PERSONAL ACTIONS REVISITED

1. Property, tort and contract in modern legal thought
   a. Property
      i. Real (land)
      ii. Personal (watches, money)
   b. Tort
      i. Intentional (assault, punch in the nose)
      ii. Negligence (auto accidents)
   c. Contract: enforceable agreements, normally involving a promise for a promise
2. Trespass takes over (dates approximate at best)
   a. 1300—debt, detinue, covenant, account, and trespass *vi et armis*
   b. 1350–80—trespass *vi et armis*—>action on the case
   c. 1500—action on the case in *assumpsit* substitutes for covenant
   d. 1550—trespass *vi et armis* in ejectment substitutes for real actions
   e. 1600 (or slightly earlier)—action on the case in trover substitues for detinue
   f. 1600—action on the case in *assumpsit* substitutes for debt
3. Developments discussed the week before last:
   a. The emergence of the action on the case, in which the plaintiff is allowed to tell a story in the central royal courts that does not involve force and arms or against the peace, but lays out in the whereas clause a duty that the defendant is alleged to have breached.
   b. By the end of the 14th century it seems clear that this action on the case will be allowed in a wide variety of situations in which the defendant has undertaken to do something and does a bad job, so that the plaintiff is in some way damaged: the ferryman, the blacksmith, the surgeon, and the horse-doctor.
   c. We also saw one case quite early on (1368), where the defendant had done nothing at all and was still held liable, but that was said to be according to the custom of the realm. *The Innkeeper's Case*.
   d. By the end of the 15th century, it has become clear that if I suffer damage because someone has promised to do something for me and doesn't do it, I can bring an action on the case called *assumpsit* against him. The example frequently given is the carpenter who agrees to put a roof on the barn and doesn't do so, so that the crop is lost. *Dictum in Gray's Inn.* The *Dictum* also marks the end of the argument that covenant is the only remedy for an unperformed agreement.
   e. By the end of the 16th century, it has become clear that if I lend money to someone and he doesn't pay it or deliver goods on a sale to someone and he hasn't paid for them, I can bring an action of *assumpsit* against that person, and need not bring the action of debt against him. *Slade's Case.*

4. Do these developments give us a system that corresponds to the modern notions of property, tort, and contract?

   a. Where's property?

      i. Ejectment substitutes for the real actions in the 16th century

      ii. Hints of a distinction between property in chattels and contract in mid–13th century, when the action of detinue, which had originally been a part of the action of debt begins to be thought of in somewhat different terms from debt. Something like the modern distinction seems to emerge in the mid–15th century, when the courts begin to distinguish between two sorts of counts in detinue actions: detinue sur bailment and detinue sur trover. Interestingly enough, the element of obligation returns when the action on the case for trover substitutes for detinue sur trover in the 16th century.

   b. The temptation to think that we have a general contractual action after *Slade's Case* is strong. If we do, *Slade's Case* has virtually nothing to do with it. *Slade's Case* is about the substitution of *assumpsit* for debt, and debt is about money obligations that arise out of partially performed contracts. The last lecture in the course will deal with this problem.

   c. That brings me to the problem of tort. The problem can be stated quite simply. There are two writs, trespass *vi et armis* and case. In the situation where there is no undertaking, no common calling, and no possibility of proceeding under the statute of Labourers, what are the limits on the wrongs that are actionable under either form, and granted that the wrong ought to be actionable, what is the appropriate writ? I'd like to get at that by focusing on *Burden v. Burton*.

5. *Berden v. Burton* (1382, *Mats.*, VII–24): "A man brought a writ of trespass against Davy Houlgrave and Thomas de Burton and twelve others for his house burnt and broken, his servants beaten and maltreated, twelve oxen and a hundred sheep taken and driven off, and other goods and chattels taken and carried away, and other wrongs etc., to his damage etc. …

   "And as to the arson of the houses, the defendants showed how after the distress, which was taken in the morning, some of the servants came after the defendants, and others remained inside the manor; thus the burning which was done was by reason of the negligence of the servants inside, who should have watched the fire. And they asked judgment whether etc. And he also showed the court that he came at the third hour with the constable of the town without any more people.

   Holt (for the plaintiff). We say that they came with a great assembly and multitude of armed men and entered the manor and in the morning before sunrise, broke the doors and then entered the hall and threatened the servants, with the result that the servants were in fear of death and let the fire lie unattended and did not dare to return. Thus it was the fault of the defendants that the manor burned. And we ask judgment etc.

