TORT AND CONTRACT

1. Property, tort and contract in modern legal thought
   a. Property
      Real (land)
      Personal (watches, money)
   b. Tort
      Intentional (assault, punch in the nose)
      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 this week:
   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.*
   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?

Ejectment substitutes for the real actions in the 16th century

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* (1602) 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? That is the topic of *Berden v. Burton* that you discussed in section.

d. On Wed. we talked about the development of assumpsit into an action that encompassed all of what we call contract. There seem to be the following markers along the road

   Ferrers v. Dodford (1307), *Mats*, p. VII-18: "whereas lately the king had by his letters ordered his beloved and faithful John de Ferrers to come quickly to him with horses and arms on his Scottish expedition to assist him with his aforesaid expedition and the same John, getting ready to come to the aforesaid parts, had bought at Dodford a certain horse for a certain great sum of money from the aforesaid John, vicar of the church of Dodford, trusting in the same John's words, for he put that horse up for sale under guarantee, affirming by corporal oath taken at Dodford before trustworthy men that the same horse was healthy in all its limbs and unmaimed."

   Humber Ferryman (1348), *Mats*, p. VII-19: "John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B. upon Humber had undertaken to carry his mare in his boat across the River Humber safe and sound, and yet the said [Nicholas] overloaded his boat with other horses, as a result of which overloading his mare perished, wrongfully and to his damage." In that case, defendant's counsel argues: "We pray judgment of the bill, which suppose no wrong in us, but rather proves that he should have an action by way of covenant rather than by way of trespass." But the court says: "It seems that you did him a trespass when you overloaded your boat so that his mare perished. So answer."

e. How the action the case became pretty much a general contract action first by substituting for covenant in the fifteenth century and then by substituting for debt in the sixteenth.

   Fyneux (1499, *Mats.*, p. VII–35): "In Gray's Inn. Note, if a man makes a covenant to build me a house by a certain date, and does nothing about it, I shall have an action on my case for this nonfeasance as well as if he had built badly, because I am damaged by it: per FYNEUX. And he said that it had been so adjudged, and he held it to be law. It is likewise if a man bargains with me that I shall have his land unto me and my heirs for £20, and that he will make an estate to me if I pay him the £20, and he does not make an estate to me

according to the covenant, I shall have an action on my case and need not sue out a subpoena."

Slade's Case (1602, *Mats.*, p. VII-50): "Every contract executory imports in itself an assumpsit."

5. In all of the 14th-century cases that we looked at, however, except in the case of the innkeeper, the defendant did something and did a bad job. Or at least one could argue that he did, because in some of them it's not clear that he did anything at all. But not doing remains no trespass, except in the case of innkeepers — why? In the Year Books the movement away from the concept of not doing is no trespass comes in cases where there are
   a. Damages
   b. Deceit
   c. Disablement
   d. Advance payment
6. We spent some time on Wed. on *Anon.* (1436) (*Mats*, p. VII-31), where it seems to be decided that the plaintiff who has special damages as a result of the defendant's non-feasance can have an action on the case in assumpsit. Here's the case that involves disablement, which we only briefly covered on Wed.

   Doige's Case (1442, *Mats*., p. VII-32). This is a complicated case that eventually went to the Exchequer Chamber, an informal gathering of all the justices and and chancellor to resolve particularly difficult cases. We haven't got time for all the argumentation in the case (it's a great case to write a paper about if you want to try to get into the minds of 15th century lawyers), but the bottom line is fairly simple. Mrs. Doige (whose real name seems to have been Dodge) agreed to sell land to William Shipton. She didn't. She sold it to John Melbourne. The question is whether William can bring an action on the case against her when, after all, she just didn't do something.

   "NEWTON, CJCB. The defendant has disabled herself from keeping her covenant with the plaintiff because she has enfeoffed another and, moreover, the day has passed by which the feoffment should have been made. To what effect, then, would he have a writ of covenant, when the defendant cannot be held to any covenant with him, even if there was a specialty? (Implying that it would be pointless.) Now, when the plaintiff has made a firm bargain with the defendant, the defendant can demand the purchase price by a writ of debt, and in conscience and in right the plaintiff ought to have the land, even though the property cannot pass to him in law without livery of seisin. For it would be amazing law (*merveillous Ley*), then, if there should be a perfect5 bargain under which one party would be bound by an action of debt and yet be without remedy against the other. Wherefore the action of deceit well lies.

   "FORTESCUE, CJCR. If by a deed of indenture I lease land to a man for a term of years by deed indented and then I oust him within the term, and twenty years (say) after the end of the term he brings an action of covenant against me, the action lies well; and yet he cannot recover the term itself, but damages only. So in this case. And as to the argument that, because he has disabled himself from executing the covenant, the action of deceit lies, I will put you a case where the party has disabled himself and yet no action lies save covenant. For suppose I make a lease for a term of years to *Paston* [one of the justices], and then I lease the same land to *Godrede*,

[another justice] who goes into occupation: now I have disabled myself from giving *Paston* his lease, and yet he shall have only a writ of covenant against me.

"PASTON, JCB. Because a man can have a writ of covenant, it does not follow that he shall not have a writ of deceit; for perchance all the covenants are kept and yet he is deceived. For suppose a carpenter takes upon himself to make me a house of a certain length and width and height, which he does, but makes default in the joinery or some such thing, which is outside the covenant; now the action of covenant will be of no use to me because he has kept all the covenants, and yet I shall have an action of trespass on my case for his misfeasance. So here, though I can have a writ of covenant, yet, since she has disabled herself as aforesaid, I shall have deceit."

The answer seems to be that she did do something; she sold the land to John thus disabling herself from selling it to William. Despite Fortescue's misgivings, the court held that the action lay, and William recovered. One of the things that may be pushing the common-law courts here is that there is evidence the court in Chancery, which we'll get to in a couple of weeks, was beginning in this period specifically to enforce such promises.