# F. W. Maitland:
# The Forms of Action at Common Law (1909)

I propose to begin by speaking briefly of the Forms of Action, with especial relation to those which protected the possession and ownership of land. It may---I am well aware of it---be objected that procedure is not a good theme for academic discussion. Substantive law should come first--adjective law, procedural law, afterwards. The former may perhaps be studied in a university, the latter must be studied in chambers. As to obsolete procedure, a knowledge of it can be profitable to no man, least of all to a beginner. With this opinion I cannot agree. Some time ago I wished to say a little about seisin, which still, with all our modern improvements, is one of the central ideas of Real Property Law; but to say that little I found impossible if I could not assume some knowledge of the forms of action. Let us remember one of Maine's most striking phrases, "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." [Maine, *Early Law and Custom*, p. 389]. Assuredly this is true of our real property law, it has been secreted in the interstices of the forms of action. The system of Forms of Action or the Writ System is the most important characteristic of English medieval law, and it was not abolished until its piecemeal destruction in the nineteenth century.

What was a form of action? Already owing to modern reforms it is impossible to assume that every law student must have heard or read or discovered for himself an answer to that question, but it is still one which must be answered if he is to have more than a very superficial knowledge of our law as it stands even at the present day. The forms of actlon we have buried, but they still rule us from their graves….

Let it be granted that one man has been wronged by another; the first thing that he or his advisers have to consider is what form of action he shall bring. It is not enough that in some way or another he should compel his adversary to appear in court and should then state in the words that naturally occur to him the facts on which he relies and the remedy to which he thinks himself entitled. No, English law knows a certain number of forms of action, each with its own uncouth name, a *writ of right*, an *assize of novel disseisin* or of *mort d'ancestor*, a *writ of entry sur disseisin in the per and cui*, a *writ of besaiel*, of *quare impedit*, an *action of covenant, debt , detinue, replevin, trespass, assumpsit, ejectment, case*. This choice is not merely a choice between a number of queer technical terms, it is a choice between methods of procedure adapted to cases of different kinds. …

Each procedural pigeon-hole contains its own rules of substantive law, and it is with great caution that we may argue from what is found in one to what will probably be found in another; each has its own precedents. It is quite possible that a litigant will find that his case will fit some two or three of these pigeon-holes. If that be so he will have a choice, which will often be a choice between the old, cumbrous, costly, on the one hand, the modern, rapid, cheap, on the other. Or again he may make a bad choice, fail in his action, and take such comfort as he can

from the hints of the judges that another form of action might have been more successful. The plaintiff's choice is irrevocable; he must play the rules of the game that he has chosen. Lastly he may find that, plausible as his case may seem, it just will not fit any one of the receptacles provided by the courts and he may take to himself the lesson that where there is no remedy there is no wrong.

[The Action in Debt]

An action for a fixed sum of money due for any reason….

Its first and chief use was for the recovery of money lent---a sense in which the word "recovery" is still used. The difference between *commodatum* and *mutuum*---the loan to be returned and the loan to be repaid---was hardly seen. It is hardly seen today by the vulgar. "My money at the bank", is a phrase in common use. Another use of the action of debt was for the recovery of the price upon a sale, and another the recovery of rent due. There were other *causae debendi*, and gradually the progress towards generalization got to be expressed in the phrase that debt would lie for a fixed sum of money if there were a *quid pro quo* or, later, if there were "consideration". Thus Debt originally conceived as recuperatory, like Detinue, becomes capable of being used for the enforcement of contracts of sorts. One limitation, however, remained---the untranscendible limit---the claim must be for a fixed sum. Debt cannot be used to obtain compensation for breach of contract. And, further, debt can always be met by wager of law, which becomes more and more absurd. It is never forgotten that the action of debt is not necessarily based on contract---it serves for the recovery of statutory penalties, of forfeitures under by-laws, of amercements, and of monies adjudged by a court to be due….

