

COMMON PLEAS AND KING'S BENCH

Tract probably by Sir Matthew Hale in F. Hargrave (ed.), *Law Tracts* (1787), vol. I, pp. 357-376

Tract by Sir Francis North in Lord Nottingham's 'Manual of Chancery Practice' and 'Prolegomena of Chancery and Equity' (D. E. C. Yale ed., 1965), pp. 179-174 (and Lord Nottingham's response, pp. 158-159)

C. A. F. Meekings, 'King's Bench Bills' (1977), *Legal Records and the Historian*, pp. 97-139; 'A King's Bench Bill Formulary' (1985) 6 J.L.H. 86-104

J. H. Baker, 'The Court of King's Bench' (1978) 94 SS 53-63

M. Blatcher, *The Court of King's Bench 1450-1550* (1978)

N. G. Jones, 'The Bill of Middlesex and the Chancery 1556-1608' (2002) 22 J.L.H. (forthcoming)

FLUCTUATIONS IN BUSINESS

M. Blatcher, 'The Great Depression', in *The Court of King's Bench 1450-1550* (1978), pp. 10-33

E. W. Ives, *The Common Lawyers in pre-Reformation England* (1983), pp. 199-207, 212-216

C. W. Brooks, *Pettyfoggers and Vipers of the Commonwealth* (1986), pp. 48-111; 'Civil Litigation in England, 1640-1830', in *The First Modern Society* (A. L. Beier et al. ed., 1989), pp. 357-399 (repr. in *Lawyers, Litigation and English Society*, ch. 3); 'Litigation and Society in England 1200-1996' (1998), *Lawyers, Litigation and English Society*, pp. 63-128

EXCHEQUER

H. Jenkinson, *Select Cases in the Exchequer of Pleas* (48 SS, 1932), introduction

H. Wurzel, 'The Origin and Development of Quominus' (1939) 49 *Yale Law Jo.* 39-64

D. J. Guth, 'Notes on the early Tudor Exchequer of Pleas' in *Tudor Men and Institutions* (A. J. Slavin ed., 1972), pp. 101-122

J. H. Baker, 'The Exchequer of Pleas' (1978) 94 SS 63-64

R. M. Ball, 'Exchequer of Pleas, Bills and Writs' (1988) 9 J.L.H. 308-323

4. The Forms of Action

In the mind of the modern lawyer pleading and procedure are ancillary to the substantive law, and a law student may complete the academic stage of his studies without reading the *Supreme Court Practice* or becoming immersed in precedents of pleading. Law is treated as a body of abstract rules which are applicable to given factual situations. The rules under which litigation is initiated and pursued are of great practical importance but are generally treated for educational purposes as separate from the substantive rules which the courts apply once the facts are before them. In real life the relationship between law and fact may not be as clear cut as that, but it is true to say that large parts of the law have an intellectual existence independent of the legal system. To some extent this was always so. Most basic legal ideas have originated outside the legal mind, and even a medieval lawyer was capable of abstraction about more technical principles. Yet, between the thirteenth century and reforms of the nineteenth, procedural formalities dominated common-law thinking. As far as the courts were concerned, rights were only significant, and remedies were only available, to the extent that appropriate procedures existed to give them form. No doubt, in its earliest stages, the common law must have been anterior to the forms; and eventually a means was found of introducing new remedies through a relatively formless action, so that Holt CJ could declare in 1703 that wherever there was a right a remedy must be found.¹ But the formulae through which justice was centralised and administered by the king's courts in the twelfth and thirteenth centuries were frozen as part of the 'due process of law' guaranteed by charters of liberties, and gave rise to a formalistic legal culture which affected legal thought at every turn.

Originating an Action

Legal proceedings are commenced, or 'originated', when a plaintiff makes his complaint or demand before a court in due form. In the local courts the plaintiff himself was enough to set the process of justice in motion, and it did not have to be written. When, in the early days of itinerant royal justice, complaints were laid before the justices in eyre or justices *coram rege*, orally or by informal (French) bill, the royal courts were merely taking over existing procedure. Where, however, a plaintiff wished to originate a suit in the Common Pleas, or in the

¹ See p. 432, post. The means was the action on the case: p. 61, post.

King's Bench when sitting in another county, he had to purchase a royal writ from the king's Chancery² to authorise the commencement of proceedings. The reason is that these royal courts, although they rapidly became the ordinary and regular courts of law, were at first exceptional. The king was not here merely taking over a traditional system, but was offering a new and separate justice of his own. This alternative justice was a royal favour before it became a right. In the case of the court before the king himself, and the eyre with commission to entertain all pleas, the favour was soon extended generally to all comers. But those who wanted the additional advantage of suing outside the itinerant system had to seek and pay for a grant of that favour in the form of an 'original writ'. The writ worked like a pass admitting suitors to the kind of justice for which they had paid, and there were different kinds of pass for different purposes. By 1200 many types of writ had become common form in the Chancery, and were issued on payment of a standard fee; but the writ remained a normal prerequisite to litigation in Westminster Hall.

It has been suggested that original writs evolved from writs containing executive commands to sheriffs to do justice between the parties in the county or to take some specified action. Such writs were in use in Anglo-Saxon times, and the pipe rolls of Henry I show them still in regular use at the beginning of the twelfth century.³ The writ of right patent retained this form, being a command to the feudal lord of whom the plaintiff claimed land; and the viscontial writs similarly conferred judicial authority on the sheriff.⁴ Some other writs, such as habeas corpus, prohibition, and mandamus, also used this executive form and became known as 'prerogative writs'.⁵ But in those cases the command was to initiate a procedure rather than to settle something finally.

When an executive writ commanded a final result, it was indeed sometimes intended to execute a judgment already given rather than to initiate proceedings. But where a writ ordered the recipient to do something 'justly', this was taken to mean that it should be done only if its justness was established by due enquiry.⁶ Such a writ was therefore in reality an original writ. The development which turned writs of command explicitly into originals was the introduction of an option; the addressee, invariably the sheriff, was to convey a command to the defendant, coupled with the alternative of coming before the king's court to explain why it was not obeyed. The failure to obey royal writs was itself a plea of the Crown,⁷ and so long as there was no limitation on what might be commanded any matter could be brought within the scope of royal justice by first issuing a writ. This form of original writ – a command with an 'or else' clause – was established in

² For the secretarial role of the Chancery, see p. 99, post.

