis*) must be discussed. S. B. comes and says that he does not wish to answer him inasmuch as he is about to go on the king's service, unless the court shall so award. J. L. prays that it be allowed to him that S. B. did not appear before the third day. And the said John offered himself with his law which he

There was another action in which damages appeared very early, one which like the assise of novel disseisin was strictly limited to the king's court. This was the action of *de vetito namii* as Bracton called it, *replegiari* or replevin as it came later to be known.<sup>38</sup> The appearance of the damage element as such in the replevin cases is almost contemporaneous with, or only little later than, its appearance in the assise of novel disseisin.<sup>39</sup> In this connection it becomes necessary

had waged against S. B., that he S. B. unjustly and without judgment of the court of the Count of Brittany (*cur. com. Britanni* = in the court etc.?) had disseised him of the aforesaid chattels. And he S. B. and his son and W. M. grasped him J. L. by the right hand extended beyond the book, saying that wickedly would he claim upon it (*voluit abjurare super eum*) that money (*pecuniam*). It is considered that John has deraigned the said money against S. B., and that the son of S. B. with W. M. are in mercy." 1 *Rot. Cur. Reg.* (1199) 451. There has been a disseisin of chattels, apparently, if we may judge from the language, in connection with land. The mention of chattels at the beginning of the record and the use of *pecunia* at the end, suggests that the demandant is after either one or the other. Note that it is "of the aforesaid chattels" that the complainant alleges he was disseised. The case is not altogether easy to understand, but it looks like the aftermath of an assise of novel disseisin that restored the land but not the chattels, the original disseisee in this later action attempting to get back his chattels or their money equivalent.

The other case is from 1201. "G. H. demands against R. W. one caracote of land with appurtenances in T. and in G. as his right and inheritance. And R. W. comes and says that the same G. H. disseised him R. W. of all that land, on account of which he brought a writ of novel disseisin against him and recovered his seisin before the justices at Westminster, and for his damage he should have given him two marks, and he has not yet paid him; and he does not wish to answer him (G. H.) as to the aforesaid land until he (R. W.) shall have full seisin of the chattels. And G. H. is not able to contradict this. Therefore it is considered that he (R. W.) need not answer until he have seisin of his chattels. And let them depart without day." 1 *C. R. Rolls*, 411. Here very clearly the payment of two marks is an alternative of restoring the chattels.

<sup>38</sup>*Bracton* f. 155b-159b. Emphasis should be laid upon the fact that these two early actions in which damages were recovered were actions which could be brought only in a court of the king. Whatever may have been its origin, the action for damages was, like the jury, a royal and not a popular institution. The case cited by Ames, *op. cit. supra* note 1, at p. 65, note 1, as a case of replevin from the time of Henry I, can be termed at best only a suit in the nature of replevin. An action *de vetito namii* might be brought in the county court and before the sheriff, but the sheriff would hold this plea not in his capacity of sheriff, but as a king's justice. See *Bracton* f. 155b, where it is made perfectly clear that this is a plea of the crown which is terminated only before the king or his justices. There was a persistent tradition in the late thirteenth century that this action was not very old. It was said to have been invented by Henry II, *Placita Quo Warranto*, 232b; to have been invented by Glanvill, *Mirror of Justices*, ch. 2, sec. 26; to have been invented in John's time, Y. B. 30, 31 Edw. I. (Rolls Series) 222.

<sup>39</sup>*Abbot of Pipewell v. Croft* (temp. Ric. I)—A complains that B unjustly took his beasts in a common pasture and detained them against gage and pledge, so that he has been damaged to the value of fifteen marks and more. B denies the taking in the common pasture or the detention against gage and pledge, but says that he took them in his own pasture, delivering them up on demand. It

to examine a case which on first reading might seem to imply that damages were given in this class of actions before they were given in the assise of novel disseisin. The case is found in a roll the exact date of which is uncertain, but which is clearly from the time of Richard I, and probably from the year 1194.<sup>40</sup>

"Arnulf de Torleia complains that Simon son of Richard unjustly took his beasts and detains them against gage and pledge, touching a knight's fee in Penethorpe, contrary to a fine made in the court of the lord king, and so kept them that they died. And he has damage to the value of forty shillings. Simon altogether denies that he took the beasts contrary to the fine. They make a compromise."<sup>41</sup>