   "*Burgh*. Now we ask judgment on the writ, for you notice how they have alleged by their writ how we burned their house in fact, and now they have pleaded nothing on that point but show how we were the cause of the burning, in which event they ought to have had an action on their case and not this action. And we ask judgment etc., upon their admission etc.

   "BELKNAP, C.J. I also believe that the writ is improperly framed, for you ought to have brought your special writ upon your case, since it was not their intention to burn them, but the burning happened by accident. Even though it stemmed from their act, still it was done against their

will. It is as if you broke my close and entered therein, and my animals went away through this opening and fled, so that I lost them forever; while you know nothing of this, I shall never have a writ of trespass against you alleging that you drove off my animals, but I really think that I shall have a general writ of trespass for breaking my close, with no mention of the driving away of the animals, and everything will be accounted for in the damages for the breaking of the close, for by the breaking of the close all the damage occurred and has been fully effected. And, furthermore, if you break my houses, and you go away, and then other strangers carry off my goods without your knowledge, I shall have a writ of trespass against you for the breaking into my houses etc. and recover everything in damages, as above. But, if you should be knowledgable or plotting or willingly present when the trespass is done, you shall be adjudged a principal feasor, for in trespass no one is an accessory etc.

"And then *Holt* said that they came in the morning with certain assemblies of people, as above, and broke the doors and entered and took some straw and fired it in order to see around them, and the straw, while afire, threw sparks on the ground. Thus they burned etc.

"BELKNAP, C.J. Now you are speaking to the point, for by the firing of the straw the houses were burned; thus they are as principal feasors. And then a day was given, as above.

"And in this case it was also agreed that if your house be next to my house and my house is burned and your house as well by the accident of my house, you shall never have a writ against me alleging that I have burned your house, but rather a special writ upon your case. And, also, if I lie in your house and place a candle on the wall, and the candle falls on the straw, so that your house is burned, you shall have a special writ.

"And later the parties reached an agreement etc."

6. *Anon.* (1436) (*Mats*, p. VII–31): "Trespass was brought by one R. on his case. And he counted that the plaintiff had bargained [to buy] certain land for a certain sum from the defendant, and he showed everything in detail, and that the covenant of the defendant was that he should cause strangers to make release to him within a certain time, and that they had not released; and so the action accrued to him.

"*Ellerker*. This action sounds in the nature of a covenant, wherefore he should have had a writ of covenant, and not this writ.

"*Newton*. In as much as you acknowledge the trespass and show no other matter, we demand judgment.

"*Ellerker*. It seems that your writ should abate, for various cases of a similar kind have been held as law before now. For instance, in the case where I make a covenant with a carpenter to make me a house within a certain time and he does not make me my house, I shall have no action except a writ of covenant. And the law is the same if someone takes it upon himself to shoe my horse and he does not do so, I shall have no other action but a writ of covenant if he does not do it, and if there is no specialty, the action fails. So here, he has taken it upon himself to cause strangers to release, which is a covenant, and it is set out that he has not released, which is nothing but a covenant broken. So it seems that the writ should abate.

Newton thought the contrary, and that the writ is good. I agree well that the case of the carpenter which *Ellerker* has put is law; but if a carpenter makes a covenant with me to make a house good and strong and of a certain form and he makes me a house which is weak and bad and of another form, I shall have a good action of trespass on my case. So, too, if a farrier

covenants with me to shoe my horse well and compentently and he shoes it and injures it with a nail, I shall have a good action on my case. So, too, if a leech takes it upon himself to cure me of my maladies and he gives me medicines but does not cure me, I shall have a good action on my case. Again, if a man makes a covenant with me to plough my land at a seasonable time and he does so at an unseasonable time, I shall have an action on my case. And the reason in all these cases is that there is an undertaking and a matter in fact beyond that which sounds in covenant. So it is in the case at bar, he has taken it upon himself that a stranger shall release to the plaintiff, which is an undertaking, and, inasmuch as this has not been done, the plaintiff has tort [perhaps meaning 'has been wronged'], as in the cases before rehearsed.

"PASTON, J. thought the same. As to what has been said, that, if the carpenter takes upon himself to make me a house and does not make it, I shall not have an action on my case, I say, Sir, that I shall. And, Sir if a hostler or a farrier makes a covenant with me to shoe my horse and he does not do it, so that when I go on my way and my horse has no shoes and is lost for lack of shoes, I shall have an action on my case. And if you, who are serjeant at law, take it upon yourself to plead my cause and do nothing--or do something otherwise than I have told you--whereby I suffer loss, I shall have an action on my case. So it seems to me that in the case at bar the writ is good.

