

had alleged in his declaration that the defendant 'took toll', he might have had a general writ of 'cepit et asportavit' his corn, with force and arms; and that he was not entitled to a special writ on the case. This objection was sustained by the court. However, a special writ in a similar case a short time afterwards was held good (*p*).

From all these instances it will be seen that the procedure in Trespass on the Case was in a very immature and unsettled state in the reign of Edward III. It was not until the reign of Henry IV that the line of demarcation between trespass proper and trespass on the case was effectually established. In 12 Hen. IV, 3, in an action for stopping up a sewer, the distinction between the two remedies was drawn as follows: An averment of 'vi et armis' as to the stopping up of the sewer was good, because it was by force and so properly remediable in Trespass; on the other hand, the consequential damage, which was the gist of the action, was not recoverable in Trespass but required a special writ. The principle was then laid down that the *causa causans* might be forcible, as in the case then before the Court, and be declared 'vi et armis' even in an action upon the case; although that action is properly grounded upon the consequence of the *causa causans*.

The case last cited was based upon malfeasance, and although the gap between that and non-feasance in respect of a duty is ethically a narrow one, it was a long time before it was bridged in legal procedure. The lay mind sees little reason why a right arising from the doing of a wrongful act is enforceable, while one arising out of the breach of a promise to do a lawful act is not; but to the lawyer the distinction is wide enough to cut the province of civil remedies in twain. And so in the early history of Procedure the defendant was prone to present these troublesome questions to the plaintiff: "You say I am guilty of a trespass, what was my act of force? If I am liable upon a promise, where is your covenant?" But with the evolution of Assumpsit from the action on the Case came the enforcement of simple contracts in the Superior Courts of Common Law.

In the transition period between Case and Assumpsit we find, in 19 Henry VI, 49, pl. 5, the report of an action curiously