*Covenant.* This actlon is also an old one. Its writ directs *quod conventio teneatur*. The earliest use of the action is for the protection of the termor; at one time it is the lessee's only remedy. It early sends off a branch which is reckoned a real action because land is recovered [This action of Covenant Real was abolished in 1833], in other cases the action results in money being obtained. It appears for a time as if covenant might be of general use wherever there is an agreement (*conventio*), might become, in fact, a general action for breach of contract; but the practice of the thirteenth century decides that there must be a sealed writing. A sacramental importance was attached to the use of the seal---*collatio sigilli*---and it was finally adopted as the only acceptable evidence of a covenant. Thus we come to the English formal contract, the Covenant under Seal. One curious limitation appears, and is maintained until the seventeenth century; Covenant cannot be brought for the recovery of a debt, though attested under seal. This action remains useful but in its own narrow sphere.

**Lecture VI.**

*Trespass*. All the other personal actions branch out from one, namely Trespass. Trespass appears *circa* 1250 as a means of charging a defendant with violence but no felony. The writ, as we have seen, contains the words *vi et armis contra pacem*, the procedure is enforced by a threat of outlawry, imprisonment is resorted to by way of mesne process, and the vanquished defendant is punished for his offence. He is not merely in *misericordia*, he is liable to a *capias pro fine*. There is a trifurcation, the writ varying according as the violence is done (1) to land, (2) to the body, or

(3) to chattels. Speaking of trespass to land let us once more remember how trespass *quare clausum fregit* sends out the action for ejectment as a branch.

Trespass to the body (assaults and batteries) covered the whole ground of personal injury, and no great development was possible here. Trespass to goods, trespass *de bonis asportatis* is an action which results in damages, never return of the goods, for carrying goods off from the plaintiff's possession---and therefore the bailee can bring it [On this subject *See*: Holmes, *The Common Law*, *sub. tit.* Possession and Bailment]. …

Gradually during Edward III's reign we find a few writs occurring which in form are extremely like writs of trespass---and they are actually called writs of trespass---but the wrong complained of does not always consist of a direct application of unlawful physical force to the body, lands, or goods of the plaintiff; sometimes the words *vi et armis* do not appear. Sometimes there is no mention of the king's peace. Still they are spoken of as writs of trespass, they appear in the Chancery Register as writs of trespass, mixed up with the writs which charge the defendant with violent assaults and asportations. The plaintiff is said to bring an action upon his case, or upon the special case, and gradually it becomes apparent that really a new and a very elastic form of action has thus been created. I think that lawyers were becoming conscious of this about the end of the fourteenth century. Certain procedural differences have made their appearance---when there is *vi et armis* in the writ, then the defendant if he will not appear may be taken by *capias ad respondendum* or may be outlawed---this cannot be if there is no talk of force and arms or the king's peace. Thus Case falls apart from Trespass---during the fifteenth century the line between them becomes always better marked. In 1503 (19 Hen. VII, c. 9) a statute takes note of the distinction; the process of *capias* is given in "actions upon the case". Under Henry VIII Fitzherbert in his *Abridgment* and his *Natura Brevium* treats of the *Action sur la Case* as something different from the action of trespass---each has its precedents. …

*Case* becomes a sort of general residuary action; much, particularly, of the modern law of negligence developed within it. Sometimes it is difficult to mark off case from trespass. The importance of the somewhat shadowy line between them was originally due to the fact that where *vis* and *arma* were not alleged there was no imprisonment in mesne process, nor was the defeated defendant liable to the judgment *quod capiatur pro fine*….

Greater uniformity was introduced, partly by statute and partly by fiction, but still the distinction had to be observed. The plaintiff must sue either in case or in trespass, and upon the accuracy of his claim depended the success of his action. The well-known case of *Scott v. Shepherd* (2 W. Bl. 892 and 1 Sm. L.C.) turns upon this distinction, and is worth reading as illustrating the narrowness of the margin between the two. Even as late as 1890 parties in a case of wounding by a glancing shot fired from the defendant's gun are still arguing as to the appropriateness of trespass or case, the plaintiff contending, though without success, that in trespass negligence is immaterial and the defendant is liable for inevitable accident [*Stanley v. Powell*, 1891, 1 Q.B. 86]. In 1875 Lord Bramwell (then Bramwell B.), in the case of *Holmes v. Mather* [L.R. 10 Ex. 261], had explained the distinction thus:

"If the act that does the injury is an act of direct force, *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons no action is maintainable, though trespass would be the proper form of action if it were wrongful."

Sub-forms of Case become marked off, *e.g.* Case for negligence, for deceit, for words (slander and libel); but two great branches were thrown out which gain an independent life, and are generally important, *viz*. Assumpsit and Trover.