Is this an action for damages? "And he has damage" may mean any one of three things: a) the beasts were worth forty shillings, hand over that amount as the equivalent of, and instead of, the beasts, which you cannot now return because they are dead; b) the value of the beasts, plus such actual damage as I have sustained by the taking and detaining, amounts to forty shillings; c) I am willing to compromise on a forty shilling basis. Actually they did compromise. So even if we prefer to accept the second explanation here given and emphasize the damage element, we still have to put this case among those actions for damages in which the old habit of arbitration triumphs over the newer damage concept. Probably, however, the first explanation offered is the correct one. This would be in keeping with the general trend of this class of cases at this particular time.<sup>42</sup> The beasts have not been restored—the defendant "unjustly took and detains," not "detained" as in the other cases just cited—the complainant wants them back, or rather their equivalent, for they are dead. This is a demand for specific relief; the situation is quite different from that where the plaintiff has had return of the beasts and still is demanding damages for the unjust taking or detention. Another case of the same kind, from this very roll and year, illustrates plainly the idea of specific relief—as contrasted with a claim for damages—which underlies this action at this time. A woman complains that her lord unjustly took her beasts (three cows and nine sheep) and detains them against gage and pledge, no mention being made of damages. After some little pleading, "by leave they made a com-

is considered that he defend himself twelve handed. 24 *Pipe Roll Society* (1900) 240. What if the defendant failed at his law in this case? *Bracton* f. 156 gives the answer—he should render to the complainant such an amount of money as would cover the damages which the latter had had from the unjust detention. Cf. 1 *C. R. Rolls* 146-147, 159, Oxon.; 2 *Rot. Cur. Reg.* 233-34—all from 1200. For an excellent case of considerable length on this point see *Note Book*, pl. 477.

<sup>40</sup> For a discussion of the date of this roll see Maitland, *op. cit. supra* note 25, at pp. xvi-xix.

<sup>41</sup> Maitland, *op. cit. supra* note 25, at p. 40 (Norf.).

<sup>42</sup> "The writs in *Glanvill* XII 12, 15, which touch replevin suppose that the chattels are still in the distrainer's hands and the action aims at specific relief." 2 *P. and M.* 525, note 1.

promise, so that he William returned her beasts, and for her sheep which have died on his hands (*in balla sua*) he gave her eighteen pence and the skins of the dead sheep."<sup>43</sup> Note that the eighteen pence have to do only with the sheep that have died, they are in no way connected with the cows or with such sheep as are yet alive and have been restored, they are not damages for the taking or detention. If the skins could have been returned on the backs of live sheep, no compromise would have been necessary, and money would no more have been mentioned in connection with them than in connection with the cows.<sup>44</sup> Without any doubt the same principle underlies the other case from 1194 just cited, which must therefore be regarded not as an action for damages, but one for specific relief in which a money equivalent takes the place of sheep no longer alive and capable of being returned.

In our present state of knowledge, therefore, we can hardly do otherwise than regard the action of novel disseisin as the first action in English law in which the idea of damages, in anything like its modern sense, played a part.

But whence came this idea? To-day and for us the notion of the recovery of damages seems so instinctive that we find it almost impossible to think of a time when there was no such idea in English law; but we have seen that the legal instinct of the earlier English turned to the compromise instead of to an action for damages. Now there was nothing inherent in the assise of novel disseisin itself that demanded the recovery of damages to the exclusion of the idea of arbitration; why did they not then, in the case of this action also, settle the matter of loss by the expedient to which they had hitherto always been used, the private agreement? This is what we should expect from a people so given to the compromise procedure; and this is apparently what they did, for a time;<sup>45</sup> the idea of the recovery of damages in this action came only as an afterthought. Under

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<sup>43</sup>Maitland, *op. cit. supra* note 25, at p. 26 (Buking).

<sup>44</sup>Of course the compromise may have resulted in the lady getting more than the actual market value of the dead sheep. Nevertheless, theoretically and legally the principle is,  $x \text{ sheep} = 18d. \text{ plus } x \text{ skins}$ ; return  $x \text{ sheep}$  or their equivalent.

