

Chapter 4

Detinue, Trover and Conversion

J Randall & B Edgeworth

Introduction

In early medieval times the law of torts (as we now know it) was notoriously dominated by the forms of action. Trespass, for instance, focused on invasive interferences with land, the person and corporeal assets.¹ By contrast, the law had an entirely distinct conception of the mere detaining of property from the person entitled.² So, detinue emerged from debt in the 13th century, the law having then drawn no material distinction between a writ which required the sheriff to tell a defendant to hand over a sum of money, or a quantity of grain, or an animal of which he had “deforced” the plaintiff, and if not to come to court.³ As a writ offering the possibility of *in specie* recovery of the subject chattel, it had an obvious connection with the concept of proprietary rights. Hence Fifoot’s well made observation that the medieval writ of detinue “lay across the categories of modern analysis, and to force it into one or other of them is to be guilty of anachronism”.⁴

By about the middle of the 14th century, however, the action of trespass on the case had become established.⁵ Under it, a plea of some harm suffered by the claimant, and caused by some wrongful conduct of the defendant, could succeed without the way in which that harm had been brought about first having to be artificially re-stated so as (apparently) to fit into the straight-jacket of one of the established forms of action. It enabled judges to award compensatory damages “where harm had been caused in circumstances where the conduct of the authors of the harm had been sufficiently reprehensible to require the conclusion that

1 Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP, New York, 1999), 97.

2 Pollock, *The Law of Torts* (Stevens & Sons, London, 1887), 284.

3 Milsom, *Historical Foundations of the Common Law* (2nd ed, OUP, Oxford, 1981), 262-265.

4 Fifoot, *History and Sources of the Common Law: Tort and Contract* (Stevens, London, 1949), 25.

5 Though its origins go back earlier – see, for example, Bracton, *Treatise on the Law of England* at f 1b (Kiralfy, *A Source Book of English Law* (London, Sweet & Maxwell, 1957), 138).

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