1925

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THE ORIGINS OF THE ACTION OF TRESPASS*

GEORGE E. WOODBINE

Once established in the assise of novel disseisin, the idea of the recovery of damages soon spread to other fields. This was partly due to the application of the idea to old actions already in existence, but it was more largely the result of the development of new actions in which the recovery of damages played an essential part. As was to be expected, the old actions, stereotyped as to form before the recovery of damages had become a possibility, quite generally resisted the innovation, which in their case made at best no rapid headway and altogether failed to affect some of them. On the other hand there appeared in ever

*Continued from the June number, (1924) 33 YALE LAW JOURNAL, 799-816.

2 Undoubtedly changes in the economic condition of England should be taken into consideration here. At only a comparatively short time earlier money damages would have been a practical impossibility because of the general lack of money. It was not until the reign of Henry I that the sheriff paid his farm in money instead of in kind. In 1159 Henry II made it possible for the vassal to discharge by money payment part of the military service due the king. In the next reign many of the towns were able to buy with money charters of liberties from Richard I. In John’s reign an increase in the amount of money in England led to a cheapening of money and a rise in prices. John’s consequent financial troubles, and his attempt to make ends meet, were largely at the bottom of the exactions on the king’s part which led to the resistance of the barons and Magna Carta. In other words, the development of actions for the recovery of damages in English law coincides with the economic period in which England had, for the first time, a relative abundance of money due to the revival of commerce.

3 Damages appear quite early in the writ of right for customs and services, on what basis does not appear, but perhaps because the peculiar nature of feudal services, such as suit of court for instance, would hardly permit of services once due and omitted being made up, or being compensated for, except by payment of damages. See (temp. John) Abbreviatio Placitorum (1811) (hereinafter referred to as Abbr. Plac.) 76a; (1220) Maitland, Bracton’s Note Book (1887) (hereinafter referred to as Note Book) pl. 197. Cf. the Quod capiat homagium, Glanvill, IX, 5, 6; (1195) Maitland, Rolls of the King’s Court in the Reign of

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increasing numbers new actions, in which the fundamental idea was the recovery of damages. As contrasted with the set formulas of the old actions they were in large measure unformed, that is, they were not based upon any fixed form that had come down from the past; they were hybrid actions in that they partook, in varying degrees of both form and procedure, of the nature of one or more of the old formal actions. Apparently little more than experiments at first, they had wide divergences among themselves; their irregularities perplex us, and make it difficult to classify and arrange them; they fit into no nice compartments as do the older forms, but they show very clearly that underlying them all was the feeling that a remedy, in the shape of an action for damages, was now available in situations for which the older forms of action either did not provide or provided inadequately. Their very lack of a definite and rigid fixed form made it possible for the complainant to state the facts of his complaint in an informal manner; like actions on the case of a later time they were elastic—in fact, many of these early hybrid actions remind us much more of case than of trespass. Unable to escape the inevitable tendency towards fixity of form, they became more and more rigid as time went on, especially as to the damage element. Finally one form emerged supreme as the action of trespass, an action which was two generations in developing out of these hybrid actions, and which like them contained elements of both the old and the new, and the fundamental idea of which was, as in their case also, the recovery of damages.

Such in brief is the origin of the action of trespass. The evidence of the cases themselves is clear as far as the broad, general facts are concerned. As to details, on the other hand, though some may be discerned clearly enough, many that interest us most are all too obscure, as will appear from what follows.

We have seen that originally the recovery of damages was closely connected with the concurrent facts of an unlawful entry upon land and


Good illustrations of this type of action will be found in (1199) 2 Rot. Cur. Reg. 120; (1200) 1 C. R. Rolls 217-8; (1201) ibid. 434.

For mention of damages in early actions other than the assise of novel disseisin, see, in addition to the cases in note 3 supra, (1200) 2 Rot. Cur. Reg. 169; 1 C. R. Rolls, 144; (1201) Baildon, Select Civil Pleas (1890) no. 86.

It was this elasticity which made possible the "golden age of the forms (of action)." Cf. 2 P. and M. 564.

* This obscurity in regard to details is due less to gaps in the continuity of the records than to the brevity of the early records themselves.
the asportation or destruction of chattels found thereon. That is, the operative facts necessary to constitute what was later to become trespass d.b.a. or trespass q.c.f. were present from the beginning in those cases of assise of novel disseisin in which damages were first awarded. Where the two sets of facts remained concurrent, and the entry was of such a nature as to result in a disseisin, the assise would continue to serve as a sufficient remedy for the recovery of damages. But there were situations where it would not serve. Though at this time the asportation of goods and chattels was almost always connected with an invasion of land, yet every unlawful entry was not a disseisin for which the assise of novel disseisin would lie, and damages for the asportation of chattels could not, therefore, always be recovered in assise. Very early, if not from the first, there were cases of the asportation or destruction of chattels where the assise would not apply, and where an appeal of robbery or an action of replevin was either impossible or inexpedient. Apparently in such cases there came to be made an extension of the principle of the recovery of damages, and the owner was allowed to put himself, for purposes of recovery, in much the position of the disseisee whose chattels had been taken or consumed. Every now and then the record of a case indicates that it is the aftermath of an assise of novel disseisin in which the disseisee, for some reason or other, has failed to get either goods or damages. Sometimes, also, it would appear that the disseisor had already left the land, taking the chattels with him, and that the disseisee again in possession of his land wanted only his chattels which had been carried away. The situation here would be so analogous to that in an assise of novel disseisin where the sheriff could not cause the tenement to be reseised of its chattels, that the application of the same principle of the recovery of damages to both cases would seem to be inevitable. Therefore it is not surprising to find in the very year after damages are first given in the assise of novel disseisin, an action for the asportation of chattels—connected, of course, with an invasion of land—in which damages are laid.

"H. R. complains that W. M. his lord with a force and arms (cum vi et armis) has cut down a wood, and with his force (cum forcia) often

1 (1924) 33 Yale Law Journal, 808.
2 a P. and M. 166.
3 For examples of entry upon a vacant possession (vacua possessio) which did not constitute a disseisin, see Bracton, fs. 160-161. As to land which had been surrendered as a pledge see Glanvill, XIII. 26, 27, 28, and (1199) Rotuli de Oblatis (1235) 22. Bracton f. 161 b says that reaping and carrying away crops is a disseisin. Cf. (1236) Note Book, pl. 1204.
6 For a series of cases illustrating these points see (1194) 1 Rot. Cur. Reg. 4; (1194) Maitland, Rolls, supra note 2, 7; (1199) 2 Rot. Cur. Reg. 51; (1200) 1 C. R. Rolls 217-8, 247-8; (1200) Abbr. Plac. 25a; (1201) 1 C. R. Rolls 434. Cf. (1199) Rotuli de Oblatis 23, Glanvill, XIII. 38, 39 and XII. 18. For a somewhat later period cf. (1225) Note Book, pl. 130; (1226) ibid., pl. 1735.
7 Rande v. Malfe (1199) 2 Rot. Cur. Reg. 120.
carries it to his house; and with his force (cum forcia) he takes his four horse teams in his own wood of W., and even now he holds and unjustly detains one of them; and (he says) that on the day before he cut down a hundred rafters, and when the forester of him H. would carry them away, he demanded a reasonable gage; so that he is damaged to the value of twenty marks and more. And he says that R. P. was in that force. W. M. comes and says that H. R. neither holds nor ought to hold that wood of him, because when his predecessors enfeoffed the ancestors of him H. R. they retained that wood for their own use; but because they were kinsmen they sometimes allowed them to have timber and other necessaries in that wood; and that he neither has nor can have other right or entry, he puts himself upon a jury of the country. And H. R. puts himself on the grand assise as to whether he has the greater right of holding the wood of him, or he of holding it in demesne. And W. M. similarly. (They make a compromise.)

This, as a typical hybrid action, deserves a word of comment. On their face the facts would not easily, if at all, have supported an appeal of felony. An assise of novel disseisin would hardly have lain, for though from the point of view of the complainant there may have been repeated trespasses, it is doubtful if at this early date such facts constituted a disseisin.\(^{13}\) It may also be questioned if at this time an action of replevin could have been brought in this case, the taking not having been in the nature of distress. As far as we can judge, no one of the older actions would quite fit the situation. At any rate, either from necessity or from choice, W. H. was content to state his case and lay his damages. Now if he had brought any of the other actions just mentioned, matters of form and procedure would have been so settled as to allow of no variations from the fixed type. But here there is no fixity. In form a complaint, the action seems to have been built on exemplars from several different sources. What appears at first sight the most technical expression of all, cum vi et armis, is merely the statement of a fact.\(^{14}\) The allegation that H. R. was in that force savors of an appeal.\(^{15}\) "Holds and detains" suggests the expression which became a regular part of the count in debt and detinue,\(^{16}\) but it just as nearly approaches that in replevin. Yet this is clearly neither an action of detinue nor an action of replevin. The idea of damages comes from the assise of novel disseisin, and the claim is couched in the early form

\(^{13}\)Two generations later, Bracton could write that frequent repetition changes a trespass into a disseisin. F. 216b. Cf. ibid. f. 161b and Y. B. 20-21 Ed. I (R.S.) 393. The lord's statement in regard to the privilege of taking wood suggests reasonable estovers, but assise could not be brought for such until (1285) St. Westminster II. c. 25.

\(^{14}\)The meaning of this phrase will be discussed later.

\(^{15}\)See infra notes 71-74.

