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QUASI-DELICT IN ANGLO-AMERICAN LAW

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The task of the classifier of Anglo-American law is not unlike the Herculean struggle with the hundred-headed hydra. For every head stricken off, nature produces two. Has not the attitude of Anglo-American jurists in suppressing the head of quasi-delict resulted in something of the same sort?

One of the greatest accomplishments of Anglo-American juristic thought in the century following the publication of Blackstone's *Commentaries* was the unification of the law of contracts.¹ The accomplishment, however, involved the necessity of creating a separate head, quasi-contract. Perhaps the greatest defect in the legal system noted at the close of that century² was the lack of a unified law of torts. Some progress has been made in the last fifty years towards the unification of the law of torts too,³ but such a process cannot be completed here any more readily than it was in the case of contracts without the creation of an outlet for that which, while closely resembling the concept of tort under the unified law, will still be incapable of being brought within whatever definition finally prevails. Hence the heading, quasi-delict.

In contract law it is possible not only to speak of the elements of a typical contract and expect to find them in all enforceable agreements, but also in dealing with specific contracts such as bailments, insurance, employment, leasing, and the like, to begin with the rules of simple contract and test the legal nature of the transaction before us.⁴ In the case of torts, however, that is not yet possible. We still have a law of

¹ Cf. Isaacs, *John Marshall on Contracts* (1921) 7 VA. L. REV. 413, 414-416.

² By Markby, *Elements of Law* (1st ed. 1871).

³ The reorganization of the subject on the basis of the elements of a tort rather than along procedural lines, begun by Burdick and continued by Wigmore, Pound, and Bohlen, is indicative of the tendency in American law schools.

⁴ Professor Williston's *Law of Contracts* (1920), for example, includes large

defamation, or, more accurately, a law of libel and a law of slander and a law of malicious prosecution; a law of trespass, which must likewise be subdivided before we can state it with any degree of particularity; a law of trover; a law of replevin; a law of nuisance; a law of waste; a law of loss of services; a law as to death by wrongful act and other statutory causes of action; laws of various torts without specific names; and, finally, a law of equitable remedies for the prevention of irreparable injury. To argue by analogy from one of these to another is dangerous. To argue from any or all of them to some new type of injury is futile.⁵ And yet most law teachers are hopeful that the next generation will see something like Professor Wigmore's tripartite division of a tort generally accepted.⁶

The big fact behind the discovery in the nineteenth century of a need for a unified law of contracts and later for a similar law of torts is the change from a classification of all law based on procedure to a classification based on substantive law. The law of contracts was liberated from the shackles of procedure by the growth of the action of *assumpsit* until other actions *ex contractu* were cast in the shade. No one action *ex delicto*, not even trespass, on the other hand, has arrogated to itself the bulk of actions arising out of wrongs. In this respect Anglo-American experience has differed widely from that of continental Europe. In the Civil Law all wrongs are dealt with under a few sections of the code as of the same general nature. Contracts, on the other hand, fall into several groups, separated by lines of cleavage that go back to Roman times. One might have expected reforms in our system of pleading to bring about naturally the unification of the law of torts. In a slight measure this has happened. Even in the states that have been least radical in their reform of pleading, a whole group of torts has been thrown together under the head of trespass, just as most contracts have been thrown together under the head of *assumpsit*. The difficulty of dealing with libel and slander, however, and several other situations such as that illustrated in replevin have kept such actions out of the trespass group.⁷

A greater source of difficulty has been the inability to find unifying principles in the laws of the several torts, or even several types of trespass, as they have grown up procedurally. Consistently with the nine-

portions of what is contained in works on "vendor and purchaser, sales of personal property, negotiable instruments, agency, bailments, carriers, landlord and tenant, insurance, suretyship, equity, master and servant, quasi-contract," etc.

⁵ The failure of the concept of "the right of privacy," so brilliantly defended by Warren and Brandeis in (1890) 4 HARV. L. REV. 193, except so far as it influenced legislation, may be taken as a classical illustration.