³ See also *Bishop of Worcester v. Abbot of Evesham* (c. 1080) 106 SS 37; *Abbot of Ramsey v. Eustace* (1087) 106 SS 89 (writ to summon county; cf. p. 125); *Staverton v. Abbot of Thorney* (c. 1110) *ibid.* 155 (writ to feudal lord). Cf. *Abbot of St Augustine's, Canterbury v. Sandwich* (1122) *ibid.* 194, where a writ of right in the form *praecipio quod plenum rectum facias* appears to be addressed to the tenant rather than the lord.

⁴ Both were in the form *praecipimus tibi*: for specimens, see pp. 538-541, post.

⁵ See pp. 146-150, post.

⁶ *Modbert's Case* (1121) 106 SS 192.

⁷ *Leges Henrici Primi*, x.1 (Downer ed., 1972, p. 108).

the twelfth century. Another kind of formula, slightly later in date, ordered the sheriff to take pledges from the defendant to appear in court to explain himself. This appears to represent a further stage in which the option of carrying out a royal command has been removed; it was appropriate for dealing with allegations of wrongs already committed. Of these two principal classes of writ there will be more to say presently. A third formula, associated with the petty assizes, was to order the sheriff to summon men of the vicinity to answer a question framed in the writ, and to summon the defendant to be there to hear the answer.⁸ This seems likewise to have undergone a transformation from executive to original writ. The prototype for the assize of novel disseisin was a simple command to the sheriff to reissue the plaintiff (*praecipio ut resaisias P.*), which came to be 'judicialised', first by adding the word 'justly' (*juste resaisias P.*), and then by adding the explicit direction to investigate the question asked.⁹

These writs addressed to the sheriff did not, like an eyre or assize commission,¹⁰ confer jurisdiction on the court mentioned, by way of direct grant, but authorised the initiation of proceedings. The words 'and have there this writ' made an original writ 'returnable' into a specified court: that is, the sheriff had to send the writ to the court, endorsed with a report (called the 'return') on the action he had taken. It was on receipt of the returned writ that the justices acquired jurisdiction over the matter, to the extent mentioned in the writ, and could themselves issue further returnable writs (called 'judicial writs') to secure the attendance of the defendant and continue the action through its further stages. Each returned writ was placed on file as the court's warrant for the next step taken.

The original writs were designed to regulate justice, not to limit it. According to *Bracton* there were as many writ formulae as there were types of action,¹¹ and well into the thirteenth century new forms could be drafted when need arose by the chancellor and his senior clerks, or 'masters', perhaps in consultation with the king's council and judges. In this formative period, we find some writs in use which did not survive into later practice, and there is no need to suppose that those who first drew up new formulae intended them to last unalterably for centuries. What caused the original writs to become fundamentally important to the common law was the early tendency for the formulae to become fixed. Once a writ had been issued it became a precedent for the future, and there was a reluctance to change the formula if it was found serviceable. A plaintiff did not, therefore, concoct his own writ, in the way that he was free to formulate his plaint or bill when approaching a court directly. He had either to find a known formula to fit his case, or apply for a new one to be invented. By the time of *Bracton* there were substantial collections of precedents (called 'registers') to guide the Chancery clerks and the emerging legal profession,¹² and by the middle of the thirteenth century the complete register of formulae was so great that the uninhibited invention of

⁸ See pp. 59, 233, post. For specimens, see pp. 542-545, post.

⁹ For an early writ of resein, brought against a plaintiff in a writ of right who had taken seisin without waiting for judgment, see *Abbot of Thorney v. Staverton* (c. 1110) 106 SS 156.

¹⁰ These were also issued under the great seal: p. 16, ante.

¹¹ *Bracton*, vol. IV, p. 286.

¹² See p. 177, post.

new writs was seen as something of a grievance. Some check was felt necessary. *Bracton* recognised this in stating that new forms of writ must be consonant with law and approved by the council. That is tantamount to saying that royal jurisdiction could not be extended without legislative and judicial sanction. This position was confirmed by complaints in 1244 that the chancellor was often issuing writs against justice or contrary to law;¹³ and in 1256 a defendant asked the court to quash a writ as 'novel, unheard of, and against reason'.¹⁴ What seems, then, already to have become the orthodoxy was voiced two years later in the Provisions of Oxford 1258, under which the chancellor was to be sworn to issue no unprecedented writs without the consent of the king's council.¹⁵ After this period, although occasional innovations were sanctioned by parliament, the categories became more or less closed. The effect was momentous. Finding the right formula was no longer simply a matter of consistency and routine. If a would-be plaintiff could not find a writ in the register he was without remedy as far as the two benches were concerned. That is not to say that he was without remedy at all. The benches did not have exclusive or even comprehensive jurisdiction, and the denial of access to them in particular cases was often deliberate policy. Indeed, it was feared that if the old system of justice broke down the royal courts would be swamped with business they were not equipped to dispatch: a fear amply borne out by the fate of the general eyre. Nevertheless, as the common law administered in the two benches gradually became the regular law of the land, so the law of the land came to be dominated by the range and wording of the original writs. Formulae which had been drafted for more or less administrative purposes, to authorise the impleading of an adversary before an exceptional royal tribunal, were now seen as defining the rights and remedies recognised by the common law, and thus as fixing the common law within an immutable formulary framework.

The choice of original writ governed the whole course of litigation from beginning to end, since the procedures and methods of trial available in an action commenced by one kind of writ were not necessarily available in another. The classification of writs was therefore more than just a convenient arrangement for reference purposes; it was a classification of actions, and in course of time a map of the substantive outlines of the common law.¹⁶ The original writ, said Stonor J in 1315, was the basis of the law.¹⁷ Later lawyers referred to the compartments of law and practice associated with different writs as the 'forms of action'. These forms of action were the first object of legal study. The two earliest treatises on the common law, *Glanvill* and *Bracton*, were essentially books about writs and the procedures generated by them. And we know that the first stage in a medieval law student's training was to learn the writs, doubtless by rote. The medieval *Natura Brevium* (The Nature of Writs) was the students'

13 M. Paris, *Chronica Majora* (Rolls ser., 1872-83) vol. IV, pp. 363, 367.

14 *Abbot of Lilleshall v. Harcourt* (1256) 96 SS xxix, 44. The case was settled.

15 *Annales Monastici* (Rolls ser., 1864-69) vol. I, p. 448. There was also concern that the king was hindering justice by stopping writs against favourites: A. H. Hershey, 113 EHR 829.