\(^{16}\)It would be difficult to prove that at this early date detinue had split off from debt. 2 P. and M. 173.
(deterioratus est) instead of that which became prevalent later.18 But in addition to all this, the case ends as would a typical writ of right case. On the complaint W. M. could seemingly have denied tort and force (vim et iniuriam). Instead of this he chooses to plead as to a question of right, and puts himself upon the country. On the pleadings as to right, H. R., as though the proceedings had been originated by a writ of right, elects the choice reserved for the tenant in the latter action and puts himself on the grand assise,19 though in this particular instance he is the one who brings the action and so originally is in the position of demandant rather than of tenant.20 All in all this case is a good illus-

17 See (1924) 33 Yale Law Journal, 815, note 58. The later form becomes common by 1220. Note Book, pl. 1374, 1419. But other forms continue to be used for a time. Ibid. pl. 194, 242, 895, 1423, etc. Some defendants will deny both the damnum and the deteriorationem. Ibid. pl. 1779. In very early cases proratus is used as synonymous with deterioratus—the complainant literally had been "made worse." 1 C. R. Rolls 917, 247 (two different entries of the same case), 2 Rot. Cur. Reg. 255.

18 The meaning of this expression will be discussed later.

19 In an action begun by the writ of right, the demandant regularly offers to prove by the body of a certain free man of his. The tenant may accept battle, either in his own person or by a champion, or put himself upon the grand assise.

20 The grand assise did not have to be summoned, as the parties made the usual compromise. See (1924) 33 Yale Law Journal, 803. For another early case where the asportation of chattels led to the grand assise see (1201) 1 C. R. Rolls 425-6. Here A. complained that B. unjustly took his beasts for pannage. B. denied the iniuriam and said that A. ought not to have the pannage he claimed, whereupon A., the original complainant, put himself upon the grand assise to determine the question of right. Cf. Note Book, pl. 835 for a similar situation in another complaint as late as 1234. In these cases the pleadings lead up to a question of right which the grand assise is called upon to determine. This settlement of complaints by the grand assise is all the more noteworthy because from comparatively early times it seems to have been the rule that the complaint action, out of which trespass developed, could not be used to determine the question which the assise of novel disseisin would normally be brought to settle, that is, the question of seisin, which would often be synonymous with right. See (1230) Note Book, pl. 278; (cìrc. 1250) Bracton f. 413; (1254) Abbr. Plac. 142a. In this last case the plaintiff complains of the destruction of turves and the maltreatment of his men, "but he does not complain that he is disseised of the turbary, because he is even now in seisin of it, but he complains of the trespass done to him. And because each party says that he is in seisin of one and the same tenement, and because the right of the tenement cannot be inquired into by this writ—but a writ of novel disseisin well lies in this case, because by a writ of novel disseisin he can recover his damages together with the tenement—it is awarded that the present writ does not lie in this case, but he may sue against him by a writ of novel disseisin if he wishes." This would have been a clear enough case for an action of trespass if no question of seisin or right had arisen. (1253) ibid. 130a, b. Strangely enough the determination of a question of seisin was allowed in an early appeal. Before the days of damages, in 1195, one A. appealed B., C., D., E., "and their force, that they came into his land of B. cum vi et armis and in robbery and wickedly and in the peace of the lord king they carried away his chattels, to wit turves, to the value of sixty shillings, etc." One of the defendants deniers the felony and the robbery, and says that the turves were taken from
tion not only of the hybrid action, but also of the difficulty which existed at this time in finding an action and procedure which would fit the case of the asportation of chattels as such, chattels not taken as a distress, and under circumstances which actually amounted to neither theft, robbery, nor novel disseisin.¹

Not only in the case of the asportation of chattels, but also in other circumstances involving an interference with land, where the wrong done was something for which the person wronged would not or could not bring assise, there very shortly developed the idea of the recovery of damages. But this did not come all at once or in every situation. Thus as late as 1202 an aggrieved party who very much needed the as yet non-existent action of trespass could do no better than bring an appeal, abortive as it proved, for depasturing meadows.² Yet before the first quarter of the century had ended, damages were being claimed in a complaint growing out of the depasturing of meadows.³ From 1200 we have not an appeal, but an informal complaint which alleges interference, amounting to boycotting, with land which has already been recovered in court.⁴ As early at least as the following year damages

his freehold and not from the land of appellant. A question of title thus arising, the court orders the sheriff to cause to be made a view of the land from which the turves have been taken, and to have the record of that view before the court at Westminster. ¹ Rot. Cur. Reg. 38. Bigelow, in Placita Anglo-Normannica (1879) 286, says of this case, “It is worthy of notice that the right of property is here ordered to be tried in an action of trespass.” But this is unequivocally an appeal of felony, not an action of trespass.

Another interesting case, complaining of the asportation of timber and other chattels, is (1201) ¹ C. R. Rolls 434. The complainant seems hard pressed to find an action that will fit the situation. Trespass is what he needs, but as yet that action does not exist. Clearly the case is neither an appeal of felony nor an assise of novel disseisin, but a hybrid action. There has been at least an unlawful entry upon land, probably a temporary disseisin. But the action is brought to recover chattels, not land. The offer of battle is in a very uncertain way—a mixture of that in an appeal and that in a writ of right. The defendant denies the two essential points (note that it is not the denial in an appeal), and then, as though he considered himself in a position analogous to that of the tenant in a writ of right, he demands a view of the land from which the chattels were taken. This case may have been the result of previous litigation. Cf. ¹ C. R. Rolls 217-8, 247-8.

¹ Maitland, Select Pleas of the Crown (1888) no. 35. Maitland’s note to this case, “Litigants seem to have tried hard to use the appeal of felony for all manner of purposes,” is quite true. These appeals have to be quashed because the appellors attempt to do something outside the scope of the appeal. Complainants who make use of the informal hybrid actions succeed much better.

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⁴ Baildon, op. cit. supra note 4, no. 7. Plaintiff complains that no one dare till the land because of defendant. From ¹ C. R. Rolls 235, 251, we learn that there had been, among other things, a vexatious taking of beasts in this case. Techni-
wonder recoverable in a case of this sort where one is hindered from tilling his land. The complaint against boycotting seems to have been informal as late as 1225, but by 1260, at the latest, such interference and hindrance was suitable ground for an action of trespass.

Of the many actions for damages which develop in the early thirteenth century, the quare intrusit is of special interest in connection
cally this is a quare deforciat, for further examples of which action see 1 Note Book 185.

Baildon, op. cit. supra note 4, no. 106. The land had already been recovered (the record says "deraigned") by an assise. Apparently the action was some form of the quare impedit, which originally was broader in its scope than the later technical action by the same name used by one who was prevented from presenting a parson to a church. See Bracton, f. 247. In many cases damages could be recovered for interfering with or hindering the exercise of a right. (Circ. 1210-15) Abr. Plac. 741; (1232) Note Book, pl. 685; (1243) Healey, Somersethire Pleas (1897) nos. 694, 714. Even in the case of interfering with the presentation of a parson to a church damages were alleged at a comparatively early date. (1233) Note Book, pl. 797. Cf. (1285) St. Westminster II. c. 5.

Maitland, op. cit. supra note 22, no. 178. The abbot of L. complains that the bailiffs of Shrewsbury are boycotting his market.

Yorkshire Assize Rolls, supra note 2, 133-4. Cf. ibid. 100-1.

For the last years of John's reign our printed records are comparatively few, and the evidence as to actions for damages scant; but for the early period of Henry III the material is plentiful, the Note Book alone, for the years 1217-1239, containing some six score cases in which damages are alleged. Not all of these involve land. Damages continue in replevin actions. Note Book, pl. 78, 477, 775.

In 1219 damages are laid where complainant alleges a vexatious suit touching lay fee, brought by defendant against plaintiff in court Christian contrary to a royal prohibition. Note Book, pl. 79. For similar cases see ibid. pl. 143, 755, etc. This particular form of action is older than the recovery of damages. (1196) 1 C. R. Rolls 21-2; (1198) ibid. 53. Cf. (1200) 2 Rot. Cur. Reg. 255-6, Abr. Plac. 31a. In 1253 such a suit against a royal prohibition was said to be "to the prejudice of the crown and against the dignity of the lord king," and was called a trespass. Abr. Plac. 130b. In 1220 there is an action resulting from a vexatious suit, again in court Christian, in regard to chattels unconnected with either testamentary or matrimonial matters. Note Book, pl. 1423. (Cf. ibid. pl. 756, 768, 810, 1599, 1671, etc.) The case is doubly interesting because it is one of the rare early cases, other than actions of novel disseisin, which shows us damages being actually awarded. Note Book, pl. 145, indicates how they executed a judgment for damages in 1222. Cf. ibid. pl. 285, 318, 348. In 1220 the demand that a lord take his vassal's homage—in order that the latter might vouch the lord to warranty—is coupled with a claim for damages. Note Book, pl. 1374. For other cases of failure to warrant or acquit of services, with allegations of damages, see ibid. pl. 979, 1211, 1566, 362, 390, 506, 811, 849. This is an old action into which the recovery of damages has been injected. For the writ see Glanvill, IX. 5, 6. There being no recovery of damages in Glanvill's time, he here as elsewhere says nothing about them. As early as 1220 damages are alleged in an action against defendant for not holding to a fine made in the royal court. Note Book, pl. 1457. This is another old action (de fine facto) that originally knew no damages. Glanvill, VIII. 4. See (1224) Note Book, pl. 1015 (damages of 20 marks awarded) and ibid. 125, 447, 478, etc. In 1219 damages are alleged for a breach of covenant real. 3 Note Book 729, pl. 6. Cf. ibid. pl. 613, 752, 1129. So, also, in 1222 where there has been an unjust taking of toll. Note Book, pl. 145. Cf. ibid.
with the action of trespass. To the subject of intrusion Bracton devotes two folios, and gives the forms of the writ of *quare intrusit*, just before he takes up the assise of novel disseisin. Intrusion, as such and alone, is less than disseisin, yet wherever there is disseisin there is in some manner intrusion. In kind, the distinction is not unlike that which at a later place Bracton makes between disseisin and trespass. In other words, an unlawful invasion of land may, according to the circumstances and the period, constitute any one or two or all three of trespass, intrusion, disseisin. As to the part played by the *quare intrusit* in the development of the action of trespass it is not possible to speak with absolute certainty. Bracton, though he remarks...
on the contrast between trespass and the assise of novel disseisin, indicates no connection between trespass and quare intrusit. Nevertheless the cases of quare intrusit themselves show in the count and pleadings many, and sometimes most, of the very elements and technical expressions which later became fundamental in trespass. The earliest case that we can find which in its technical phraseology approaches the later action of trespass—and there are remarkable resemblances in many ways—is a case of intrusion from the very beginning of the thirteenth century. A case of quare intrusit on the plea roll of 1220 looks so like an action of trespass that it has been called trespass by high authority. Five years later we get another quare intrusit which more nearly than any other case of the time, in the available printed records at least, approaches the classical action of trespass. We have the record of a