⁶ First presented in (1894) 8 HARV. L. REV. 200, 377, and since developed by him in his casebook on torts, and more recently in his address to the Section on Wrongs of the Association of American Law Schools, 1921.

⁷ Cf. the Pennsylvania Statutes: Act of May 25, 1887. Pamp. Laws, 1887, 271; "Section 1. [Scope of action of *assumpsit*.] So far as relates to procedure, the distinctions heretofore existing between actions *ex contractu* be abolished, and

teenth century attitude on the subject of contracts, which attempted to trace everything to an exercise of the individual free will, an apparently successful attempt was made at one time to base all tort liability on the conscious voluntary action of the responsible individual. In other words, a principle of tort law was sought in the formula, "no responsibility without fault."⁸ Of course, it was never supposed that this principle could be literally applied to all cases. Imputed fault, constructive fault, typical fault, and various other substitutes for actual fault had to be resorted to in order to make the statement hold at all. Developments in the latter part of the nineteenth century have tended to make the difficulty of finding an underlying principle even greater because there have arisen new types of cases of liability without fault. These cases resemble tort actions so closely that it is not customary or even possible to separate them entirely from the law of tort.⁹ They might have been dealt with in quasi-contracts under the ordinary conception of that branch of the law, as a catch-all for cases which were cases of liability not dependent on contract or tort. There is still, however, too much of a flavor of procedural classification in the expressions *ex contractu*, *ex delicto*, and *quasi ex contractu*—all these terms refer to *actions* and not to *relations*—to permit the treatment of actions which are in form trespass as instances of quasi-contract.¹⁰ The apparent necessity of dealing with such cases as torts has resulted in the break down of nineteenth century definitions.

Let us take a few examples. (a) First, if the owner of a dog that has not yet enjoyed its common-law first bite, is by statute made an insurer of the public against bites inflicted by that dog, the analogy that sug-

that all demands, heretofore recoverable in debt, assumpsit or covenant, shall hereafter be sued for and recovered in one form of action, to be called an 'action of assumpsit.'

"Section 2. [Scope of action of trespass.] So far as relates to procedure, the distinction heretofore existing between actions *ex delicto* be abolished, and that all damages heretofore recoverable in trespass, trover, or trespass on the case, shall hereafter be sued for and recovered in one form of action, to be called an 'action of trespass.'

Act of May 14, 1915. Pamp. Laws, 1915, 483, sec. 1. "Procedure in assumpsit and trespass; actions for libel and slander excepted.—From and after January first, one thousand nine hundred and sixteen, in actions of assumpsit and trespass, except actions for libel and slander, brought in any court of common pleas, the procedure shall be as herein provided."

⁸ Cf. Isaacs, *Fault and Liability* (1918) 31 HARV. L. REV. 954, and bibliography, *ibid.* 979.

⁹ *Ibid.* 974.

¹⁰ A distinction has been pointed out between obligations *qui quasi ex delicto nascuntur* and those in which a defendant *quasi ex delicto tenetur*. Gaius seems to use the expression in both senses. Cf. Girard, *Manuel* (6th ed. 1918) 399, n. 3. In the present state of the law of pleading we are, of course, more concerned with the question how the right *nascitur* than by what form the defendant *tenetur*. For the relation between the primary and secondary rights involved in the distinction, see the table at the end of this paper.

gests itself at once is to the tort action for knowingly harboring a vicious animal and not to the contract action based on an agreement of insurance. Logically it may belong with the latter, as those cases have recognized in which it was held, somewhat technically, perhaps, that where an action is brought on the common law and *scienter* is alleged, a different cause of action is shown from that sued on, if the *scienter* is not proved.¹¹ (b) Again, take those cases in which one who is not actually a trespasser is dealt with after committing a wrong as a trespasser *ab initio*. Take the case, for example, of an officer who in the execution of a legal search warrant voluntarily abuses and perverts it to other purposes¹²; or of a sheriff who has been guilty of a substantial violation of the legal rights of the party whose goods have been levied on.¹³ In such cases the complaint is, in form, on a specific tort which has not been actually committed. We have a constructive trespass, a quasi-delictual action.¹⁴ (c) Again, whether the fiction is a valuable one or not, we have constructive fraud, chiefly on the basis of the statute giving the right to an action for deceit, as if in tort.¹⁵ (d) There is also a constructive negligence.¹⁶ (e) Again, just as there is a possibility of waiving a tort and suing in contract, there is the

¹¹ Cf. *Jackson v. Fulton* (1901) 87 Mo. App. 228; *Jensen v. Pradere* (1916) 39 Nev. 466, 159 Pac. 54.