16 See Table A on p. 70, post.

17 *Northwait v. Courtenay* (1315) 45 SS 5, per Stonor J ('bref original est fondement de ley'); repeated in 104 SS 142 (1320), per Stonor J.

primer; and when the renowned legal author and judge Sir Anthony Fitzherbert published a new *Natura Brevium* in 1534 he wrote in the preface that the writs were the 'fundamentals on which the whole law depends'.¹⁸

Types of Original Writ

A writ (*breve* in Latin, *brief* in French) was a thin strip of parchment containing a letter in the name of the king, usually written in Latin,¹⁹ and sealed with the tip of the great seal.²⁰ That is as much as can be said by way of generalisation about the nature of writs, because the contents of the letters varied from one form of action to another. After 1833 there was only one type of original writ, and the plaintiff filled his own particulars into a stereotyped form. But the common-law writs were different in form from each other, and some of the deeper divisions of form reflect different approaches to litigation. The classification of original writs for present purposes begins with the rudimentary distinction between a right and a wrong. The assertion of a right – a *demand* – received different treatment from the complaint of a wrong – a *plaint*.²¹ A right was continuous, even eternal, and it was necessary that its vindication be accomplished with care and caution; the highest solemnities of royal justice were accordingly lent to the protection of rights, especially those of a proprietary nature, for the decision would bind the parties and their successors in title for ever. A wrong, on the other hand, was something past, beyond undoing, and something which at first concerned the royal courts only in so far as it infringed the king's peace. The consequences of serious wrongs, in terms of life and property, might be just as grave as in actions about rights, but the philosophy with which they were approached was necessarily different. Enquiries into misdeeds were usually less perplexing than enquiries into rights, and were peculiarly appropriate for the jury. Minor wrongs were not at first within the ambit of the king's justice at all.

PRAECIPE WRITS

The forms of action for pursuing demands belonged to the category of writs which it was suggested above may have developed from executive commands. The sheriff was told to command (*praecipe*) the defendant to do what was demanded by the plaintiff or demandant, or else to come before the king's justices to explain why (*ostensurus quare*) he would not. The king's court acquired jurisdiction in default of acknowledgment of the supposed right by the defendant. Presumably at some stage the option of performance had been real; but it became fictional.²² The disappearance of the reality of the option made the *praecipe*

18 For these works, see also pp. 187, 188, post.

19 Early privy-seal writs were sometimes in French. For the conversion to English, see p. 87, post.

20 Once writs became routine, impressions of the full great seal (about 5 inches in diameter) were used only for charters and letters patent.

21 A similar division is seen in viscontiel writs (p. 23, ante) between the *justicies* (to order the defendant to do something) and the *audias* (to hear a complaint of misconduct).

22 For an explicit statement from the 1480s, see the Inner Temple moot in Keil. 116, pl. 57.

writs truly original, in that they were conceived of as originating an action from the time of their issue rather than from the moment of non-compliance; there was no need to prove a refusal before process could issue.

The classical *praecipe* formula was settled by 1150, and there were soon a number of different species. The principal type, perhaps the prototype, was used to claim land; the sheriff was to command the defendant to 'render' or yield up to the demandant the land which the latter claimed as his right.²³ There were variants of this formula for claiming kinds of real property as diverse as advowsons and easements, and derivatives (such as writs of entry and formedon) for claims under differing kinds of title. The *praecipe quod reddat* formula was also used to claim chattels or debts which the defendant unjustly withheld, or the performance of a covenant, or to obtain an account of moneys received. And there was a negative version, *praecipe quod permittat*, under which the defendant was to be ordered to allow the demandant to have or to do something: to have an easement or profit (*quod permittat habere*), to knock down a nuisance (*quod permittat prosternere*), to present a clergyman to a benefice where there had been an obstruction (*quod permittat praesentare*, usually called *quare impedit*), or to grind corn without paying toll. What is interesting about this *quod permittat* group is that four quite different kinds of legal claim were linked by a common formula: the form preceded any legal analysis. These writs also mentioned wrongdoing, and yet they were actually demands of right, the rights being such as required exercise by the demandant's action rather than the defendant's. All the *praecipe* actions have this in common, that they look not to compensation for misconduct but to the restoration of some right; they are prospective rather than retrospective, in the subjunctive mood rather than the active, and in the present tense rather than the past. Where possible they resulted in recovery of the right, enforced by a writ to hand over the thing in demand or to do what was asked.²⁴

As these were the oldest and most solemn of actions, the procedure which accompanied them was archaic and solemn, and slow. Much parchment and wax was needed to secure the appearance of the defendant, who could safely ignore several initial stages in the process against him, and even at later stages was allowed various excuses (called 'essoins') for not appearing. In the writ of right, trial was originally by battle, the judgment determined by God. In debt and detinue, and to begin with in covenant, trial was by oath-taking (wager of law), the most familiar mode of proof in the old communal courts. The *praecipe* writs were therefore closest to the old ways of doing things and the first to seem outmoded. One course might have been to modify the procedures to bring them into line with current notions of efficacy. In the twelfth century that was still thinkable, and in 1179 Henry II did indeed introduce the 'grand assize', a form of jury, as an alternative to battle at the option of the defendant. By Edward I's time, however, the conservatism which accompanied the rise of the legal profession, and which had frozen the writ system, put paid to radical procedural

23 This was addressed to the sheriff only where land was held in chief, or where the lord waived his court: pp. 231, 235, post. But the writ of right patent to the lord contained a similar 'or else' clause, which gave the sheriff jurisdiction by default: p. 540, post.

24 This was once possible even in covenant, though here the usual remedy came to be damages.

change. As neither their wording nor the concomitant procedures could be modified, the *praecipe* writs became less and less usable; and their fate was to be gradually superseded by whatever newer and more effective remedies could be found. One solution was found in the bill procedure of the Chancery and conciliar courts. But alternatives existed within the common-law forms of action, and principally in the second main class of writs, those concerned more with wrongs than with rights.

PLAINTS OF WRONG

The petty assizes, already noticed, fall between the two classes. But one of them, novel disseisin, was effectively an enquiry into wrongdoing; the bringer of the action was a 'plaintiff' – an 'appellant' in *Glanvill* – rather than a 'demandant', the general issue was 'No tort', and damages could be recovered for the wrongdoing. At the same time as novel disseisin was introduced to deal with a particular form of disorder, we find other procedures (one of them likewise attributed to an 'assize') to deal with what we call crime. Complaints of violent wrongs could be made either by the community, through the grand jury, or by the victim or his next of kin.²⁵ The latter made an 'appeal', originally oral, upon which the accused was arraigned and tried. The most serious appeals were those alleging felony, and the appeal of felony was the only kind of original appeal to survive into the later common law. But there were once appeals of trespass for other breaches of the king's peace; and these gave way on the one hand to actions of trespass,²⁶ and on the other to indictments for misdemeanour. Although the appeal did not require a writ for its commencement, it became increasingly common to use a writ of attachment to produce the defendant in court to answer the charge against him.