\[ \text{(1200) 2 Rot. Cur. Reg. 169. W. K. complains that (three men) intruded themselves on his land at S. vi et armis and in the peace of the lord king, and took his beasts and held them against gage and pledge, and held his swineherd for ransom and took his pannage, so that they did him damage to the value of twenty marks. And he produces suit which testifies this. And they (defendants) came and denied tort and force (vin et iniuriam) and all the allegations word for word. \} \] \[ \text{Cf. Maitland, Rolls, supra note 2, 17-18; Abr. Plac. 4b.} \]

\[ \text{Note Book, pl. 85. "The sheriff was ordered that if R. B. finds security for prosecuting his suit, he should have before the justices (seven defendants) to answer said R. B. wherefore against the peace of the lord king with force and arms they intruded themselves upon his land and against his houses and carried away his chattels and ejected him and threshed his grain." The defendants not appearing—"a day is given, and let him (plaintiff) have a writ that the sheriff have their bodies, and if they shall continue to withdraw themselves and be unwilling to come to the peace, let them be demanded and outlawed in the county court according to the law of the land. And let the sheriff diligently enquire what damage he R. B. had because of that intrusion, and in connection with what things." Maitland in his note to this case calls it "a rare early example of trespass vi et armis." The designation is correct to this extent, that of all the cases of its own time, as far as we have been able to discover, it comes nearest in its technical phraseology to the later action of trespass. Nevertheless it is clearly to be listed as a quare intrusit, or perhaps better as a quare intruserunt, for the verb occurs in the plural form. As to the point in regard to outlawry touched on in the note, that was not at all peculiar to trespass, but was part of the regular process to compel appearance in actions in general. Almost the very same words that are used in the judgment in this case as to outlawry are used in a quare deforciat, ibid. pl. 82. For the process to compel appearance see Bracton, fs. 439-441; Woodbine, Four Thirteenth Century Law Tracts (1910) 10-11, 54 seq. For outlawry in criminal law see 3 Holdsworth, History of English Law (3d ed. 1923) 694-5.} \]

\[ \text{Note Book, pl. 1104. "F. H. was attached to answer W. O. wherefore she intruded herself in one carucate of land with its appurtenances in B. and vi et armis held herself in that land... whereof W. O. complains that... said F. H. with a multitude of men armed with hauberks, purpoints and helmets and all manner of arms and with force (omnibus armis et vi) ejected him, and destroyed his chattels found in his house, to wit his grain, hay, forage and whatever they found there, and she tore up his garden and threw down his house and did other destruction, through which he is made worse and is damaged to the value of forty} \]
case from 1228 which has been designated "a rare example of trespass quare clausum fregit," but which the parties themselves regarded as a case of either intrusion or disseisin, and in which the court awarded seisin to the complainant. Had this been really an action of trespass, the question of seisin could not have been determined. In a quare intrusit three years later, in which injury to the plaintiff's person as well as the asportation of chattels is alleged in connection with the intrusion, the judgment is that the principal defendant satisfy the plaintiff as to his damages, and that all the trespassers (transgressores) be taken into custody. Unfortunately we cannot be sure of the meaning of the word transgressio or transgressor at this time. A generation earlier it would have had no technical meaning, a generation later it was used almost exclusively in its technical sense of trespass. This case comes from a generation in which the meaning of the word was changing from the general to the technical, during which period it was used sometimes in one sense, sometimes in another.

marks, and thereof he produces suit. And F. H. comes and denies tort and force and the intrusion. And therefore it is considered that W. O. has recovered his seisin, and F. H. in mercy. The sheriff is ordered diligently to enquire by the oath of lawful men what damage F. H. did to him W. O. as to his houses, gardens, fishponds and other things." This, so similar to pl. 85, note 33 supra, is listed by Maitland as a quare intrusit, which it clearly is.

Note Book, pl. 289. Technically a quare obsedit rather than a quare intrusit. "R. A. was attached to answer R. L. wherefore . . . said R. A. besieged him in his house and later threw down and carried away those houses against the peace and crown of the king, whereof he R. L. complains that . . . he R. A. came with his force and with armed men (cum vi sua et cum viris armatis) and besieged him for five days so that no one could come to him, and caused the trees around the house to be cut and felled, nor held himself satisfied with this, but caused the house in which R. L. was to be thrown down, so that if he had not gone out quickly he would have been crushed therein, whereby he is made worse and is damaged to the value of twenty marks, and thereof he produces sufficient suit. R. A. comes and denies tort and force and the damage of twenty marks and everything word for word, and denies that he ever disseised him, and says that R. L. never had seisin thereof, not for a day nor for a single hour . . ." (R. A. says that R. L. is a bastard, which statement R. L. contradicts.) . . . "It is considered that R. L. have such seisin as had J. (R. L.'s brother whose heir he claims to be), and R. A. in mercy." 

Note Book, pl. 378, n. 1. "The time is not yet when title shall be tried in an action of trespass vi et armis; but this is a noteworthy attempt." Not exactly this, but a quare action for damages, brought for loss of common of pasture which both parties claimed as their own, and in which it was awarded that defendants should go without day, and that plaintiff "may sue out for himself a writ of novel disseisin if he so wishes." Cf. ibid. pl. 392. To the effect that title cannot be tried in an action of trespass, see (1254) Abbr. Plac. 142a; (1272) ibid. 262a. See also supra note 20.

Cf. (1231) Note Book, pl. 566. At first transgressio means wrong-doing in a very general sense, that in which it is used in "Forgive us our trespasses." It is with this non-technical meaning that it is used in (1199) 2 Rot. Cur. Reg. 34, "de placito transgressionis," which case has been erroneously referred to as the earliest reported case of trespass.
Quare intrusit certainly had much in common with the action of trespass of a later date. Even though intrusion as such would normally be regarded as an act more permanent in its results than a mere trespass—the judgment in a quare intrusit will say that the successful plaintiff has recovered his seisin9—still the facts which will support a quare intrusit will later support an action of trespass,40 for though every intrusion is not a disseisin and every trespass is not an intrusion, yet every intrusion and every disseisin is a trespass.41 Moreover, the quare intrusit disappears as time goes on; two actions working from different angles cover the same ground; one of these is trespass.42 Just as the quare intrusit would appear to have been an early thirteenth century attempt to meet the case of an invasion of land not amounting to a disseisin,43 so trespass q.c.f. seems clearly enough to have been a still later development along the same line, which came to displace first quare intrusit, and ultimately—with ejectment, and for all practical purposes at least—the assise of novel disseisin itself. We have seen that the step from the assise of novel disseisin to an action for damages for the asportation of goods and chattels was plain and easy. Almost, if not quite, as easy was the step from assise to quare intrusit, in both of which actions seisin and damages were recovered by the successful complainant.44 The further step to an action for the recovery of mere damages for the unlawful invasion of land was but another step in the same path and direction.45 And seemingly one that was inevitable. For this last

Ames, Essays (1913) 179, n. 3. In John's time it was a transgressio for the surety to produce one woman instead of another at a trial. Yorkshire Assise Rolls, supra note 2, 17. For the earlier use of transgressio in its various meanings, see Bracton, 1s. 91b, 101, 101b, 119b, 125b, 127b, 167, 216b; Note Book, pl. 40, 1436, 530; Patent Rolls, 16 Hen. III, 459, 463, 473, 484; Calendar of Patent Rolls, 37 Hen. III, 172, 225, 226; Healey, op. cit. supra note 25, nos. 621, 686; N. A. R. 117, 329, 365, 369; Abbr. Plac. 129 seq. passim; Coram Regis Roll of 1297, supra note 28, 2, 3, 4, 5, 6, etc.