<sup>45</sup>"A. P., R. A., and G. the reeve were ordered to restore to R. S. his grain which unjustly they carried away from his land in M. And unless they did this they were to be before the justices at Westminster two weeks from Michaelmas to show why they had not done it. A. and G. did not come nor did they essoin themselves, and the sheriff's clerk testified that they could not be found. And R. came and prayed the privilege of making a compromise." (1194) 1 *Rot. Cur. Reg.* 4. Like the case cited in note 37 *supra*, this would seem to be the aftermath of an assise of novel disseisin, an attempt to get back grain which the disseisor had carried away before the disseisee had been restored to his land. No damages are asked, but specific relief, as in Glanvill XIII. 39. With this case compare the facts in *Bret v. Wolmeresti* (1200) 1 *C. R. Rolls* 217-18.

the circumstances it is very difficult to think of this afterthought as the result of some intuitive force in the legal consciousness of the Englishmen of that period, some happy discovery or invention altogether new.<sup>46</sup> Developments of this sort which follow new lines, and are based on new theories and concepts, are more often than not the result of suggestions, or even of borrowings, from outside sources. This is, and always has been, especially true in the field of law. There had been a good example of this very thing when the assise of novel disseisin itself was made part of the law of the land; Henry II and his advisers had drawn upon Roman law (if we may be permitted to use this word as inclusive of both civil and canon law) for much that was fundamental in the action as then established. It has been suggested above that the idea of the recovery of damages came from the same source; but let it be noted that it did not come in at this time. Presumably there was originally no thought or realization of the possible contingency which so soon afterwards became real—the impossibility of restoring the chattels together with the tenement. At any rate the facts are clear; Henry and his counsellors made no provision for what was later to become one of the most noteworthy features of the assise of novel disseisin, the recovery of damages.<sup>47</sup> Nevertheless, Roman law influence appears to have been as responsible for this feature of the action as for the assise itself. It must be admitted that the evidence on which this statement rests is necessarily indirect. The very nature of the facts to be proved militates against the discovery of historical evidence that will allow us to say positively that the idea of the recovery of damages came into English law from Roman sources. On the other hand there is no evidence against it, and there is much that makes this the most probable, and certainly the readiest, explanation of such facts as we have.<sup>48</sup> Seemingly in 1198 or thereabouts the idea of simple damages was borrowed from the Roman law to become a part of the English descendant of the old Roman interdict *unde vi*, in much the same way that something more than three-quarters of a century later the idea of double and

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<sup>46</sup> It has been somewhat the fashion in times past to believe in an eternally existing reservoir of legal principles somewhere in space which may be drawn upon as needed. Were this so, the theory of an invention or discovery could be more easily accepted; in the face of all the facts it is not satisfactory.

<sup>47</sup> See note 14 *supra*.

<sup>48</sup> These statements are directly at variance with what has until very recently been the traditional attitude of English writers on English law towards the influence of the Roman law upon the law of England as it developed. It has been very similar to the traditional English view as to the origin of the jury—now happily almost altogether abandoned. For a long time foreign scholars have been disposed to see a much greater Roman influence than the English writers were inclined to admit. It is refreshing to see the appreciation of Roman law influence manifested in the most recent history of English law. See especially 2 Holdsworth, *op. cit. supra* note 30, at pp. 176-77, 202-205.

treble damages was borrowed from the same source and incorporated in a statute.<sup>49</sup>

As to the actual extent of Roman law influence upon English law there has been much discussion and much disagreement among the writers. It is, however, pretty generally agreed that for a half century on either side of the year 1200, the civil and canon law directly influenced the development of English law.<sup>50</sup>

Of the many things which operated to produce this result, we can mention here but a few. Except possibly in the latter part of this period there were no lay judges or lawyers; practically all the judges were churchmen knowing canon law, many of them versed in the civil law as well; as judges in the king's courts administering the law of England, they naturally could not forget what they knew of civil or canon law, the influence of which would remain even when they were not conscious of it. Whatever may have been the result of the legislation of Henry II on appeals to Rome, the effect of the latter upon the legal situation in England was real, and kept alive by the canonical pleaders. Think of the significance of this statement alone: "In Richard I's day the monks of Canterbury went to law with the archbishop; a statement of their case has come down to us; probably it was drawn up by some Italian; it contains eighty citations of the *Decretum*, forty of the *Digest*, thirty of the *Code*. The works of the classical Roman jurists were ransacked to prove that the archbishop's projected college or canons would be an injury to his cathedral monastery."<sup>51</sup> Englishmen who later became high in church and state went to Italy and studied Roman law.<sup>52</sup> About 1150 Vacarius came to England, taught Roman law, at Oxford it would seem, and wrote a book on that subject for the use of poor students—which book still exists and is now being edited. William Longchamp, "King Richard's viceroy and the true ruler of England," wrote a manual on Roman law procedure.<sup>53</sup> In short, many Englishmen, and men in England who were not Englishmen, studied or taught, and sometimes wrote about, civil or canon law.<sup>54</sup> There is overwhelming evidence to show that at