A third mode of proceeding against a wrongdoer was by a writ in the form *pone*,²⁷ whereby the sheriff was ordered to 'put the defendant by gage and safe pledges' to come before the king's justices and show why (*ostensurus quare*) he had committed some specified misdeed. It will be remembered that the *ostensurus quare* formula had been used in the 'or else' clause of the *praecipe* writs, where the defendant was to come and explain his disobedience of the command; but here it was elevated into a direct command to come and explain the matter alleged against him. The direct *ostensurus quare* formula possessed various sub-species: a form of replevin,²⁸ the writ of waste,²⁹ the writ of deceit (for misconduct in legal proceedings), and – the broadest category of all – the writs of trespass.

25 See further pp. 502-506, post.

26 See p. 60, post. In 1241 an appeal for carrying away hay was quashed on the ground that an action by writ was available: *Crown Pleas of the Wiltshire Eyre 1249* (Meekings ed., 1961), p. 83. And in 1321 knocking a door down was said to be too 'simple' a trespass for an appeal on the crown side of the eyre: 85 SS 93.

27 Another kind of *pone* was used to remove cases from inferior courts: p. 231, post. This was in the form *pone ad respondendum*. The *pone* formula also occurs in novel disseisin.

28 See p. 237, post. For the notion that replevin was a plea of the Crown, see p. 38, ante. In 1310, Bereford CJ said replevin was a writ of trespass: 22 SS 195.

29 Waste (and a number of other writs concerning property, such as *quare ejectit* and ravishment of ward) were not in the form *pone*, but contained a summons *ostensurus quare*: see the form, p. 547, post.

TRESPASS

'Trespas', the law-French word for *transgressio* or wrongdoing, was not in the beginning a term of art. In the 1525 translation of the Lord's Prayer – 'forgive us our trespasses' – the word is used both for the *peccatum* (sin) and *delictum* (wrong) of the Latin Vulgate.³⁰ Trespass was a broad enough category at one time to embrace felony, criminal misdemeanour and disseisin as well as those wrongs remedied by the later actions of trespass and trespass on the case. It acquired the narrower meaning because it became the name of a great family of original writs. None of these writs actually employed the word 'trespass',³¹ but they were related by the *ostensurus quare* formula and eventually by common procedures. They were also linked by an approach which distinguishes them from the *praecipe* actions. Whereas a *praecipe* writ ordered the defendant to accede to a demand or justify himself, a trespass writ brought the defendant directly to court to explain why he had done wrong. Trespass writs were therefore not concerned with the vindication of rights, but with punishment and amends for past transgression. A writ of trespass offered no option, even fictitious, of doing right: as Blackstone put it, while a *praecipe* writ was 'optional', trespass was 'peremptory'. It embodied a complaint rather than a demand. As with the assize and the appeal, trial was by jury. And the outcome of a successful suit was damages, with a fine to the king in serious cases.

The peremptory *ostensurus quare* formula appeared in the decades before 1200, though trespass writs are uncommon before the middle of the thirteenth century. It seems highly probable that such actions developed in tandem with the appeal, in which the writ of attachment to answer an accusation mirrored the *ostensurus quare* formula but included words alleging felony. Appeals of felony continued in use as a means of recovering stolen goods, or of achieving the execution of an aggressor; but the appellant ran the risk of having to fight a battle, or of being severely punished if the appeal failed. The appeal of death apart, most appeals could be converted into actions for damages by omitting the words of felony.³² This may be why most of the earliest writs of trespass contain the phrase 'with force and arms and against the king's peace', a phrase taken from the appeal. The writ of trespass for taking and carrying away goods (*de bonis asportatis*) was closely similar to the appeal of larceny, and that for assault and battery was similar to the appeal of mayhem. However, the writ was not as restricted as the appeal, and could also be brought for trespass to land (*quare clausum fregit* and ejectment).³³

It was settled in the course of the thirteenth century that writs of trespass – in whichever bench they were returnable – could only be issued in respect of wrongs committed 'with force and arms' (*vi et armis*) and 'against the king's peace' (*contra pacem regis*), or which infringed royal franchises.³⁴ Only such wrongs

30 Matthew, vi. 12, 14 (1525 and 1611 versions; but 'wrong' in the *New English Bible* of 1961). Cf. Luke, xi. 4 (sin).

31 The word sometimes occurs in the pleadings: e.g. in the 14th-century form of general plea, *Non fecit transgressionem*.

32 Bracton, vol. II, p. 411, explicitly says this.

33 As in the case of the woman whose door was knocked down: p. 59, note 26, ante.

34 The writ of deceit might also be considered a species of trespass: here the king's interest was in the integrity of his justice.

were suitable for the attention of the king's justices. Other wrongs were more appropriate for local jurisdictions, and there was a policy of discouraging private disputes in the highest courts about mere passing wrongs. Thus in 1278 it was enacted that actions of trespass should be brought in the county as in the past, and that no one should have a writ of trespass unless he swore that the claim was substantial.³⁵

The limitation of writs of trespass to wrongs *vi et armis* and *contra pacem* did not reflect any narrow understanding of the nature of 'trespass'; it was merely a fetter on the jurisdiction of the central courts. But the desire for remedies in those courts soon came into conflict with this limitation, which in the fourteenth century was increasingly felt to be an inconvenience with little purpose. Since local courts were generally forbidden to entertain suits for more than forty shillings without royal sanction,³⁶ there would have been a failure of justice if non-violent trespasses involving a greater sum were excluded from the king's courts as well. The pressure for change is first seen in attempts to use *vi et armis* writs fictitiously, smuggling in actions under the pretence of force in the hope that no exception would be taken. A series of actions for injuring horses with force and arms, brought against defendants identifiable as smiths, suggests irresistibly that the complaints were really of shoeing accidents;³⁷ and actions for forcibly chopping up timber, brought against men described as carpenters,³⁸ strongly suggest the negligent performance of building contracts. Doubtless there were other fictions which are no longer capable of detection. If the truth came out, some plaintiffs met with a helpful court,³⁹ but others did not, especially where the non-violent nature of the wrong appeared from the plaintiff's own count.⁴⁰ The necessity for the plaintiff to make out some royal interest had become an embarrassment.