¹² *Lawton v. Cardell* (1850) 22 Vt. 524; *Malcom v. Spoor* (1847, Mass.) 12 Metc. 279.

¹³ *Lamb v. Day* (1836) 8 Vt. 407; *Adams v. Adams* (1832, Mass.) 13 Pick. 384.

¹⁴ It may be doubtful whether under the head of quasi-delict we should include instances in which one tort is committed and another sued on. We do, of course, include in quasi-contract instances where there is an actual promise and a fictitious promise and the latter is sued on. If the same latitude is allowed in the definition of quasi-tort, there would be included not only the case of trespass *ab initio*, but the entire historical procedure in ejectment, the action for loss of services, and, if we go back far enough, the beginnings of trover.

¹⁵ For example, in statutory provisions that certain types of transfer, mortgage and the like, shall be deemed to be fraudulent as to certain persons unless recorded, filed, or publicly announced.

¹⁶ I confess that the least satisfactory part of Professor Wigmore's presentation of torts seems to me his fitting certain types of constructive negligence into the framework of culpability and causation. He speaks (*op. cit.* 8 HARV. L. REV. at p. 389) of the looseness and confusion attending the doctrine of acting at one's peril, and continues: "In numerous cases, also, courts are found ruling that on the facts of case the defendant is guilty of negligence as a matter of law. The difference between this and the preceding form of the principle seems merely to be that the court lays down no general rule for a class of cases, and does not intend to go beyond the complex of facts then before it." What we are dealing with here is, of course, not negligence at all, but constructive negligence. One is reminded of what Professor Wigmore once said—perhaps less justifiably—of Professor Brunner's discussion of imputed and presumed fault. He suggested that when the learned investigator spoke of "treating the unlawful intent as accompanying, etc." he did not mean that anything was presumed or imputed, he simply meant that no unlawful intent was required as a matter of law. Cf. *Tortious Responsibility*, 3 *Select Essays in Anglo-American Legal History* (1909) 474, 481, n. 3; and see Isaacs, *op. cit.* 31 HARV. L. REV. 958, n. 10.

less common process of waiving a contract and suing in tort. One need not go so far as Lord Campbell in *Brown v. Boorman*,¹⁷ where he says:

"Wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract."

Yet there is the ever-present possibility of suing a bailee in case, trespass, trover, detinue, or replevin.¹⁸ Let us consider, now, in the light of these five illustrations, the following features that were almost universal in the nineteenth century definitions:

"Unlawful act or omission"—not true in example (a) nor applicable in (b) nor necessary in (c) or (d).

"Not a mere breach of contract"—not true in (e) nor necessarily true in (b), (c), or (d).

The causation element—not applicable in (a) or (e) nor so far as the act complained of is concerned true in (b) nor satisfactory in (c) or (d).

The damage element—not necessary in (e).

Culpability—not true in (a) nor necessary in (c) or (d) or, in the ordinary sense, in (e).

Absence of justification—overridden in (b).

"For which the common law gives an action for damages"—not applicable to the statutory instances, (a) and (c), or to statutory torts in general.

These cases will illustrate the existence in Anglo-American law of quasi-delictual procedure. Is their significance limited entirely to procedure?¹⁹ Sir John Salmond would have us think so, and accordingly he tells us:²⁰

"Since the abolition of forms of action, fictitious or quasi-torts have ceased to perplex our modern law. They were the outcome of a perverted development of legal procedure and have disappeared with the procedure to which they owe their origin. A knowledge that they once existed, however, is still essential if we would read with understanding the later authorities."