9 Note Book, pl. 566, 1104.

4 The connection between intrusion and trespass is well brought out in a case from 1260 in which “trespass” is apparently used in the technical sense. One W. complains that R. intruded into W.’s land to the latter’s damage of thirty shillings. R. denies the allegations and puts himself on the country. “And the jurors chosen by consent of the parties say . . . that R. after the said loss intruded on his own authority into the said two bovates of land, without the license and will of W. And therefore it is considered that W. do recover his seisin thereof; and R. be in mercy for the trespass and do satisfy him for his damages, which are taxed by the jurors at fourteen shillings. Yorkshire Assise Rolls, supra note 2, 102-3.

40 Cf. (1253) Abbr. Plac. 1438, 1290, 1290. For the tenant’s remedy quare elecit infra terminum, see 2 P. and M. 107; Note Book, pl. 1140; Bracton, 32. 220, 220b.

41 The other is the writ of entry. Writs of entry sur intrusion became common before 1250. Bracton, 32. 324, 325; Note Book, pl. 774, 1222.

42 The assise of mort d’ancestor, which met one particular aspect of this situation, could be used only by the heir.

43 Supra note 39.

44 We are not here concerned with the action of ejectment, a later development of the action of trespass, in which the complainant came ultimately to recover not
mentioned action was also a *quare* action, the general type of action that had been multiplying the different kinds of writs and ever widening the field for the recovery of damages.\(^4\) That the men who first made use of this remedy called it "trespass" is altogether unlikely, to them it was still only a *quare* action; even Bracton refers to it not as trespass, but as *quare vi et armis.*\(^5\) In just such words might a writer of a generation earlier have referred to the *quare intrusit.*\(^6\)

But *quare intrusit* was not trespass. Neither were other *quare vi et armis* actions of the same period. They were *quare* actions on their way towards trespass, steps in the process of that development which out of the informal actions of the early thirteenth century produced the stereotyped action of trespass towards its close. Repugnant as this statement is to our modern notion that the insertion of *vi et armis* in a complaint was invariably the label of trespass, the truth of the statement can nevertheless be proved. Thus we may take the records of three cases, from different periods, in each of which the fundamental facts are practically the same—the asportation of things severed from the soil, each of the parties claiming the land as his own. The earliest of these cases has already been given in full above and commented upon;\(^7\) aside from any other consideration, the use of the grand assise shows that it cannot be trespass. The second, a *coram rege* case involving the asporation of grain, has many of the ear-marks of an action of trespass and is strikingly like one in many particulars.\(^8\) The third, another *coram*

only damages, but the land itself. 2 *P. and M.* 109; 2 Holdsworth, *op. cit. supra* note 33, 581; 3 *ibid.* 214.

\(^4\) "There will be as many forms of writs as there are kinds (*genera*) of actions." *Bracton,* f. 413b. For the *quare* actions in general see *supra* note 28.

\(^5\) *Bracton,* f. 413. *Cf.* (1292) *Y. B.* 20, 21 Ed. I (R. S.) 314, "note that in a *quare vi et armis* the defendant must answer in one of three ways. . ."

\(^6\) Thus (1220) *Note Book,* pl. 85, "*quare contra pacem domini regis vi et armis intruserunt se.*" *Cf.* (1225) *ibid.* pl. 1124. The meaning and origin of *contra pacem* is discussed further on. It is enough to say here that both intrusion and disseisin were acts *contra pacem,* breaches of the king's peace for which, as in trespass, the wrongdoer was amerced.

\(^7\) (1199) *Rande v. Molfe,* note 12 *supra.*

\(^8\) (1234) *Teuton v. Chaggeford,* *Note Book,* pl. 1121. "H. C. was attached to answer H. T. wherefore at night, *vi et armis* and against the peace of the lord king, he carried away the grain of the men of the manors of A. and W., which said H. T. holds by delivery of, earl Richard of Cornwall, of lands which the earl holds of the dower of queen Isabella, mother of the lord king, whereof he H. T. complains that on such a day etc. came said H. C. with an armed band of some two hundred men to the aforesaid manors and carried away the grain from the land; and he says that his men and tenants had sowed that grain; and he has damage to the value of etc, and thereof he produces suit.

H. C. comes and denies tort and force and the asportation of the grain, and denies that he ever carried away any grain from the land of said H. T.; and thereof he puts himself upon the country, and he says that the land from which the grain was taken is his own. Questioned as to which of them sowed that land, he says that the men of H. T. sowed it, but they did it in spite of his protest, and
rege case having its facts almost identical with those of the second case, is an action of trespass from a time when that action has become perfectly well settled and defined, with a form and procedure of its own. A comparison of the second and third of these cases while showing differences which are perfectly distinct, nevertheless reveals such a marked similarity between the two as to make us wonder if the second case also is not an action of trespass. This second case, as the first case, ends in the customary compromise, but there is in it no mention of the grand assise. Were there, we could decide at once that it was not trespass, for that action did not try title. Now there is from this same year a fourth case which in points of technical similarity agrees as closely with the third case above as does the second. The plaintiff complains that defendants vi et armis and against the king's peace fished in his fishery to his damage. There is the denial of tort and force by the defendants' warrantor who puts himself on the country. Then, as in cases two and three, both parties claiming ownership, "the earl denies all this and puts himself on the grand assise of the lord king, and prays that a recognition be made whether he has the greater right of fishing in that fishery, etc." In other words, in 1234 it was still possible to when the crop was ripe he came and caused the grain to be carried away, by day and not by night... And he acknowledged that he carried off the grain after it had been gathered in heaps on the land.

H. T. says that the land is his, and that the grain was carried away vi et armis and at night, and this belongs to the lord king, and thereof he prays judgment. Afterwards they make a compromise with the king's leave, and H. C. gives to H. T. one hundred shillings for the damages of the aforesaid men, and H. C. holds himself satisfied. Therefore without day, etc." A wrong done at night was often regarded as a more serious offense than the same kind of act done in the day time, and the records constantly use de nocte or noctu or noctanter to bring out this point. See 3 Holdsworth, op. cit. supra note 33, 369. This "belonged to the king" not because it was an action of trespass, but because it involved a breach of the king's peace, as did many other actions. Cf. Adams, Origin of Courts of Common Law (1921) 30 Yale Law Journal, 798, 810, note 46.

* (1297) Coram Rege Roll of 1297, supra note 28, 9-10. The case is too long to be given here.

* Supra note 35.

* (1234) Note Book, pl. 835.

* The editor's note to this case is, "This grand assise in an action of trespass is noticeable." But these quare vi et armis actions which make use of the grand assise, or settle questions of title or seisin, are not technically actions of trespass, but only actions of trespass in the making. And in this latter class, from the time of Rande v. Malfe (supra note 12), where the pleadings have led to a question of title or seisin, that question has regularly been settled by grand assise or jury.

In this same year, 1234, certain defendants were summoned to answer plaintiff quare vi et armis they came into his ward's free fishery and fished there contra iust itjam. The defendant's warrantor, Adam, claimed a right of common in part of the fishery and denied having fished in any other part. Issue being joined on this, the sheriff was ordered to summon a jury to determine "if said Adam was in seisin of said fishery together with said W. (as to the part Adam claimed to hold in common), and if said Adam fished vi et armis (in the other part)." Note Book,
settle one of these *quare vi et armis* actions by the grand assise, when the pleadings raised the question of title to land, just as it had been back in 1200 in the case of the informal actions. Though the first case brings up both the grand assise and the compromise, the second case mentions only a compromise, while case four is concerned with the grand assise alone. Yet either the grand assise or the compromise was as applicable to cases two and four as to the first case—and for the same reasons. This being so, neither of the cases from 1234 can be considered an action of trespass in the technical sense; there is no place for the grand assise in that action. These *quare vi et armis* actions develop into trespass, but by as slow degrees as they themselves have developed out of the earlier actions. Considered year by year the alterations are made so imperceptibly for the most part that it is impossible to tell at just what moment of time this or that change actually occurred; we cannot put our finger upon any certain date and say that it marks the beginning of the action of trespass.

Thus far we have been concerned only with the origin of trespass *d.b.a.* and trespass *q.c.f.* Both of these seem to have been the result of a common cause—the partial failure of the assise of novel disseisin. As originally devised this assise was meant to provide a remedy for the unlawful invasion of land and security for the chattels upon it. But the frequent impossibility of reseising the tenement of its chattels often made this second point difficult of accomplishment. So in 1198 damages came to be given in the assise to make up for this deficiency. Next, on the basis of the recovery of damages idea, and through the medium of the hybrid actions, there developed a remedy for the asportation of chattels, not connected with a disseisin, which finally hardened into trespass *d.b.a.* Nor could the assise always accomplish its first point. Some unlawful invasions of land would not be of the kind for which the assise could be brought. To meet this situation, in part at least, there developed the *quare intrusit*, in which, as in the assise, damages were awarded. But invasion of land and asportation of chattels

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pl. 839. Apparently by 1253 the *quare vi et armis* complaint as to fishing has gotten rid of the grand assise. *Abbr. Plac.* 135a (the facts are very similar to those in *Note Book*, pl. 835). On the subject of trespass to a fishery see (1401) Y. B. 2 Hen. IV, 1148; Pollock, *Torts* (11th ed. 1920) 380.