TRESPASS ON THE CASE

The *vi et armis* restriction was openly abandoned in the 1350s, when the Chancery clerks began regularly to issue writs of trespass in which the phrase was omitted.⁴¹ Orthodox teaching from the sixteenth to the last century was that the innovation was sanctioned by a statute of 1285, which provided that the clerks of the Chancery should draw up a new writ 'whenever henceforth it should happen in the Chancery that a writ is found in one case but none is found in a like case (*in consimili casu*)

35 Statute of Gloucester 1278, c. 8.

36 This was a common-law rule, the date of which is uncertain: see J. S. Beckerman, in *Legal History Studies* 1972, p. 110.

37 See Milsom, 74 LQR at 220-221, 586; Palmer BD, pp. 364-365. (The defendant is usually called Smith or Ferroux.) For selling contaminated wine *vi et armis*, see *Rattlesdene v. Grunestone* (1317) B. & M. 300.

38 Palmer BD, p. 334. The *vi et armis* form was dropped in 1369.

39 E.g. *Anon.* (1304) B. & M. 297; *Petstede v. Marreys* (1310) B. & M. 298.

40 E.g. *Anon.* (1313) B. & M. 300 (deceit in selling); *Toteschalle v. Orfevre* (1321) 86 SS 149, B. & M. 301 (conversion by a bailee); *Houton v. Paston* (1321) 86 SS 282, B. & M. 302, per Herle J (accident). Cf. *Anon.* (1374) B. & M. 304 (negligence). See also *Anon.* (1390) B. & M. 305 (horse overworked by bailee).

41 The relaxation began earlier with bills: e.g. *The Oculist's Case* (1329) B. & M. 340 (eyre of Nottingham); *Bukton v. Tounesende* (1348) B. & M. 358 (King's Bench at York); p. 330, post.

falling under the same law (*cadente sub eodem jure*) and requiring a like remedy'.⁴² But no such connection was explicitly made in medieval times, and historians now disagree as to whether the statute played any role. It was nearly seventy years after 1285 before the abandonment of the *vi et armis* requirement in practice, and the fictions resorted to in the interim would have been unnecessary and absurd if the statute had already authorised the change. It may be that the statute simply removed the need for an exact precedent when issuing new writs, and that by a process of accretion the corpus of trespass formulae grew little by little until eventually the force and arms could be dropped. However, it is difficult to see how a writ for a non-forcible wrong could have been thought 'in like case' to a writ for a forcible wrong, or as 'falling under the same law', when it had already been held that the writ *vi et armis* did not lie for the non-forcible wrong. The facts suggest a more sudden reversal of policy in the 1350s, perhaps occasioned in some way by changed social and economic conditions in the wake of the Black Death.⁴³ No official decision is recorded, but such an important change was almost certainly sanctioned by the king's council.⁴⁴

The new writs differed significantly from the vast run of *vi et armis* writs. They embodied the same *ostensurus quare* formula; but whereas the *vi et armis* writs were mostly 'general', accommodating wide spectra of facts in simple stereotyped forms,⁴⁵ all other writs of trespass had to set out the plaintiff's cause of action with some particularity in what was called his 'special case'. The special facts were recited in a *cum* (whereas) clause, following immediately after the words *ostensurus quare*, and preceding the direct assignment of wrongdoing.⁴⁶ The *cum* clause is first found in *vi et armis* writs, in the thirteenth century, as a way of adding aggravation or explanation; and there were precedents long before the 1350s of *cum* clauses showing the breach of some royal interest, such as a franchise, in lieu of force.⁴⁷ There was also a line of cases in which special writs were brought for flooding through non-repair of sea-walls, culminating in a leading case of 1344 in which the writ was described as being 'a formed writ conceived on his case' (*in suo casu conceptum*); it is difficult to account for this exception to the *vi et armis* rule, except as an analogue of the *praecipue quod reparari facias*, but here the extension had occurred before 1285.⁴⁸ When writs without *vi et armis* became more common in the 1350s, introducing actions for negligence and breaches of contract,⁴⁹ for deceit by sellers, for damage caused

42 Statute of Westminster II 1285, c. 24 (*in consimili casu*). The statute also says that if the clerks cannot agree, they are to refer the problem to parliament. A 15th-century reader on this provision said it was 'to no effect': BL MS. Lansdowne 1138, fo.104.

43 This is the suggestion in Palmer, *English Law in the Age of the Black Death*, though the precise nature of the change of policy remains controversial.

44 The council is known to have considered and sanctioned the action on the case against innkeepers: see B. & M. 554, per Knyvet CJ.

45 Thus the battery formula (p. 545, post) could embrace wrongs as diverse as shooting or running down with a horse and cart. See pp. 404-405, post.

46 For specimens, see p. 547, post; B. & M. 343-344, 385.

47 E.g. *Prior of Coventry v. Gramscop* (1309) B. & M. 611 (franchise of market).

48 Milsom, 74 LQR 430-434; *Barnardston v. Heighlynyge* (1344) B. & M. 338.

49 In the well-known *Humber Ferry Case* (1348) B. & M. 358 (and see p. 330, post) a King's Bench judge in Yorkshire sanctioned such an action shortly before the Black Death broke out.

by dangerous animals, for the loss of goods from inns, and for misconduct by bailees, the *cum* clause (setting out the special facts) was indispensable. Early descriptions of such writs – for instance, 'a writ according to his special case' – betoken formulae specially created for individuals.⁵⁰ As they became more common, the whole family of non-forcible trespass actions was given the generic name of 'trespass on the case' or of 'actions on the case'.⁵¹

This difference of form seems to represent no more than an accident of history. The general *vi et armis* writs had been invented first, and the plaintiff who could not find one suitable for his purpose had to have a special one drawn up for him with an explanatory clause. At first any other differences were minimised, for instance by retaining the *contra pacem* formula, though this soon ceased to be necessary. The conceptual unity is in fact more striking than the differences. For instance, it might have been supposed that trespass on the case was a common plea and therefore outside the jurisdiction of the King's Bench; but the point was not pressed and had no practical effect.⁵² It was also arguable that jury trial was not de rigueur in trespass on the case, as it was in trespass *vi et armis*, and in 1374 the argument nearly prevailed;⁵³ but by the 1380s it was settled that wager of law was not acceptable in any writ of trespass if deceit was alleged,⁵⁴ and no case is known after that period in which wager of law was offered in such an action. The exclusion of wager of law was an important precondition for the prominent part which actions on the case were to play in legal development over the next four-and-a-half centuries. Another difference concerned mesne process; but in 1504 any previous doubts were settled by the enactment that the same process was available in case as in trespass.⁵⁵ As late as 1610 it could be said that trespass was a collective name, including the two species trespass *vi et armis* and trespass *super casum*.⁵⁶ Such, however, became the dominance of form over substance that in later ages lawyers convinced themselves that the species 'trespass' and 'case' must have been distinct entities for a reason, and that they ought not to be confused. Suing by the wrong writ was fatal; and so different did trespass and case become in the legal mind that they could not even be joined in one action.⁵⁷ Legal

50 E.g. B. & M. 358 ('special writ according to the case', 1369), 341 ('writ according to his case', 1372), 378 ('writ formed on his special case', 1400), 381 (trespass '*sur le matter monstre*', i.e. on the facts set out, 1425). (Similar expressions were used for writs other than trespass.)