This view is entirely in accord with that which he has expressed elsewhere:²¹

"Forms of action are dead, but their ghosts still haunt the precincts of the law."

I am inclined, however, to volunteer an opposite explanation. So long as forms of action were alive, to use Sir John's figure, there was

¹⁷ (1844, H. L.) 11 Cl. & Fin. 1, 44.

¹⁸ Ample illustrative matter is collected in the admirable article on Bailment by Professor Throckmorton in 6 *Corpus Juris*, 1080, 1152.

¹⁹ Cf. *supra* note 10 and table near end of article.

²⁰ Salmond, *Torts* (5th ed. 1920) 6.

²¹ *Observations on Trover and Conversion* (1905) 21 L. QUART. REV. 43.

no need of concerning ourselves with quasi-torts, for these cases, judged by the procedural standard, were merely torts and nothing else. It is only now in our transition from a classification based on procedure to a classification based on the rights involved, that we must separate the quasi-tort from the actual tort, that is, the tort in form from the tort in substance. Thus, though cases of this kind may be rare, and their importance slight, the ignoring of their existence will prevent the very thing that Salmond and all of us desire, the study of torts as a single head in Anglo-American law. Is it worth while to chop off this head of quasi-delict if, as a result, we are forced to grapple with trespass, trover, case, and a half a dozen other heads independently?

On the other hand, if we provide a separate place for extraneous matter that has been traditionally included in torts—but only then—it becomes possible to accept almost any one of the definitions and divisions of tort that are now demanding attention. We may approach the definition from the point of view of the right of the plaintiff alleged to have been invaded by the defendant, as Professor Burdick does. According to him, a tort is “an act or omission which unlawfully violates a person’s right created by law, and for which the appropriate remedy is a common law action for damages by the injured person.”²² Or we may make our starting point the culpability of the defendant as Mr. Justice Holmes does. “Our system of private liability,” says he, “for the consequences of a man’s own acts, that is, for his trespasses, started from the notion of actual intent and actual personal culpability.”²³ Or we may center our attention on causation as Pollock seems to. “Tort,” says he, “is an act or omission . . . which is related to harm suffered by a determinate person in one of [several] ways.”²⁴ Then, if we feel free to omit the procedural element from the definition, it will no longer be necessary to distinguish as carefully as Pollock did those types of wrong for which through one accident or another the old common law failed to give a remedy, and forced litigants to seek it in some extraordinary tribunal.

The entire list of quasi-delicts in Anglo-American law is not large. What there is of them can easily be appended to a course in quasi-contracts or separated from the body of tort law as an appendix. I shall attempt here to bring together and roughly classify the main heads of the subject in our system of law. One must bear in mind, however, that the actual contents of the concept—since it is a residuary concept—must vary with the definition of torts that we adopt.

Corresponding to the first important division of quasi-contracts—benefits conferred on the defendant—we have harms inflicted on the plaintiff, that is to say, harms inflicted otherwise than through breach

²² Burdick, *Torts* (3d ed. 1913) 12. The whole work, it will be remembered, deals with torts from the point of view of the type of right invaded.

²³ Holmes, *The Common Law* (1881) 4. Cf. *ibid.* 161.

²⁴ Pollock, *Torts* (11th ed. 1920) 19.

of contract or through tort, for which restitution is none the less required by law on equitable grounds. A second head, corresponding to the statutory obligations in quasi-contract, is that of statutory obligations sounding in tort or based on the development of a tort analogy. A third division may roughly be headed "waiving contract and suing in tort."