*Where a person held merely as guardian, though seised of the wardship he was not seised of the land. If dispossessed he could not bring an assise of novel disseisin. These cases are usually listed under “Ejectment of ward.” Actually they are complaints and *quare* actions—*quare siecit de custodia terrae*. The one making the unlawful entry against the guardian was guilty of an intrusion instead of a disseisin. (1220) *Note Book*, pl. 1799, 687. The records of these cases are very similar to the *quare intrusit* cases. Thus (1221) *Note Book*, pl. 1529, “A. F. complained that W. (and seven other defendants) with many others armed, came to her house at F. which she had in wardship with P. her son by the gift of earl R., chief lord of that fee, and ejected her A. F. and her son from said house, and
THE ORIGINS OF THE ACTION OF TRESPASS

usually went hand in hand. So the complainant naturally stated both sets of facts, stressing the one or the other, but in either case couching his allegations in much the same phraseology—more and more so as time went on—and in either case laying his damages in words which soon became technical, the defendant on his part denying in terms which also became technical. Fully developed these actions gave us trespass d.b.a. and trespass q.c.f., two actions differing only in the nature of the wrong they were brought to remedy, but alike in the details of form and procedure, and showing till the end most evident traces of their common origin.

This would mean that the assise of novel disseisin was really the source of these actions of trespass. Or perhaps it would be better to say that it was the ramifications of the assise—the normal, almost inevitable, extension of principles embodied in or suggested by the assise to situations in which it did not itself apply.

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vi et iniuste et contra pacem domini regis held themselves in it, and the grain and the food and other things of her Agnes destroyed, whereof the sheriff was ordered that he should have before the justices the bodies of all the aforesaid and of others whom he should find were in that foray, to answer concerning that trespass (transgressione illa)... (The defendants come and deny the breach of the king's peace, and state their side of the case.) "It is awarded that A. F. have her seisin and chattels, and that they satisfy her as to the rent and be in mercy for the trespass (transgressione)." The editor's note to the case is, "This seems a case in which trespass is brought for a disseisin; but I suppose Alice (corr. Agnes) could not have brought an assise as she claimed to be in merely as guardian." This is hardly an action of trespass, but a quaer action brought for an intrusion. The judgment that Agnes recover her seisin means such seisin (possession) as she had. It was perfectly well settled that a guardian did not have such seisin as would support an assise. Note that the court is careful to call the act not a disseisin but a transgressio. These cases are interesting as illustrating the development of the quaer actions for invasion of land towards trespass q.c.f. They help to make plain the fact that the antecedents of trespass q.c.f., as of trespass d.b.a. also, were civil and not criminal actions. For other cases of the same type see (1227) Note Book, pl. 256 (in which the defendants deny "tort and force and breach of the king's peace and whatever is against the crown of the lord king"); (1245) Healey, op. cit. supra note 25, no. 566 (a quaer vi et armis et contra pacem domini regis eicerunt); ibid. no. 644. "This continues long after trespass has become a perfectly well defined action in itself. Coram Rege Roll of 1297, supra note 28, passim.

The assise of novel disseisin seems still further responsible for the spread of the recovery of damages idea through that phase of the assise which later became known as the assise of nuisance (Glanvill, XIII, 34, 35, 36; Bracton, fs. 233, 233b) in which damages were given at least as early as 1199. 1 C. R. Rolls 76; 2 Rot. Cur. Reg. 6o. Closely connected with the assise of nuisance—and discussed immediately after it in Bracton, f. 235—is the action for the levying of a market to the damage of a neighboring market, the action of quaer tenet mercaturam. It is as old as the beginning of the thirteenth century—(1202) Baildon, op. cit. supra note 4, no. 136—and was an action in which damage had actually to be shown. Note Book, pl. 494; Bracton, f. 235b. In the assise of nuisance the usual allegations describe a "levying" (construction) of something—dike, wall, ditch, etc.—to the nuisance of the complainant's
The same conclusions are reached if we work along the only other line available, by tracing in so far as we can the historical significance of each of the component parts in the fully developed action of trespass. Here again we are forced to the belief that the origin of the action of trespass must be sought in some earlier action or actions having to do with an invasion of land, and such action, having regard to matters of chronology and circumstances, by the very process of exclusion can hardly be other than the assise of novel disseisin.

The typical trespass action of the late thirteenth century, by which time the form has become established, is a complaint in which the plaintiff alleges that the act complained of was done *vi et armis* and against the king's peace to the damage of the plaintiff to such an amount—of which he produces suit. The defendant denies tort and force (*vim et iniuriam*), says he is not guilty of the alleged trespass, and puts himself on a jury. Now outside of the idea of the recovery of damages, already discussed, the most important of these elements, historically, are the allegation of *vi et armis* and the denial of *vim et iniuriam*.

Freehold. Baildon, *op. cit. supra* note 4, nos. 4, 236. Both Bracton and Glanvill state clearly that "throwing down" is equivalent to "levying." So also do the cases. *Ibid.* no. 98; *Note Book*, pl. 806, 1624, 1653. For this reason the assise of nuisance continued to be used in situations where we might normally expect to find trespass employed. This assise ultimately gave way not to trespass, but to case, though only after a long time. In 1401 it was said that an assise of nuisance and not an action on the case lay for the obstruction of a way. *Y. B.* 2 Hen. IV. 1148, per Markham, J. Though for a way in gross, case and not assise was the proper remedy. (1410) *Y. B.* 11 Hen. IV. 2548, per Hankford, J. *Cf.* (1462) *Y. B.* 22 H. VI. pl. 23. As late as 1596 either case or an assise of nuisance would lie for stopping a way. *Ashton v. Pamphyn*, Cro. Eliz. 456.

This is fully illustrated by the cases in *Coram Rege Roll of 1297, supra* note 28.

(1924) 33 *Yale Law Journal*, 802 seq.

The clause "and other enormities did to the great damage of him (the plaintiff)" which became a permanent part of both the writ and the count, is not met with in the earlier cases. In the period of lawlessness consequent upon the struggle between Henry III and his barons, manors were invaded by armed forces who burned the houses, cut down the trees and carried off the moveable goods. After quiet was restored, many actions were brought against the invaders, actions in which the complainant usually alleged that the wrongs which he had suffered had been to his great damage—perhaps because of the manifest difficulty of correctly estimating the actual damage in one of these forays. See *Abbr. Plac.* 1506–1668, etc. *passim*. Many of these were actions of trespass apparently, so many in fact, that it can hardly be questioned but that the general situation at this time gave a tremendous impetus to the use of this action. This is doubly interesting because it shows, at a comparatively late time in its development, the close association of the invasion of land and the asportation of chattels in the history of trespass. To this same general period we must look for the invention of the clause quoted at the beginning of this note. In 1253 plaintiffs say at the end of their complaint that defendants "did many other evil things to them against the peace." *Abbr. Plac.* 1311, b. In 1265 a complainant says that defendant invaded his land, took his hay and grain, "and other enormous damages (damna enormia) did to said William to his great damage." *Ibid.* 1568. Under similar sets of facts
The setting of both of these originally presupposed an unlawful invasion of land.

Before discussing these subjects, however, it is necessary to consider the allegation of breach of the king's peace. It has been said that trespass, originating in the appeal of felony, is founded on a breach of the king's peace, is a semi-criminal action. Actually, the uniform insertion of the words contra pacem domini regis in the count of trespass cannot at all be regarded as a proof that that action originated in the appeal. From Anglo-Saxon times on, breach of the king's peace had been one of the pleas of the crown. It was only natural, therefore, that mention of the king's peace should be brought into the count in the appeals of felony, themselves pleas of the crown. In fact it many times became necessary as a jurisdictional flourish. But every disseisin was also a breach of the king's peace, for which the disseisor paid a fine to the king—an amercement as it was called—in addition to the same expression is found twice again in this same year. Ibid. 158a, b, 159a. But the phrase had not yet become stereotyped. Two years later one complaint says merely "and other damages did," while another recites "and other enormous damages did." Ibid. 162b. This shorter form is in use for a time. Ibid. 164b, 168b, etc.; N. A. R. 162-3, 182. Before the end of the century the longer form comes into uniform use. Coram Rege Roll of 1927, supra note 28, passim.

a Maitland, Equity and the Forms of Action (1913) 342-3.
b 2 P. and M. 453.

The form used in the early appeals was in pace domini regis, not as in trespass contra pacem. Maitland, op. cit. supra note 22, nos. 3, 4, 11, 13, etc.; Note Book, pl. 91b, 108a, 146b, 1600, etc. The earliest use of contra pacem in an appeal that we have found dates from 1232. Note Book, pl. 699. But this appeal is irregular in more ways than one. Seemingly the complaint is trying to bring a civil action in the form of, or partly in the form of, an appeal of felony. He is told to get a writ of novel disseisin instead of this action. The phrase contra pacem was in common use in civil actions long before it becomes noticeable in criminal actions. Ibid. pl. 85, 256, 1520, 287, 835, etc.; Healey, op. cit. supra note 25, nos. 565, 572.