51 'Trespass on the case': B. & M. 367 (1441), 554 (1443). 'Action on the case': B. & M. 613 (1410), 397 (1449).

52 94 SS 57-59.

53 *Stratton v. Swanlond* (1374) B. & M. 360 at 361, per Cavendish CJ ('This writ does not suppose force and arms, or *contra pacem*, and so it seems wager of law is quite acceptable'). However, the defendant withdrew the wager of law and accepted a jury.

54 *Aylesbury v. Wates* (1382) Y.B. Mich. 6 Ric. II, p. 120, pl. 27, per Belknap CJ ('Be assured that you shall not have the law, because the action is based on the nature of deceit and falsity'); *Rempton v. Morley* (1383) Y.B. Trin. 7 Ric. II, p. 30, pl. 11, at p. 31. In *Garrok v. Heyesbury* (1387) B. & M. 507 at 508, the point was again raised, but not pressed.

55 Stat. 19 Hen. VII, c. 9; B. & M. 342.

56 *Cox v. Gray* (1610) B. & M. 351. In the 15th century, actions on the case were often referred to simply as 'trespass': e.g. B. & M. 380, 508, 581, 611, 613.

57 See this argued in *Haukyns v. Broune* (1477) B. & M. 629 at 630, per Townshend sjt.

rationalisation made the test one of directness.⁵⁸ An action of trespass for fixing a spout so that it directed rainwater onto the plaintiff's house was on this basis struck down in 1725 because the proper action was case. The fixing was a direct act but the consequential damage was not. Fortescue J put the distinction between a man who threw a log into the highway and hit someone (trespass), and one who left a log in the highway and someone tripped over it (case).⁵⁹ Such distinctions might be rather scholastic; but, as Lord Raymond CJ remarked in the same case, 'we must keep up the boundaries of actions, otherwise we shall introduce the utmost confusion'. The accident of history had been elevated into a principle of law, a rule which would require much effort and artificial ingenuity to avoid.⁶⁰

Judicial Writs

MESNE PROCESS

Process is the name given to that part of the machinery of justice whereby persons are brought to justice and judgments enforced. The details of the process available in different forms of action are points of practice which have little fascination for posterity; but historians must not forget that such things were of immense importance to litigants, and may often have affected their choice of action and the development of the law. Process was governed by writs, but not from the Chancery: they were issued under the seal of the court where the suit was pending, and were therefore called judicial writs.

Since a suit could not proceed in the absence of a defendant, the first stage was to secure the defendant's appearance: or, if he would not appear, to outlaw him. This was called the 'mesne' process, because it was intermediate between the original writ and the judgment. As soon as an original writ was returned into the Common Pleas or the King's Bench it was taken to an officer of the court called a 'filazer' who thereupon issued all the writs of mesne process until the appearance of the defendant or the commencement of outlawry. The principal forms of mesne process were the writ or precept of attachment (under which the sheriff either seized goods or took personal sureties from the defendant for his appearance),⁶¹ the *distringas* (under which the defendant was distrained by seizure of his property) and the *capias ad respondendum* (under which the defendant was arrested). The *capias* was the most effective. Though limited at common law to suits for breach of the king's peace, by statute it was gradually extended to other personal actions.⁶²

58 A similar distinction appears in *Berden v. Burton* (1382) Y.B. Trin. 6 Ric. II, p. 21, pl. 9.

59 *Reynolds v. Clarke* (1725) B. & M. 354; quotation from 1 Stra. 634.

60 See further p. 412, post.

61 In actions of trespass the order to attach the defendant was in the original writ, by the words 'put by gage and safe pledges'. Another writ of attachment, of a quasi-criminal nature, was used against a party or official who disobeyed an order or was otherwise in contempt of court.

62 In 1285 to account, in 1351 to debt, detinue and replevin, in 1504 to case, and in 1531 to covenant: B. & M. 342.

Judicial writs resembled originals in that they too were addressed to the sheriff and were returnable in court. The effectiveness of process therefore depended on the sheriff. Unable as he was to claim expenses, and liable in damages if he made mistakes, the temptation for him to do nothing was considerable. The sheriff could return to a *distringas* that he could find nothing to restrain, or to a *capias* that the defendant was ill or not to be found. Whether he had looked was a question one was not allowed to ask, and so these returns became common fictions for use by under-sheriffs who could not be persuaded to take positive action or who hoped by delay to prise some gift from the plaintiff. There was, in any case, a succession of judicial writs to be issued in due sequence before any real sanctions began to operate. Even where *capias* was available, three successive writs went out before further steps were taken, and notwithstanding them the plaintiff still could not seek judgment by default but had to resort to outlawry.⁶³ Outlawry was an elaborate rigmorole, requiring the sheriff to 'exact' the defendant by calling upon him to come forth at five successive county assemblies. But it was not as terrible as it sounded. It could easily be reversed for formal slips, and technical escape routes seem to have been left almost as a matter of course; if all else failed, an outlawry could be pardoned on payment of a pound or two to various officials. The Robin Hood legends have preserved an image of outlaws as desperate outcasts; but by 1400 outlawry was not usually much of an inconvenience, and even royal officials could continue in office while outlawed.⁶⁴

Moderate delay in litigation was often defended as a desirable feature of royal justice in an age when communications were slow. Certainly the common-law system had ample opportunities for delay built into it at many points. One contributing factor was the division of the legal year into terms during which formal business had to be transacted. These originated in the twelfth century, when the Exchequer began to hold its major accounting sessions at Easter and Michaelmas. The council was assembled for these sessions, and the justices stayed afterwards to dispose of judicial business. Two further terms were probably added in the 1190s when the Bench became firmly established. The terms were separated by four vacations, periods when the Church prescribed holidays, when the king's justices took time to make their circuits, or when everyone went home. All Sundays and certain saints' days were non-judicial (*dies non juridici*) at common law. The three religious seasons of Christmas (with Advent and Epiphany), Lent (with Easter) and Trinity (with Whitsun and Corpus Christi) account for three of the vacations; while the fourth, the 'Long Vacation', kept the summer months free for home pursuits when weather could make town life unsafe. Thus was the legal year divided into the four terms during which the courts sat at Westminster: Michaelmas (in October and November), Hilary (in January and February), Easter (in April and May), and Trinity (in May and June). The total number of working days in the year, in Elizabeth I's time, was only 99.⁶⁵ Later reforms took away about ten more days, so that for as much as three quarters of the year there were no common-law courts sitting at Westminster.