1. The main head, then, is that of harms inflicted which fail to come within our definition of tort. Following the theory in most definitions, all cases of absolute liability should be included here, such as the absolute liability of the keeper of a wild animal for harm it inflicts.²⁵ We must be particularly careful to detect absolute liability parading under the thin disguise of conclusive presumptions of negligence, of negligence *per se*, and negligence as matter of law.²⁶ We may further include such an instance as that furnished by equitable waste, where no tort is committed in the eyes of the law, and other instances as they develop of "abuse of rights."²⁷ If, however, we define tort more in accordance with the procedural tradition, our inclusions under the head of harms inflicted will be quite different: for example, we should include those instances where one tort is committed and the party is dealt with as if he were guilty of another, as in the case of trespass *ab initio* mentioned above. In addition to all of these there is the entire subject of vicarious liability which is awaiting a new treatment that will accord better with the needs of modern industrial society as well as with modern ideas of justice than does the rather mechanical system bequeathed to us from the industrial organization of the past.

2. Statutory liability as if in tort—we do not include true statutory torts—will fall a little more clearly outside of almost any reasonable definition of tort that we may adopt. Thus, assuming that there is nothing wrong in keeping a dog not known to be vicious, the liability as an insurer that is imposed on the owner is pretty clearly quasi-delictual. Assuming further that it is possible for a man to sell goods in bulk without perpetrating any actual fraud on his creditors, the provision that he shall be dealt with as if guilty of fraud, regardless of the actual fact of the case, creates a quasi-delictual liability. Furthermore, a statute by merely creating constructive notice may indirectly impose a quasi-delictual liability on one who acted in absence of

²⁵ *Nichols v. Marsland* (1875) L. R. 10 Exch. 255, where it is said that if a man kept a tiger and lightning broke his chain so that the tiger ran away and inflicted injuries, the owner would probably be liable.

²⁶ Cf. *supra* note 16.

²⁷ The abuse of legal procedure, as shown in Winfield, *History of Conspiracy and Abuse of Legal Procedure* in the new *Cambridge Studies in English Legal History* (1921), has historically been rather misuse of legal procedure than *abus de droit*. Yet it is not true that actions ordinarily lawful are necessarily lawful where it is entirely against conscience to indulge in them for the direct purpose of annoying one's neighbor. Cf. *e. g.*, Ames, *Lectures on Legal History* (1913) 399.

the actual notice of the situation, and thereby unintentionally caused an injury. Statutes creating penalties, particularly *qui tam* actions, may create a quasi-tort liability at least in so far as the liability flows to one who has suffered no harm.²⁸ The statutory possibilities are, of course, almost unlimited—except as they clash with constitutional notions of property. It is remarkable how many of the traditional instances of *damnum absque injuria* statutes in one state or another have aimed to remove. It will suffice to mention legislation prohibiting spite fences, compelling the rental of premises or sale of goods on a fair basis, making producers of goods liable for defects to subvendees, regulating competition in business, imposing liability to creditors on directors of corporations, punishing a physician for refusing to respond to a call, punishing discrimination in various ways against persons on the ground of color or race, causing railroads to be liable for fires started by sparks from an engine regardless of fault, and removing or curtailing the defence that has been aptly described as the irresponsibility of government. Some of these statutory provisions simply create statutory torts, as did the Lord Campbell's Acts, which become in time indistinguishable in their nature from common-law torts. Others are readily absorbed, especially in states where forms of action are abolished, in the concept of quasi-contract. There is a residuum, however, that hardly ceases to be pure quasi-delict.

3. The waiving of contract and suing in tort is frequently the result of a confusion in our law between contract in the sense of an agreement and contractual relations which include many uncontracted consequences of offer and acceptance. More or less standardized relations result from our more or less standardized contracts. We therefore proceed as if such a relation as that of passenger and carrier, or of shipper and carrier, or of depositor and banker resulted from contract, but constituted a fact in itself independent of the contract, much as marriage, whether resulting from a contract or not, constitutes a relationship free from the ordinary incidents of contract. Just as the husband owes certain duties to his wife which we hardly think of as contractual duties, so the banker, carrier, warehouseman, and a host of others owe duties to us by virtue of their relation to us. Hence we sue them in tort without reference to the contract for failure to perform these seemingly non-contractual duties. Historically, of course, many of them are non-contractual duties, for prior to the nineteenth century a vast number of human relations were controlled without reference to the particular terms of individual agreements.²⁹ We must not forget that the relation between master and servant was—and in the books still is—a domestic relation; that the relation of landlord and tenant

²⁸ E. g., there are statutes giving a right of action to informers or to members of the public in general to recover money lost in gambling, part of which at least is to be retained by the individual plaintiff.