At a later time, probably because of the ever widening influence of the action of trespass, contra pacem comes into more general use in the appeals of felony. (1266) Gross, Select Coroners' Rolls (1895) 2; (1271) ibid. 18, 21; (1274) ibid. 32, etc. During the intermediate period both in pace and contra pacem seem to have been used in the same appeal. (1256) N. A. R. 91, 109, 111, 117, etc. Cf. Bracton, fs. 144-146b. Perhaps the explanation is to be found in the fact that what was ground for an appeal of felony at the suit of an individual, might be ground for an action of trespass at the king's suit. That is, where for various reasons the private appeal comes to naught, the appellee may nevertheless be convicted for trespass at the king's suit, in which the truth of the appellant's allegations will be enquired of by a jury, pro pace probanda. (1256) ibid. 109, 117, 125; (1279) ibid. 324, 345, 350-1.

c Glenwill, I. 2; C. R. Rolls 221; Maitland, op. cit. supra note 22, nos. 21, 31, 172. This is important as bearing on the alleged origin of trespass in the popular courts. See (1924) 33 Yale Law Journal, 799, 800. To have said in the local court that the wrongful act was done contra pacem domini regis, would in most cases have thrown the trial into the king's court.

d Bracton, fs. 168b, 187.
the damages which he paid to the disseisee.\textsuperscript{67} Thus the disseisor or the one who committed an intrusion was, on this point, in exactly the same position as the losing defendant in an action of trespass. This is important. The fact that in trespass the defendant who loses is amerced for a breach of the king’s peace, does not make that action criminal in its nature any more than the amercement of the disseisor or the intruder makes a criminal action of the assise of novel disseisin or of the \textit{quare intrusit}. Trespass was from the first a civil action because it developed out of a civil action—a civil action in which, nevertheless, there was regularly an amercement for a breach of the king’s peace.\textsuperscript{68}

Further proof of the origin of trespass from the civil actions is found in this, that the action of trespass was begun by original writ and involved production of suit.\textsuperscript{69} In these respects it was like the actions for damages which we have been considering. But in the appeal of felony there was neither original writ nor production of suit.\textsuperscript{70}

In regard to \textit{vi et armis}—the use of this expression in the action of trespass has usually been considered the clearest kind of proof of the relationship of trespass with the appeal of felony. As a matter of fact, however, among the several thousand earliest cases examined we have found it only twice in appeals, and then in the forms \textit{cum vi et armis} and \textit{cum vi sua et armis}.\textsuperscript{71} \textit{Cum vi sua} without the \textit{armis} occurs constantly in appeals, invariably with the meaning “with his force (of helpers).”\textsuperscript{72}
The words are synonymous with *forcia*, which is discussed at considerable length by Bracton, who shows that both the principal wrongdoer and his accessories may be appealed—when you appeal a man *de vi* or *de forcia* you appeal him of having been an accessory merely. The most striking fact about the use of *cum vi* (*sua*) *et armis* and kindred expressions in the early appeals is that they were used only in connection with an invasion of land by an armed force, never of the act of an individual of and by himself. These statements hold true also of the meaning of the expression in one of the only two complaint actions, as distinguished from appeals, in which it has been found upon the early plea rolls. The first of these uses that form occurring in the appeals, the other gives us our first clear cut instance of *vi et armis*. As noticed already, this latter is a case of intrusion which in its use of technical expressions is very similar to trespass. As far as our available cases indicate, the *vi et armis* phrase in any form continues to be uncommon for at least another quarter of a century. Whether or not it is a mere coincidence cannot be said, but the fact is that with the single exception of an appeal, the next two cases, in point of time, which use the expression are both actions of *quare intrusit* in which, as usual, it occurs in the form *vi et armis*. Not very long after this the *quare vi et armis* action as the remedy for an unlawful invasion of land, not amounting to a disseisin, becomes general.

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remove that force (*vim illam*) caused to be assembled the four neighboring townships, who removed that force (*vim illam*). (1231) *Note Book*, pl. 530. We have found only one early mention of *armis* without the *cum vi sua*. (1202) 1 *Bedfordshire Hist. Rec. Soc.* (1913) 226, no. 224, "S. T. and his wife appeal R. H. because he in the king's peace and wickedly, with arms whetted (*armis mollitis*) came to their house in D. where S. T. was lying ill, and in robbery took from him forty-two shillings."

"Bracton, fs. 137b, 142, 146b, 148b. The words *de forcia* and *de vi* are used interchangeably. Maitland, *op. cit. supra* note 22, nos. 88, 91. See 1 Rot. Cur. Reg. 207-8, 376; Maitland, *op. cit. supra* note 22, nos. 31, 38, 76, etc.

"Cited in note 71 supra.

*Cum vi et armis*. See note 12 supra. This form continues for a while in the descriptive part of some complaint actions. (1228) *Note Book*, pl. 287, "R. came *cum vi sua et cum viris armatis*"; (1231) *ibid.* pl. 530, "came said R. W. *cum vi sua et gente armata.*" In 1217 a sheriff was ordered to collect knights and free tenants *cum vi et gente armata* and in his own person to proceed to M. *Note Book*, pl. 1995.

"Note 32 supra.

"(1220) Maitland, *op. cit. supra* note 22, no. 202. How infrequent the use of *cum vi et armis* in the appeals actually was, will become apparent at once to any one who tries to find it in the more than two hundred cases in this book. That *cum vi sua* without the *armis* continued to be the common form until well past the middle of the thirteenth century, may be gathered from the fact that *Bracton* (fs. 144-146b), in giving the formal words of the various appeals, uses *cum vi sua* alone.

"(1220) *Note Book*, pl. 85; (1225) *ibid.* 1104. *Supra* notes 33, 34.

"See *supra* notes 50, 53, 54.
This does not mean that *vi et armis* supersedes the *cum vi sua* form. The latter does not disappear with the advent of the former; it continues to be used in criminal actions, and it occurs in the descriptive parts of the records of civil cases when the point to be emphasized is the armed invasion. But whether found in appeals or complaints, *cum vi sua et armis* is always descriptive and non-technical, the statement of a fact, namely the use of an armed band of helpers. Now, because they come from this same period of feudal violence, the facts of most, if not all, of the *quare vi et armis* actions brought for an unlawful invasion of land, would include the use of an armed force. But this would apply equally well to cases of novel disseisin. That is, the fact that *vi et armis* would, from the very nature of things, necessarily be descriptive, would not prevent that expression from being technical also, in the sense that “unjustly and without judgment” was technical in the assise of novel disseisin—and as *cum vi sua* never was. We take it that *vi et armis* was a technical expression, that it was to the *quare* actions for the invasion of land what *iniuste et sine iudicio* was to the assise of novel disseisin. For a time two other expressions, *vi et iniuste* and *vi et iniuria* may have disputed this field with *vi et armis*; but *cum vi sua et armis* was never a rival because it was always merely descriptive.

As already noted, these *quare vi et armis* actions which were brought to remedy the unlawful invasion of land, were apparently the developments of a deliberate attempt to expand the scope of the assise of novel disseisin, itself a direct descendant of the Roman interdict *unde vi*. To any one acquainted with Roman law that interdict has always been connected with Dig. 43.16, the title of which is, *De vi et de vi armata*. Many of the men directly concerned with the administration of justice in England at the beginning of the thirteenth century knew Roman law. To them and their more immediate successors, force, armed force, when considered in connection with an invasion of land, would undoubtedly mean that which the Digest treats of under the title of *De vi et de vi armata*. Even after the middle of the thirteenth century, Bracton, in discussing the meaning of force and arms as applied to the unlawful invasion of land that results in a disseisin, does little more than recast portions of Dig. 43.16. In Dig. 43.16 *vis* has a peculiar signifi-

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*See supra* note 75.

*In some of the early *quare vi et armis* cases themselves the reference to *vis* seems to be made in a technical sense. *Note Book*, pl. 819. The regular denial in this action is that of *vim et iniuriam*. It is rather significant, therefore, that when a defendant is attached to answer plaintiff *quare cum vi sua* (instead of *quare vi et armis*) he ejected him, the defendant should in his denial omit all mention of *vim* and deny only the *iniuriam*. *Note Book*, pl. 1769. *Cf. 1 C. R. Rolls* 425-6.

*Supra* notes 43, 56.

(1924) 33 Yale Law Journal, 807.

(1924) 33 Yale Law Journal, 813.

Bracton, f.s. 162-162b. Parts of the discussion are taken almost verbatim from the Digest. See *The Roman Element in Bracton's De Aquirendo*.
cance, it is the *vis* to which the interdict will apply, and that application is limited to violent force used to eject one from his land. This meaning of *vis* would fit in exactly with the use of *vi et armis* in the *quare* actions; it would account for what is, as a matter of fact, the apparent difference between the *cum vi sua et armis* of the appeals and the shorter form in the civil actions. That Dig. 43.16 is the original source of *vi et armis* in English law, can, of course, never be proved—or disproved, for that matter—but the probability of it must be kept in mind until some better explanation is offered.

The question may well be asked as to why, if *vi et armis* came into English law from the Roman law, it was not used in the assise of novel disseisin. This question, like many another on the same general subject, can never be answered. It may have been because the assise came through the canonists' *actio spolii*, which had another expression of its own; or it was perhaps because "unjustly and without judgment" was a phrase associated with disseisin long before the establishment of the assise, and before Roman law had begun really to affect English law. At any rate, from the time of Glanvill on, *iniuste et sine iudicio*, used always in the writ of novel disseisin, was reserved as a technical term for that action alone, even though it would have applied as a statement of fact equally well to any unlawful invasion of land not amounting to a disseisin. The technicalities of the assise of novel disseisin, by restricting the use of *iniuste et sine iudicio* to cases of actual disseisin, would seem to have necessitated the use of a similar technical expression in those *quare* actions which were used when the unlawful entry did not amount to a disseisin.

The phrase most generally used at first to fit this last situation seems to have been not *vi et armis*, but one more like to that employed in assise, *iniuste et vi* or *vi et iniuste*. It appears not to have been used in the appeal of felony, or in any civil action which did not involve an invasion of land. In this respect it is like *vi et armis*. Moreover, in the latest instance of its use which we have found, it occurs just where

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"We have no very early English definition of *vis*. The first we find is from about the period that trespass becomes established as an action, Bracton's definition (f. 162), taken directly from the Roman law—"*vis* is the attack of a greater something which cannot be resisted." See *The Roman Element etc.*, *supra* note 85.