<sup>49</sup> Stat. Westminster I (1275) 12 Edw. I; 2 *P. and M.* 522, note 1.

<sup>50</sup> (1922) 31 *YALE LAW JOURNAL*, 827 and notes. Cf. (1923) 32 *YALE LAW JOURNAL*, 751 ff.

<sup>51</sup> 1 *P. and M.* 116. This was the reign in which the element of damages came into the assise of novel disseisin.

<sup>52</sup> Note the case of John of Salisbury who "has given a sketch of civil procedure which drew high praise from Savigny." 1 *P. and M.* 120. Thomas Becket, chancellor and afterwards archbishop, had studied Roman law at Bologna.

<sup>53</sup> 1 *P. and M.* 121. As to chronology, see note 51 *supra*.

<sup>54</sup> There is a most excellent account of this in 1 *P. and M.* 111-122. The statement on page 122—"As to Roman law it led to nothing" represents the traditional English view. Cf. note 48 *supra*. For a very interesting story of where Roman law led to something, see 2 *ibid.* 113-115.

the time when the recovery of damages became a part of the assise of novel disseisin—as well as for a long period both before and after that time—a very considerable number of men, of the class who would be most interested and influential in establishing and maintaining this innovation in English law, were well versed in that then greater and more scientific body of law in which the recovery of damages had for hundreds of years been a fundamental principle. The idea of the recovery of damages, as such, was new to English law; for two generations at least it had been anything but new to men who were making and administering that law.

These being the facts, the difficult thing to understand is not why this idea should have come into English law when it did, but rather why it had not come before. To bring it about there need have been no deliberate borrowing; the application of the principle may well have been made almost or quite unconsciously. But even if it was the result of a conscious act of borrowing, it could hardly have seemed in any way unnatural, to men who knew both English and Roman law, to graft this Roman law principle upon an English action which bore so plainly the mark of its Roman origin.

Reference has already been made to a case which seems to represent an attempt to introduce this same Roman principle of damages into an appeal of felony in that same year in which we find it appearing first in the assise of novel disseisin. The case reads:<sup>55</sup>

“Serlo the son of Eustace appeals Roger Faber that in the peace of the king he beat him and bruised him in a way that he would not have permitted for a hundred shillings (*ita quod noluit habuisse pejoramentum pro C. sol.*), and so that he is maimed by that assault, and this he offers to prove against him by consideration of the court as one who is maimed. Roger denied the whole accusation. . . . It is considered that he (Serlo) is not maimed. Judgment—Serlo in mercy half a mark; pledge for the amercement, Eustace of Selford; let those appealed go quit.”

This case can best be explained as follows: the place of our action for assault and battery is taken in Roman law by the *actio iniuriarum*. In 1198 the English action for assault and battery was the appeal. So Serlo brought an appeal, alleging assault, battery and mayhem. But seemingly he, or someone else who was counseling him, knew something about Roman law and the *actio iniuriarum*, and so he inserted in his count the clause stating for how much he would have been unwilling to suffer the injury. These words were not necessary to the appeal; they are not, at least as far as we have been able to discover, in any other appeal of this period, or in any other appeal of mayhem for another hundred years. But they, or words like them, would be used in an *actio iniuriarum*, which in Roman law could be

<sup>55</sup> (1198) 1 *Rot. Cur. Reg.* 203. Cf. note 10 *supra*.



brought on the facts on which Serlo brought his appeal.<sup>56</sup> It seems certain that whether Serlo was merely trying to make out an injury of sufficient magnitude to constitute the ground of an appeal,<sup>57</sup> or trying to introduce the element of damages (which latter is more likely, because the mayhem itself would have been sufficient for an appeal), he was influenced by the analogy between the English and the Roman action to insert the damage element of the latter in his appeal.<sup>58</sup>