²⁹ Isaacs, *The Standardizing of Contracts* (1917) 27 YALE LAW JOURNAL, 34, 45.

was a semi-feudal relation; that many persons engaged in business were no freer to make a special contract with an individual than is the carrier to-day. And a business consideration undoubtedly prevented many who were free to make special contracts from doing so—namely that it was only in the absence of a special contract that they could claim the peculiar advantage of lien.³⁰ It was only in the middle of the nineteenth century that all these relations were huddled together as contractual relations. It is, therefore, no innovation, but a survival, that we can proceed in some of them as in tort or *quasi in delicto*. A banker may be sued in tort for dishonoring his customer's check,³¹ a warrantor in a sale for his deceit,³² and so on. In all these cases, we must bear in mind that although the action sounds in tort, we have no true tort. Thus the infant cannot be made liable through one of these quasi-tort actions on a contract which he repudiates.³³ The banker must respond at least with nominal damages for his breach of contract, though the action is in tort.³⁴ In cases where the bailee, particularly the carrier, is sued in tort, it is impossible to say dogmatically that his duty is based on his position or status on the one hand, or on his contract on the other. Either statement involves a transparent fiction. The more or less standardized contract is to all intents and purposes the very same thing as a status in the sense of a named relation from which legal consequences flow.³⁵

Remedial rights *in personam* may, then, be summarized as being given for:

I. Breaches of agreement, that is breaches of primary paucital rights, to use Professor Hohfeld's expression, (*in personam*) *ex contractu*.

II. Legal analogues for breach of agreement, *quasi ex contractu*, being modes of enforcing primary paucital rights not contractual (generally because of the absence of the element of assent).

III. Unlawful acts other than breaches of agreement, *ex delicto*, being breaches of primary multital rights (*in rem*).

IV. Legal analogues of such unlawful acts, *quasi ex delicto*, being modes of enforcing primary multital rights, not within the purview of a definition of tort (either because of absence of damage or responsibility

³⁰ Cf. Schaub and Isaacs, *The Law in Business Problems* (1921) 103.

³¹ *Marzetti v. Williams* (1830, K. B.) 1 Barn. & Ad. 415.

³² *Weall v. King* (1810, K. B.) 12 East, 452; *Green v. Greenbank* (1816, C. P.) 2 Marsh. 485. The failure of the court to realize the possibility of disregarding a contract and suing for the negligent manner in which work was done is the basis of a criticism of the case of *Lillegren v. Burns International Detective Agency* (1916) 135 Minn. 60, 160 N. W. 203, in a note on tort liability from attempted fulfilment of contract. COMMENTS (1917) 26 YALE LAW JOURNAL, 486.

³³ Of course a distinction should be made between indirectly attempting to hold the infant on his contract through the quasi-tort action, and suing him in tort for a tort committed in connection with the making of the voidable contract. Cf. Williston, *Contracts* (1920) secs. 245, 246, where the whole subject is discussed.

³⁴ See *Marzetti v. Williams*, *supra* note 31.

³⁵ Cf. Isaacs, *op. cit.* 27 YALE LAW JOURNAL, at p. 39.

or the presence of justification or contract covering the same subject matter).

V. Breaches of trust.

VI. Legal analogues of breaches of trust (constructive trusts).

The second, fourth and sixth headings may be subdivided in corresponding ways. The quasi-contract group is based on:

- (a) The equitable doctrine of unjust enrichment.
- (b) Record or statutory liability to pay another otherwise than for harms inflicted.
- (c) Waiving of tort.

The quasi-delictual, the fourth group, as here subdivided, is based on:

- (a) Common-law and equitable liability to make compensation for or desist from non-tortious harms.
- (b) Statutory liability to make compensation for such harms.
- (c) Waiving of contract.

Quasi-trust is likewise based on:

- (a) Unauthorized intermeddling with property.
- (b) Statute.
- (c) Waiving of tort or contract.