"Hoc interdictum non ad omnem vim pertinet, verum ad eos, qui de possessione deiciuntur. ad solam autem atrocem vim pertinet hoc interdictum, et ad eos tantum, qui de solo deiciuntur, ut puta de fundo sive aedificio: ad alium autem non pertinet." D. 43.16.1-3.

"*iniuste et sine iudicio* cases in which it is found presuppose an unlawful entry in order to take the beasts. Cases cited in note 89 *supra*."

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Even the two *de statio vanni* cases in which it is found presuppose an unlawful entry in order to take the beasts. Cases cited in note 89 *supra*."

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vi et armis would be expected, and apparently in the sense of the latter expression. Unlike cum vi sua it seems to have given way to vi et armis, for it disappeared at a comparatively early date. That the meaning of vi in vi et iniuste was that of vi in vi et armis instead of that in cum vi sua, is evident from the context of the cases in which it is used. Apparently also vi et iniuste had a significance quite distinct from that of iniuste alone.

Vi et iniuria was so infrequently employed—we have found in all but two instances of its use—that it could be passed over in silence were it not for the fact that the uniform denial in the actions for damages, as also in those actions in which the allegation of vi et iniuste or vi et armis is made, becomes very shortly that of vim et iniuriam. For hundreds of years yet to come defendants in trespass will regularly make the same denial.

What is vis et iniuria? Until Bracton writes we have no definition of these terms in English law. He gives a definition of vis and another of iniuria, but he does not couple vis et iniuria. These definitions,

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91 (1221) Note Boob, pl. 1520, as given supra in note 56. Cf. ibid. pl. 85 as given supra in note 33. Cf. ibid. pl. 1360.

92 Note the two replevin cases, supra note 90. The taking of a tenant's cattle by the lord by way of distress would hardly be in the nature of a foray. And cum vi et iniuste is used to denote the cum vi sua idea. (1200) 1 C. R. Rolls 180, "W. C. seneschall of the earl of Chester complains that A. B. and his companions, whose names are in the writ, came cum vi et iniuste into the earl's warren at B. and took with their dogs twenty-three hares, and freed from their pledges (devadiaverunt) the earl's men..."

Thus (1201) 1 C. R. Rolls 392-3. S. K. complains that the abbot of K. has wasted his wood vi et iniuste; the abbot comes and denies vim et iniuriam. The same S. K. complains that S. H. iniuste took a mark of silver from his men for a suit they did not owe; S. H. comes and denies the iniuriam. Cf. ibid. 425-6.

Iniuste is used regularly in replevin cases, in connection with both the detention of the chattel and the taking. (1194) Maitland, Rolls, supra note 2, 40; (1200) 2 Rot. Cur. Reg. 233, (1201) 1 C. R. Rolls 408; cf. Bracton, fs. 136a, b.

(1194) Maitland, Rolls, supra note 2, 24, "R. L. appeals G. D. that while he was in the king's service he came to his house and took away (certain named goods and chattels) vi et iniuria. G. D. came and denied the vin et iniuriam. With leave they make a compromise, and R. L. quitclaims to G. D. as much as belongs to him." Here the word appeal can hardly be used otherwise than in the sense in which it occurs in Glanvill XIII, 38. Had this been meant for an appeal of felony it would have been quashed, no mention being made of felony or the king's peace. 1 C. R. Rolls 221. Nor is the defendant's denial the denial in an appeal of felony, for which see Maitland, op cit. supra note 22, nos. 3, 13.

There had been an invasion of land in the absence of the owner and the asportation of farm products. The mention of the quitclaim at the end would indicate that defendant had entered under color of right. It may have been a case of disseisin in which the goods (among which was the flesh of twenty pigs as well as two casks of beer) were consumed. The unlawful entry upon the land is what constitutes the vin. Cf. (1210) 3 Historical Collections Staffordshire, supra note 2, 147, "intruded himself in that wood vi et iniuria."

Thus "Vis est maioris rei impetus cui resisti non potest," f. 162. "Iniuria est omne quod (quidquid) non iure fit," fs. 45b, 155. As in D. 47.10 and Inst. IV,
taken directly from Roman law, are very indefinite. In the law French of thirteenth century English law, the equivalent of *vim et iniuriam* is *tort et force*. This, likewise indefinite, passes over into English, and after French ceases to be the language of oral pleading, the defendant in these cases denies "tort and force."

The denial of *vim et iniuriam* was very widespread in the law in which the action of trespass developed; a great variety of acts and situations were involved in it; it was not peculiar to trespass or to any one class of actions. It is much older than the action of trespass, older even than actions for the recovery of damages. It is not used in the assise of novel disseisin because theoretically, and actually in the earlier period, there were no pleadings in that action. But it was used to deny the unlawful entry upon land in actions that admitted of pleading. We have found no early instance of its use except as connected with some entry upon land. Though found with but few exceptions in the early actions for damages, it is not found in the appeals of felony. In three cases it seems to be used in an appeal, but each of these is easily explained and offers no exception to the rule. The first of these cases has already been discussed at length. The second, though purporting to be an appeal, is so irregular in form that it is at once quashed. There being no mention of felony or the king's peace, the defendant is not able to deny a felony and breach of the king's peace, as he would have done if the appeal had been regular in form; but as he must, according to the procedure of the time, make some denial, he denies an alleged unlawful invasion of land in the customary words, *vim et iniuriam*. The third is a much later case, in which a plaintiff who

4. In one place or another Bracton says quite a little about *iniurias*. See fs. 103b, 111b, 114b-115, 155-155b. Much of what he writes is based on Institutes IV, 4, or on Azo, Code IX, 35. Maitland says that the changes which Bracton makes from his Roman exemplars, "tend towards the English law of later days. In the first place, *iniurias* loses in his hands the sense of outrage and insult." *Bracton and Azo* (1894) 218. Cf. D. 92.5.1, "Iniuriam autem accipere nos oportet non quemadomodo quaera iuris, sed quod non iure factum est, hoc est contra ius..." Cf. Bracton, f. 103b on the *actio iniuriarum*. It is altogether possible, of course, that the *vis et iniuriam* concept in English law may have been borrowed from Roman law.

86 2 P. and M. 48, 612.
87 1 Rot. Cur. Reg. 93; 2 ibid. 169; 1 C. R. Rolls 217, 392, 434; 3 Historical Collections Staffordshire, supra note 2, 154.
88 This is true of the case in (1200) 2 Rot. Cur. Reg. 160 which at first sight might seem an exception to this statement.
89 Supra note 94.
90 (1200) 1 C. R. Rolls 221. A. appeals B. that the latter came into C.'s house and wounded him A. so that he is damaged to the value of forty shillings. B. denies the *vim et iniuriam*. "And because he first said that B. in his own person came into his house and wounded him, and afterwards said that his men came and did it for him, and because he made no mention of felony or the king's peace, the appeal is null."
should have used the complaint form of action, frames his count in such a way as to make it a medley of an appeal of robbery and an action of replevin. The defendant denies *vim et iniuriam*, apparently as to the replevin part, and breach of the king's peace and the robbery as to the appeal part. Again the appeal is quashed for irregularities.\(^1\) It is worthy of remark in this connection, that when Bracton gives the words of denial suitable for each appeal, he nowhere inserts *vim et iniuriam* except in the appeal of imprisonment.\(^2\) As will be shown later, Bracton is here discussing the complaint action for imprisonment rather than the appeal.

Though limited to civil actions, the denial of *vim et iniuriam* did not continue to be restricted to cases of an unlawful invasion of land. It very shortly became the general denial in actions for damages,\(^3\) even


There is one other case which cannot be passed over in this connection, a *coram rege* case from (1240) *Abbr. Plac.* 107a. "R. S. appeals (three men) that on Thursday, etc., when he R. S. was in the meadow of his lord the abbot of C., which is called M., in the peace of the lord and of the lord king, as the mower of his lord, came to him there the said defendants, and wickedly and in felony and against the king's peace, assaulted and beat him, so that R. M. struck him, whereof he R. S. says that he raised the hue and cry... and as quickly as he could he came to the king's court and made complaint to the king's council of the said felonies and injury, and showed them his wounds fresh and open; and he found pledges for prosecuting his appeal against said defendants. And he offers to deraign this by his body. And R. M. comes and denies *vin et iniuriam* and all the felonies and everything, against said R. S. And he offers to defend this by his body. And because the king was absent and there were there only a few of the king's council, they who were present did not wish to award the duel or anything in the absence of the king and so many of the council."

This is a very unusual case. Normally appeals of felony were begun in the county court before the coroner—sometimes in the hundred court. See Gross, *op. cit. supra* note 64, xl-xlxi. This direct and immediate recourse to the king's council is most unusual, if not unique, in practice. There is no question as to this being an appeal of felony; it is regular in form even to the showing of the wounds. It was one of the functions of the coroners to testify that the wounds had been shown, and failure to show the wounds would vitiate the appeal. Maitland, *op. cit. supra* note 22, nos. 4, 41, 64, 14, 25. There is an invasion of land alleged here. This may be what R. M. means to deny as *vim et iniuriam*. It had been customary for a long time now to deny alleged unlawful entries upon land by these words. At any rate, this is the only true appeal among the many hundreds recorded up till this time, in which we have found the denial of *vim et iniuriam*. Within the same period it has become the regular denial in civil actions for damages.