*Assumpsit.* The most curious offshoot of Case is Assumpsit and the great interest of this action lies in the fact that it becomes the general form by which contracts not under seal can be enforced by way of action for damages. Under the old law the contracts are formal, or "real", the form required being the instrument under seal, the bond or covenant, and the "real" contracts---the word "real" being used in the sense of general jurisprudence---are protected by Debt-Detinue without it being seen that contract is the basis. Gradually however within the delictual action of Case various precedents collect in which the allegation is made that the defendant had undertaken to do something and then hurt the plaintiff either in his person or in his goods by doing it badly---by misfeasance.

Further, an important element in this progress is the idea of breach of contract as being deceit---the plaintiff suffers detriment by relying on the promise of the defendant. This point is brought out by Ames in the Harvard Law Review [2 *H.L.R.* pp. 1 & 53] in two masterly articles which should be read at length.

The having undertaken (*assumpsit*) to do something, makes its appearance as part of the cause of action in various writs upon the case. Thus we find an early group of cases, from Edward III's reign, in which the plaintiff seeks to recover compensation for some damage done to his person or goods by the active misconduct of the defendant, but still the defendant cannot be charged with a breach of the peace, as the plaintiff has put his person or his goods into the defendant's care. The defendant, for example, is a surgeon, and has unskilfully treated the plaintiff or his animals so that he or they have suffered some physical harm. In such cases we find an assumpsit alleged. It is necessary to allege that the defendant undertook the cure---had it not been so, according to the notions of the time, it might well have been urged that the harm was occasioned by the plaintiff's own folly in going to an inexpert doctor. A little later, in the fifteenth century, we have actions against bailees for negligence in the custody of goods intrusted to them, and here also it was necessary to allege an assumpsit. Again, there is another class of cases in which an undertaking is alleged---a seller has sold goods warranting them sound, and they have turned out unsound; the cause of action is regarded not as breach of contract, but as deceit. Thus in divers directions the law was finding materials for a generalisation, namely, that breach of an undertaking, an assumpsit, for which there was valuable consideration was a cause of action.

Gradually the line between mis-feasance and non-feasance was transcended, and gradually lawyers awoke to the fact that by extending an action of tort they had in effect created a new action by which parol contracts could be enforced. It is, I think, about the beginning of the sixteenth century that they begin to regard Assumpsit as a different form from Case, a form with precedents of its own and rules of its own. Then begins a new struggle to make Assumpsit do the work of Debt. Plaintiffs wish for this result because they desire to avoid that wager of law which is allowed in Debt, and defendants may fairly argue that according to the law of the land they are entitled to this ancient mode of proof. Professor Ames's article gives the stages of this struggle. Through the sixteenth century, an actual express agreement alone gives rise to Assumpsit, and therefore if Assumpsit is to be used to enforce a debt, for example for the price of goods sold and delivered, a new promise---a promise to pay that debt---must be alleged and proved. However, in

1602, *Slade's case* (4 Rep. 92b) decides that Assumpsit may be brought where Debt would lie, and thenceforth Assumpsit supplants Debt as a means for recovering liquidated sums. In that case such a new promise had been alleged and the jury by a special verdict had found the bargain and sale to be proved but that "there was no promise or taking upon him, besides the bargain aforesaid" [Rep. IV. 92a]. Upon this finding the case was argued in the King's Bench and the action in Assumpsit was held to lie, the Court resolving that "Every contract executory imports in itself an assumpsit, for when one agrees to pay money or to deliver anything, thereby he assumes or promises to pay or deliver it" [Rep. IV. at p. 94a]. Thenceforth the proof of the new promise becomes unnecessary. This form of Assumpsit takes the name of *Indebitatus Assumpsit*.

Some seven years later we have this action extended from cases of express executory contract to cases where the original bargain was an implied contract, in the sense that a contract is really to be implied from the facts of the case, for example, cases of actions for *quantum meruit.*

Lastly, at some date between 1673 and 1705, *Indebitatus Assumpsit* is extended to actions upon Quasi-Contracts in which the element of contract is purely fictitious.

As we have already seen, this action of Assumpsit, which at least seems to us as of delictual origin, becomes the general mode of enforcing contracts even when a sum certain has to be recovered, and thus Assumpsit becomes a rival to and a substitute for Debt in which latter action the defendant may still wage his law.