"JUYN, J. thought the same. As PASTON has said, if the farrier does not shoe my horse, I shall have an action against him as much as if he had shod him and injure him with a nail. For all this [referring to the injuring of the horse?] is dependent upon the covenant and accessory to it, and, since I have an action for what is only accessory, so I shall also have an action for the principal.

"PASTON, J. That is very well said."

LANCASTRIAN, YORKIST, AND EARLY TUDOR CONSTITUTIONS

Kings: England	Battles
Henry IV — 1399–1413	Shrewesbury — 1403
Henry V — 1413–1422 (age 35)	Agincourt — 1415
Henry VI — 1422–1461, 1470–1471	Treaty of Troyes — 1420
	Orléans — 1429
	Loss of France — 1449–53
Edward IV — 1461–1470, 1471–1483	Towton — 1461
Edward V — 1483	
Richard III — 1483–1485	Bosworth Field — 1485
Henry VII — 1485–1509	
Henry VIII — 1509–1547	

I. PORTRAITS OF KINGS

1. Richard II
http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/Ric2WestmPortrait.jpg

http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/WiltonDipLeftPanel.jpg
http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/WiltonDipRightPanel.jpg
http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/WiltonDipShield.jpg
http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/WiltonDipWhiteHart.jpg

2. Richard III http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/Ric3.jpg

3. Henry VII http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/Hen7.jpg

4. Henry VIII
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http://www.law.harvard.edu/faculty/cdonahue/courses/ELH/slides/Hen8copyOfMural.jpg

II. FROM 1399 TO 1461

1. Our chronology (p. VI–45) reflects the inescapable influence of Shakespeare and the Tudor view of history.
   a. The traditional view: the 100 years war was followed by the Wars of the Roses, which ended at Bosworth Field in 1485 with the glorious accession of the Tudors and the end of the Middle Ages.
   b. There is no doubt that Henry IV needed all the support he could get.
   c. Henry V's French adventures cost him dearly financially.
   d. The loss of France was probably inevitable.
   e. The Wars of the Roses are largely the invention of the Tudors.
   f. All this would tend to suggest that if we are dividing, then 1461 ought to be our dividing point.

2. Three themes:
   a. Perhaps because the Tudor history focused on the problem of the succession, modern historians have a tendency to downplay its importance.
   b. The council must be an important institution at the times of minority or insanity of the king. What recent work has tended to show is that the council is also important in at least some of the periods when the king is strong.
   c. Indentures and retainers.

3. Two largely incremental changes in English institutions:
   a. In the first half of the 15th century control of the Chancery comes to rest first in the council and the privy seal and then in those who possess the signet and the way is paved for the reforms of Thomas Cromwell in the reign of Henry VIII.
   b. We noted that Edward III had experimented with chamber finance. Richard II did not, nor did the Lancastrians. We will see when we return to the topic that in the second half of the 15th century there was a return to the practice of chamber finance. Edward IV, Richard III, Henry VII had increasingly tight control over finances through the Chamber. Again the final reform comes under Cromwell with the reform of the Exchequer and the rise of the Privy Council.

III. FROM 1461 TO THE REFORMATION PARLIAMENT (1529–36)

1. The danger of rebellion did not stop at Towton. But from 1471 to his death in 1483, Edward IV was solidly in control.
2. In April of 1483 Edward IV died young. In June, his brother Richard usurped the crown. In 1485, Henry Tudor (who claimed through the Beauforts), won a great victory at Bosworth field. In 1486 Henry married Elizabeth of York, Edward IV's daughter, thus uniting Lancaster and York.
3. The problem of the succession, however, did not end there.
4. So many had lost their lives or had been attainted during the 15th century that Henry VIII had the opportunity to create a virtually new higher nobility. His father, Henry VII, made use of a wider circle of advisers.
5. The first European power to take the Tudors seriously was Spain.
6. Henry VIII's foreign ventures.
7. The period from 1515 to 1529 was the period of the ascendancy of Cardinal Wolsey.
8. We have already said that from Edward IV on we have an increasing trade and prosperity. There was also, beginning in 1500, a truly phenomenal inflation. The causes of this are once more in dispute.
9. Officially Protestantism begins in the late 16th century. Most modern historians regard Henry VIII's break with Rome as a schism rather than as an open espousal of Protestantism. We will have a later lecture on the religious changes of the 16th century.