63 Judgment in default of appearance was not introduced in personal actions until 1725.

64 Elizabeth I is said to have complained at the number of outlaws sitting as members of parliament.

65 Meekings, in *Legal Records and the Historian*, p. 111 n. 1.

Each term was divided into four or more 'returns', each return-day being a week apart. All writs were made returnable at one of these days, and at that stage the plaintiff had to take his next step. There were three days of grace at each return, and a provision for late entries on payment of a fine after the fourth day; but if the plaintiff missed the return altogether, his action was 'discontinued' and he had to give up or start again. If the sheriff or the defendant defaulted at the return, then the plaintiff would ask for the next judicial writ to be issued, returnable after a prescribed interval at another return-day, often the next term. It was the function of the attorneys to watch their clients' causes to make sure that steps were taken at the proper days. But the system was typified by delay. It was not uncommon for a year or two to pass before a defendant appeared. This was one of the main reasons why, if there was any choice, plaintiffs preferred those forms of action which needed the fewest writs to procure an appearance. If the parties pleaded to an issue of fact, further judicial writs were required to produce a jury: first the *venire facias juratores*, repeated if it had no effect, then the *distingas juratores* (to distract recalcitrant jurors), and finally the *habeas corpora juratorum* (to produce their bodies).

FINAL PROCESS

Execution of a judgment was likewise obtained by judicial writs addressed to the sheriff. The choice of writ depended on the form of action and the nature of the judgment. In real actions the judgment was usually to recover seisin of the land demanded, and the writ of execution was then the *habere facias seisinam* in which the operative words were 'cause A to have seisin'.⁶⁶ A judgment for money, whether for a debt, damages, or costs,⁶⁷ was primarily enforced at common law by the writ of *fi. facias* (commonly called *fi. fa.*), which ordered the sheriff to seize the defendant's chattels⁶⁸ and cause the sum to be 'made up' (that is, raised by sale). Freehold land was not liable at common law to execution for a money judgment, except in the case of the king or a recognizee.⁶⁹ In 1285, however, parliament introduced an alternative procedure called *elegit*, under which a judgment creditor could elect instead of *fi. fa.* to have the defendant's goods and a moiety of his lands delivered to him as a passive security.⁷⁰ In practice it came to operate like a mortgage, the debtor remaining in possession and paying an assessed rent until the debt was paid off. In those actions where mesne process was by *capias*, the plaintiff had the further option of suing execution against the

66 In ejectment, when a term was recovered (see p. 300, post), the writ was *habere facias possessionem*.

67 A plaintiff was generally entitled to costs in all cases where he recovered damages: Statute of Gloucester 1278, c. 1. (Later statutes provided that in certain cases costs should not exceed the damages: e.g., p. 410, post.) The defendant was first given costs in 1531: 23 Hen. VIII, c. 15.

68 This included leaseholds: see B. & M. 191.

69 In these cases a *levari facias* was used, allowing the profits of land to be taken as well as chattels. For recognizances, see p. 312, post.

70 Statute of Westminster II 1285, c. 18. The tenancy was a freehold protected by novel disseisin; but it was treated as a chattel for succession purposes, so that it went to personal representatives together with the debt itself.

debtor's person by the writ of *capias ad satisfaciendum* (ca. sa.), under which the debtor was incarcerated until the debt was paid: a technique which depended for its limited success largely on the hope of intervention by friends.

These writs proved remarkably durable, and were unaffected by the Common Law Procedure Acts. The abolition of imprisonment for most civil purposes in 1869 put a virtual end to the fearful ca. sa., though it remained available in rare cases until 1981.⁷¹ *Elegit* was actually enlarged in scope in 1838, so that *all* the defendant's lands were made liable to execution; only in recent times has it been replaced by the more flexible charging order.⁷² *Fi. fa.* and writs of possession are still in common use, and (retaining their common-law form) have turned out to be the principal survivors of the medieval writ system.⁷³ More modern forms of execution – designed chiefly to reach a wider range of assets than tangible property – derive either from statute⁷⁴ or from Chancery procedure.⁷⁵

End of the Forms of Action

Much of the variety described in this chapter came to an end as a result of the triumph of trespass and case, which shared a common procedure from beginning to end, over most other actions.⁷⁶ Debt remained numerically the most important cause of action, but (as was seen in chapter 3) the usual mode of commencing suits for debt in early-modern times depended on fictitious actions of trespass to land. The expansion of trespass, and especially of the flexible action on the case, provided the common law with a temporary escape from the formulary system, an opportunity to melt down the medieval law and recast it in new moulds. Most of the law as we know it was shaped by this process. After the redistribution, the commonest types of trespass and case became the basis of a new scheme of actions: *assumpsit* (for breach of parol contracts and restitutionary claims), *trover* (for interference with personal property), actions on the case for torts (such as defamation and negligence), and ejectment (to recover real property). But the flexibility inherent in trespass and case prevented any recurrence of the restrictiveness and procedural nicety which beset the *praecipe* actions. For most purposes the new remedies were but subdivisions of one form of action.

This progress towards uniformity was carried to a conclusion by nineteenth-century legislation. Most of the forms of action, as distinct procedures, were abolished in 1832 and 1833. Actions were thereafter commenced by one same

71 Supreme Court Act 1981 (c. 54), s. 141. Imprisonment in civil cases was generally abolished by the Debtors Act 1869, 32 & 33 Vict., c. 62.

72 Judgments Act 1838, 1 & 2 Vict., c. 110, s. 11; Administration of Justice Act 1956 (c. 46).

73 In 1991 alone 100,942 writs of *fi. fa.* were issued to enforce Queen's Bench Division judgments: *Judicial Statistics Annual Report 1991* (Cm 1990), p. 34. By 1999 the number had dropped to 44,592: *Judicial Statistics 1999* (Cm 4786), p. 33.

74 E.g. charging orders, introduced by the 1838 Act as a means of levying execution against stocks and shares; and attachment of debts (including bank accounts and earnings), introduced in 1854.