It may be asked why quasi-delict has not generally been recognized as existing in Anglo-American law.³⁶ Four reasons suggest themselves. First: the ease with which a fictitious promise could be predicated and relied upon wherever in the eyes of the law a compensation ought to be paid, recommended the mode of treating these cases as based on a fictitious contract wherever this was possible. Logically pursued, this plan might have led to the inclusion of all that has here been described as quasi-delict and quasi-trust under quasi-contract. As a matter of fact, however, that the courts stopped short of this more or less logical process is manifest from a consideration of the form of action that has been used in the cases of quasi-delict. It has not been *assumpsit*. On the other hand—and this may be considered as a second reason—the grossness of a fiction that a particular tort has been committed even if it is manifest that the defendant is guilty of some other wrong, has made courts resist the development of any body of quasi-delictual law. Thus, Mr. Justice Holmes, in speaking of the doctrine of trespass *ab initio*, has said:³⁷

³⁶ Thus, Professor Corbin in his defence of quasi-contract in (1912) 21 YALE LAW JOURNAL, 533, 550, remarks: "Obligations *quasi ex delicto* are hardly known as such in the common law. The Roman lawyers divided torts into two classes, those where the wrongdoer was personally and actively at fault, and those where he was not. The latter were said to give rise to an obligation *quasi ex delicto*." Cf. also Salmond, quoted note 20.

³⁷ Holmes, *The Path of the Law* (1897) 10 HARV. L. REV. 457, 468. The case he refers to is *Commonwealth v. Rubin* (1896) 165 Mass. 453, 43 N. E. 200.

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. . . . I am thinking of the technical rule of trespass *ab initio*, as it is called, which I attempted to explain in a recent Massachusetts case."

The fact that the fiction is of the harmless type which serves merely for purposes of classification and not as a means of changing the law has not saved it from condemnation. To be accused and found "guilty" of a tort, after all, carries with it a stigma which makes one hesitate to brand innocent conduct as constructively fraudulent or otherwise constructively vicious. In the third place, the analogy of Roman law, which was, no doubt, fruitful in the production of the concept of quasi-contract, was comparatively sterile in the matter of quasi-tort. After all, the four cases of quasi-delict proposed by Gaius and accepted by Justinian have no logical basis in common, nor has any very good reason ever been given for excluding other cases. The types of action included in the Roman list, it will be recalled, are: first, that against a *judex*; second, the action against one from whose premises there has proceeded or been thrown something which has caused damage to another; third, a similar action against one from whose property something had fallen causing injury; fourth, the action based on vicarious liability of the owners of boats, inns, and the like.³⁸ A final reason may, however, be suggested for the lack of the conception of quasi-delict in our books, and that is simply that it has not heretofore been needed. So long as every type of tort stood on its own bottom, so long as it was deemed useless to formulate a uniform law of torts, there was no particular reason for isolating in the law of trespass or the law of trover or the law of libel or the law of slander, those instances in which an action traditionally lay in spite of the absence of elements generally present in torts. After all, quasi-contract became a branch of our law only after contract law became emancipated from the forms of pleading some fifty years ago; and even then the generation trained in contracts through pleading, including Dean Langdell, resisted the innovation.³⁹ Will legal history repeat itself in the perfection of tort law?

³⁸ Cf. Girard, *Manuel* (6th ed. 1918) 649. The fading out of the distinction between delict and quasi-delict in modern civil law is clearly shown in the article by R. W. Lee on *Torts and Delicts* (1918) 27 *YALE LAW JOURNAL*, 721.

³⁹ Thus Ames in his biography of Langdell says: "He never had occasion to make a careful study of the subject of Quasi-Contracts. He never became quite reconciled to the introduction of this new term into our law, and he could hardly restrain his impatience if one spoke to him of the doctrine of unjust enrichment. Had he explored this subject in his exhaustive manner, it is quite certain that he would have adopted and made constant use of these terms." Reprinted in *Lectures on Legal History* (1913) 467, 481.