Some forty or fifty years after Serlo brought his appeal, Bracton wrote of the action which lies for the man who has been struck, beaten and badly treated; he called it an *actio iniuriarum*, and he laid the damages in almost the very words of Serlo.<sup>59</sup> That Bracton

<sup>56</sup> *Just. Inst.* IV. 4; *Digest* 47. 10. "The praetors allowed those persons who had suffered injury to put their own estimate on the wrong, in order that the judge at his discretion might condemn the wrongdoer in as great a sum as the complainant estimated he had suffered, or in a less amount." *Just. Inst.* IV. 4. 7.

<sup>57</sup> *Bracton* f. 145 makes it perfectly clear that not every blow or wound will be sufficient ground for an appeal, "and because of the insignificance of the wound the appeal may fail." *Cf. ibid.* f. 101b-102.

<sup>58</sup> Sometime later, in the reign of John, another Englishman who felt that he had been injured, brought another action and made use of this same way of stating the amount of his damage. But this time the aggrieved party did not appeal, he complained—as later on the plaintiff in an action of trespass is going to complain (*queritur*). And at the end of his complaint he said "that for one hundred marks he would have been unwilling that his house (priors) should have had as much damage as it had through him (defendant)." *Abbr. Plac.* 75. The defendant then denied the *vim etc. i. e. vim et iniuriam*, the tort and force, the very same denial that in the very same words men are going to make in actions of trespass for hundreds and hundreds of years to come. But this is not an action of trespass, certainly not in its technical sense, for it is too early in the day for that. Nor is the complainant stating his damage as most of the complainants lay their damages in the actions for damages that are now becoming more and more numerous. They say either that they have been made worse (*deteriorati sunt*) or that they have damage (*damnum habent*) to a certain amount, and when the action of trespass becomes developed enough to have a form of its own, the plaintiff in trespass will combine both of these forms and say that he is made worse and is damaged (*deterioratus est et damnum habet*) to a certain amount. In other words, the form used by Serlo and the complainant in John's reign never became rooted it would seem. Why it did not we are unable to say; it may have been too indirect to compete with the simpler *damnum habet*. It is interesting as an attempt to state damages in a formal way when the idea of the recovery of damages was new to English law—a Romanesque influence that did not survive.

<sup>59</sup> *Bracton* f. 103b. The rubric is "Cui actio iniuriarum competat, et contra quem." This passage is discussed in Maitland, *Bracton and Azo* (1895) 183-184. We can not, however, agree with Maitland's contention that when Bracton says "quanti actor dixerit se nolle iniuriam sustinuisse" he is using a good English phrase current in the courts; at least if the royal courts are meant. See note 58 *supra*. As to what the same writer says as to the coupling of shame and damage, we agree as to the local or manorial courts. See e. g. Maitland, *The Court Baron* (1891) 20, 23, 25, 26, etc.; Maitland, *Select Pleas in Manorial Courts*

deliberately drew on the Roman law for this portion of his work is now common knowledge. Serlo seems just as consciously to have made use of the Roman damage element in his English appeal. Just how deliberately the men of 1166 and 1189 drew on the same body of law for the assise of novel disseisin and the idea that damages should be recovered in an action we may never be able to discover; but all our available evidence tends to prove that consciously or otherwise such borrowing took place, to the gain and advantage of English law.

(To be continued)

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(1889) 56. Was not Maitland thinking of these local courts, whose records he had edited, when he made his statement in regard to damage and shame? Cf. *2 P. and M.* 537. Any mention of shame in connection with damage is certainly uncommon in the records of the king's courts, at least as far as the printed material is concerned—and that is abundant enough to make it seem altogether likely that it fairly represents the unpublished material. A rather thorough search for all damage cases through 1230 has revealed only one in which damage and shame are mentioned together. This, of uncertain date from the reign of John (found in Baildon, *op. cit. supra* note 23, no. 183), represents litigation between the Abbot of St. Edmund's and the Bishop of Ely touching the infringement of a franchise. There may be some ecclesiastical influence at work here—defamation, for instance, was a matter for the church courts, and not for the royal courts. At any rate, we may be certain that allegations of shame were rare in the king's court.