75 E.g. sequestration (see p. 104, post) and receivership.

76 In one form of trespass (ejectment), mesne process was altogether dispensed with by the use of fictions: see p. 302, post.

form of writ, in which the nature of the action was merely inserted in the space provided. After 1852 it became unnecessary even to state the 'form of action' in the uniform writ,⁷⁷ and different causes of action could now be joined in one writ.⁷⁸ The reforms extended also to mesne process. The assimilation and simplification of mesne process in all the superior courts was mentioned in the last chapter. The 1852 legislation also improved the procedure for obtaining judgment in default of appearance.⁷⁹ The return-days were abolished,⁸⁰ and eventually the services of the sheriff were dispensed with for all preliminary stages, so that parties served their own writs and pleadings within set time-limits. In 1875 the form of the original writ was again changed, principally by adaptation of the Chancery subpoena which it also replaced; the substance of the claim was endorsed on the back, but not in any technical phrases. Then, in 1880, the immemorial writ formula itself was finally abandoned, Lord Hailsham C having formed the view that sending a command from the queen herself was too awe-striking and might dismay a layman. The last original writ in the queen's name was issued on 2 June 1880. A document called a 'writ' was still used for another twenty years, though it was in fact a simple notice to appear. It has now been replaced by a 'claim form'.⁸¹

'The forms of action we have buried,' said Maitland at the turn of the twentieth century, 'but they still rule us from their graves'.⁸² Yet the posthumous rule of the forms of action tended for a time towards a tyranny which in life they were never permitted, in that the categories of common-law thought were in a way closed in 1832. The changes were procedural, and were not intended to alter any of the substantive law which was enforced through the forms of action; yet the law was so inseparable from the writs that the disappearance of the latter left conceptual problems. The chief immediate difficulty was that the fictions which had proved necessary in order to force new causes of action into the old forms were not always easy to translate into principles of substantive law.⁸³ Another problem arose from the fact that so many of the writs had come to overlap. For example, there had sometimes been an election between trespass and case, so long as the wrong complained of was not wilful.⁸⁴ But what is the substantive distinction, if any, between trespass and case?⁸⁵ The election between conversion and detinue remained important until a statute of 1977 declared curtil

77 Uniformity of Process Act 1832, 2 & 3 Will. IV, c. 39; Real Property Limitation Act 1833, 3 & 4 Will. IV, c. 27, s. 36; Common Law Procedure Act 1852, 15 & 16 Vict., c. 76, ss. 2-3. For the new form, see p. 553, post.

78 Common Law Procedure Act 1852, s. 41.

79 *Ibid.*, s. 27. Since there would in such cases be no pleadings, it was necessary for the plaintiff to endorse the writ with particulars of his claim; the procedure was only appropriate for debt and liquidated money-claims. This system was preserved in R.S.C. 1875, Ord. 13 (later Ord. 14).

80 The terms were also abolished by Judicature Act 1873, 36 & 37 Vict., c. 66, s. 26. Curiously, the vacations were not abolished; the periods of business between vacations are now called sittings.

81 See p. 94, post. Judicial writs, however, are still addressed from the queen to the sheriff.

82 *Forms of Action*, p. 2.

83 Note particularly the history of restitution, ch. 21, post.

84 *Williams v. Holland* (1833) 10 Bing. 112; p. 413, post.

85 Until 1959 there was thought to be a remaining procedural distinction: *Fowler v. Lanning* [1959] 1 Q.B. 426, [1959] 1 All E.R. 290.

that 'detinue is abolished'. But what exactly was thereby abolished?⁸⁶ There may be a similar distinction between debt and *indebitatus assumpsit*, though its subtleties seem to be appreciated only in the Antipodes.⁸⁷

The passage of nearly two centuries has, however, greatly diminished the influence of the forms of action. Occasionally their ghosts are reproached for 'clanking their spectral chains',⁸⁸ though one judge has asserted that 'if one is not unduly timorous one may find that they are waving one along the path of justice'.⁸⁹ Long experience has shown that forms may be good servants but uncharitable masters. Although the classification of causes of action, and remedies, is still important for purposes of clarity, it ought not to defeat a just claim if a party's lawyer selects the wrong label.

Further Reading

Pollock & Maitland, vol. II, pp. 558-597

Milsom HFCL, pp. 33-38, 243-246

F. W. Maitland, *The Forms of Action at Common Law* (1909, repr. 1962)

R. C. Van Caenegem, *Royal Writs in England from the Conquest to Glanvill* (77 SS, 1959)

D. Sutherland, 'Mesne Process upon Personal Actions in the early Common Law' (1966) 82 LQR 482-496

G. D. G. Hall and E. de Haas, *Early Registers of Writs* (87 SS, 1970)

J. H. Baker, 'Original Writs and Mesne Process' (1978) 94 SS 85-92

A. H. Hershey, 'Justice and Bureaucracy: The English Royal Writ and "1258"' (1998) 113 EHR 829-851.

TRESPASS AND CASE

H. G. Richardson and G. O. Sayles, 'The Writ of Trespass' (1941) 60 SS cviii-cxxxiv

A. K. R. Kiralfy, *The Action on the Case* (1951), pp. 1-54

S. F. C. Milsom, 'Trespass from Henry III to Edward III' (1958) 74 LQR 195-224, 407-436, 561-590 (repr. in SHCL 1-90)

M. J. Prichard, 'Trespass, Case and the Rule in *Williams v. Holland*' [1964] CLJ 234-253

T. G. Watkin, 'The Significance of "In Consimili Casu"' (1979) 23 AJLH 283-311

A. Harding, 'The Origins of Trespass, Tort and Misdemeanour' (1981) 96 SS xxxii-iviii

R. C. Palmer, *English Law in the Age of the Black Death 1348-1381* (1993), part 3

86 See p. 400, post.

87 *Young v. Queensland Trustees* (1956) 99 CLR 560; *Pavey & Matthews Pty Ltd v. Paul* [1985] 3 NSWLR 114, (1987) 69 ALR 577, on which see Ibbetson, 8 OJLS 312.

88 *Leakey v. National Trust* [1980] 1 All E.R. 17 at 26, per Megaw LJ, echoing *United Australia Ltd v. Barclays Bank Ltd* [1941] A.C. 1 at 29, per Lord Atkin. For the continuing influence of forms of action (of a new kind) in public law, see pp. 152-153, post.

89 *Sir Robert McAlpine & Sons Ltd v. Minimax Ltd* [1970] 1 Lloyd's Rep. 397 at 422, per Thesiger J.