\(^{20}\) Fs. 144-148.

\(^{21}\) In many instances there is the general denial of *vim et iniuriam* plus a specific denial of facts alleged. Thus (1234) *Note Book*, pl. 842, "he denies *vim et iniuriam* and the unjust taking and the detention against gage and pledge." Cf. (1200) 2 *Rot. Cur. Reg.* 160; (1225) *Note Book*, pl. 1049. (1227) ibid. pl. 242, "he denies *vim et iniuriam et deteriorationem.*" (1232) ibid. pl. 880, "she denies
in those cases where there was no allegation of *vi et iniuste* or *vi et iniurio* or *vi et armis*. Thus it was the regular denial in a writ of right for customs and services, in which the wrong complained of was one of omission, namely the refusal of the tenant to perform the services which he owed, suit of court usually.\(^1\) So also in the case of vexatious suits where one had been impleaded in court contrary to a royal prohibition.\(^2\) It was the denial which could be used to meet the allegation of a mere unjust taking of toll.\(^3\) It was used in the action de fine facto, which could be brought against one who was not observing a fine made in the king's court;\(^4\) likewise in the not dissimilar action of covenant real;\(^5\) and in the *quare duxit in iuxorem*, brought against one who had married a ward without leave.\(^6\) It even got into the action of debt, because debt was an action in which damages were recovered.\(^7\)

From these facts it is clear that the denial of “tort and force” in the action of trespass in no way connects that action with the appeal of felony, and not even necessarily with the allegation of *vi et armis*. Long before trespass appeared “tort and force” had become the stereotyped form of denial in that class of actions (complaints, *quare* actions) out of which trespass developed. Trespass was a late comer among the actions for damages, which had settled upon the general denial of “tort and force” long before trespass appeared. Being primarily an action for damages, trespass could not well adopt any other form, more especially because the regular denial in the pre-trespass *quare vi et armis* actions was already a well settled “tort and force.”

As yet nothing has been said of trespass to the person. The origin of this phase of trespass is no more to be sought in the appeal of felony than is that of trespass *q.c.f.* or of trespass *d.b.a.* Even the distinguishing allegation in this particular action of trespass, namely that defendant “assaulted, beat, wounded and maltreated” plaintiff (*insultum fecit et ipsum verberavit vulneravit et male tractavit*) is looked for in vain in the early appeals. Actually, the phrase is the result of a development that spreads over a considerable period of time, affects both the civil actions and the appeals—the former more than the latter—and becomes a set form only in trespass.\(^8\)

\(^8\) *viam et iniuriam*, the waste and the destruction.” (1233) ibid. pl. 774, “he denies *viam et iniuriam* and the intrusion.” And see further ibid. pl. 482, 219, 287, 1104, 197, 256, etc.

1. (1222) *Note Book*, pl. 197; (1227) ibid. pl. 242; (1224) ibid. pl. 895. Cf. (1227) ibid. pl. 263. See supra note 28.

2. Several cases are cited supra in note 28.


8. The merest glance at the early appeals will show that in regard to beating, wounding, etc., such words as are used are altogether descriptive and not technical. Usually only one act is referred to, not a combination of acts. Thus A. appeals B.
Violence or injury to the person was almost always the inevitable result of the typical invasion of land of the thirteenth century; the unlawful entry, the asportation of chattels, and injury to the person were usually all present in the feudal foray. This concurrence of a triple set of facts continued for a long time. Even at the end of the century, trespass to the person is often hardly to be separated from the invasion of land and the asportation of chattels. These personal injuries could be redressed by appeals of mayhem, wounds or battery, just as the asportation of chattels could usually be made the basis of an appeal of robbery. Even the invasion of land, if it involved the breaking into a house—hamsoken so-called—would be ground for an appeal. But the appeal of felony, which won for the successful appellor only revenge, was rapidly giving way to the civil action for damages and its more substantial pecuniary compensation. Still appeals continued to be brought, though for the most part they were for acts unconnected with an invasion of land. Thus the appeal of mayhem or of wounds was usually the outcome of a medley or scuffle; that of robbery or hamsoken was almost always the result of an attack which had for its object robbery, not the seizure of land. In the actual foray or attack on land, violence to the person, as such, seems largely to have been passed over. Allegations of such violence might be added to increase the general sense of wrongdoing, where the real complaint was on the basis of the unlawful entry or the asportation of goods; but injury to the person was itself a
subsidiary matter. To such an extent was this true, that it would seem that the action of trespass to the person developed from the idea not that damages should be recovered merely for the blows and wounds inflicted on one, but rather for that form of violence which resulted in an affront to the dignity and personal liberty of the one wronged—that is, for false imprisonment.

This is the inference which must be drawn from the two sources of information which we have, namely Bracton and the cases themselves. The cases show that before the days of trespass proper there was only one civil action for what we to-day would call trespass to the person. That was the quare imprisonavit. It is found among the early quare actions, and continues until it fades into the action of trespass for false imprisonment. It seems to have developed into trespass contemporaneously with trespass q.c.f. and trespass d.b.a., or possibly a trifle later. At the period when these two latter actions were becoming writs of course, we find upon a single plea roll two instances of the quare imprisonavit which are so similar to trespass that it is difficult to distinguish them from that action until they are compared with the trespass actions of a generation later. How far away from the action of trespass, on the other hand, the appeal of imprisonment was at this time, may be seen by glancing at an appeal on this same roll.

Even Bracton, comparatively late as he is, seems to know only this one civil action in which violence or injury to the person can be redressed. It has already been noted that on folios 144-147b he carefully gives the words of each appeal, together with the form and content of the appellee's denial. All are treated wholly as criminal actions with one exception, the appeal of imprisonment. In discussing this action he clearly has in mind the feudal foray (note the cum vi sua) which results in the defeated party being carried off to the victor's keep and detained in irons, until redeemed for a sum of money. After having finished the main part of his discussion he further informs us that "in the appeal (appello) for breach of the peace and wounds and imprisonment, a civil action may be brought though the act be criminal."

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114 (1200) C. R. Rolls 147-8, 264; cf. ibid. 304, 383.
115 See especially (1229) Note Book, pl. 314; (1256) N. A. R. 49, 64, 108; Coram Rege Roll 1297, supra note 28, 8, 18, 27, 62-3. Maitland lists the case in the Note Book as trespass. But it would seem to be rather one of the complaint actions for damages typical of the period, technically a quare (cepit et) imprisonavit. Appeals of imprisonment are far more numerous than these civil actions.
116 (1256) N. A. R. 49, 64. The first of these is interesting because of its judgment—"And because said R. was not imprisoned in a keep or in irons or in a closed place, but only in a court, and it is testified that he might have gone out of the court at many places, therefore it is awarded that A. and the others go without day, and R. in mercy for his false claim." Cf. ibid. 108, of same date; another civil action for imprisonment.
117 See, by way of comparison, Coram Rege Roll of 1297, supra note 28, pp. 8, 62.
118 (1256) N. A. R. 91.
119 F. 145b.
Then he goes on to give a description of such an action, which would fit the *quare imprisonavit*. Now the appeal was throughout its whole course a criminal action and that only. There was no way of making a civil action out of an appeal. What Bracton means to say is that the wrong which would normally form the basis of an appeal of imprisonment, may be redressed in a civil action. But this civil action could not possibly be an appeal in the technical sense. In writing of imprisonment Bracton is really thinking of the act and the remedy, and the latter is twofold, a criminal action or a civil action. This explains why, in the appeal of imprisonment alone, he has the defendant deny *vim et iniuriam* in addition to what is usually denied in an appeal. The denial of “tort and force” was the regular denial in the civil action of imprisonment.\(^1\) We have yet to find it in the appeal.

It would seem that the writ of trespass for assault and battery developed out of that for false imprisonment. Even when, at a late time, a distinction comes to be made between these two writs, that for false imprisonment will still contain the allegations of assaulting, beating, wounding and maltreating, in addition to that of imprisonment.\(^2\) The writ of assault and battery will be identical with it, except that in place of the allegation of imprisonment it will say “so that his life was despaired of.”\(^2\) But this is a late refinement. Till at least the end of the thirteenth century, the only difference between the two writs was that for assault and battery left out the *imprisonavit* and made no additions.\(^2\) On the basis of these facts, and more especially because we find the civil action for imprisonment in use long before any such actions for mere assault and battery appear, we must conclude that the writ of trespass for assault and battery was formed on the analogy of that for false imprisonment simply by dropping out the *imprisonavit*.\(^2\)

Thus trespass to the person also was from the first a civil action. Its roots go back to the days when the *quare* action for damages was being brought to remedy what was at one and the same time an unlawful invasion of land, an asportation of chattels and personal violence. Ultimately splitting off as an action by itself to remedy violence to the person alone, it nevertheless continued to use the technicalities that had developed in the *quare* actions before there had been any differentiation into trespass *q.c.f.*, trespass *d.b.a.*, and trespass to the person—namely *vi et armis, contra pacem*, the set form of allegation of damages, the production of suit, and the denial of tort and force. But none of these had its origin in the appeal of felony.

\(^1\) (1256) *N. A. R.* 49, 64, 108.
\(^2\) *Registrum Brevium Originalium* (1687) f. 93.
\(^3\) Ibid. f. 93.
\(^4\) *Coram Rege Roll of 1297*, supra note 28, 6, 8.
\(^5\) It must be remembered that civil actions for damages contained allegation of beating, wounding and maltreating. *Supra* note 112.