CONTRACT AND TORT:
AN OVERVIEW OF 17TH AND 18TH CENTURY DEVELOPMENTS

I. CONTRACT

1. 19th century ideas of contract: the will theory and its relationship to economic liberalism

2. We last left contract at Slade’s Case (1602). Coke’s resolutions as interpreted by Baker (see Mats., pp. VII–48 to VII–49).
   a. You can bring assumpsit even if debt is available, the authority for this is other cases of duplication, e.g., assumpsit for covenant, trover for detinue, case for nuisance.
   b. Every contract executory imports in itself an assumpsit.
   c. If only the debt (as opposed to special damages) is sued for, the damages will be the same in either case—hence one action will bar the other (that may not be a resolution of Slade’s Case, but it is never again doubted)—hence debt on a contract is dead
   d. Problem of consideration not really considered—by 1612 the fictional promise has an equally fictional consideration—there is nothing in this case about a promise for a promise.
   e. Doesn’t say anything about quasi-contract.
   f. No discussion of indebitatus assumpsit because that was not what was pleaded and the contract was laid out quite specifically and so proven. General declarations not involved—the subsequent distinction between general and special assumpsit.
   g. Problems:
      Wager of law wasn’t all that bad
      The problem of the general pleading in assumpsit

3. Developments before and after Slade’s Case
   a. Slade’s Case and the problem of indefinite pleading
      indebitatus assumpsit — not enough notice
      the common counts: goods sold and delivered, goods bargained and sold, work done, money lent, money spent by plaintiff to defendant’s use, money had and received by defendant to plaintiff’s use, and money due on an account stated
   b. Slade’s Case and the problem of perjury—>the S/Frauds—a remarkable effort of the late 17th century involving both Nottingham (LC, 1675–1682) and Lord North (CJCP, 1675–1682), return of wager of law arguments, limitation of damages suggested (cf. continental parallels (legislation of Louis XIV)), the ultimate resolution is the Statute of Frauds, requiring a writing but not a seal for most important kinds of contracts.
   c. quasi-contract: (a) quantum meruit and quantum valebat counts rapidly become fictional, (b) fictional insumul computasset for customary payments, (c) money had and received for mistaken payments, but Holt (1689–1710) stops further developments here, (d) assumpsit for use and occupation (becomes a kind of quantum meruit, never allowed to substitute for ejectment), (e) money had and received in a rescission context develops after Holt’s time, (f) waiver of tort and suit in assumpsit (again money had and received), even Holt accepts this in the context of a tortious sale, (g) fictitious money had and received also allowed for
certain contribution situations, e.g., among co-sureties. Curiously in England the restitutionary actions died with the forms of action only to be revived quite recently. What happens in the 17th and 18th centuries has curious analogies to the S/Uses, people ask what could have been brought in debt prior to Slade’s Case, even though there is little evidence that these things ever were brought in debt.

d. Consideration, a 16th century story—merger of quid pro quo, action taken in reliance, civilian causa—the first clear promise for a promise cases do not come until shortly after Slade’s Case, but there are strong hints of it long before Slade’s Case.

e. Merger of warranty into the assumpsit action is a development just hinted at at the end of 17th c. (origins, as we have seen, in deceit).

f. Contract as we know it, offer and acceptance, covenants and conditions, general and special damages, is largely the creation of the late 18th and 19th centuries. The importance of Lord Mansfield and Continental law.

g. Is the will theory of contract the invention of 19th century liberalism? Atiyah thinks so. Baker has more doubts. In the case of both Atiyah and Horwitz for America both authors may put too much emphasis on the relatively few cases in which courts in our period were willing to examine into the worth of consideration. Leaving that mistake aside, the fact is that the number of reported cases of special assumpsit prior to Lord Mansfield is very small. The medieval idea of contract died hard, and if the current developments are any indication, it may not be dead yet.

II. TORTS

1. The 19th century settlement:
   a. Intentional torts
   b. Torts based on negligence
   c. Strict or absolute liability

2. Torts—we last left it some place in the 15th c. in order to pursue assumpsit. The word assumpsit continues to be used in tort actions and no consideration need be shown (16th c). Contract and tort are thus differentiated in one action, but they remain very close particularly in cases of trade and professional negligence.

2. The next development is somewhat surprising: the seeds that are sewn in the action on the case wither. The custom of the realm goes only so far: innkeepers, fire, that’s about it. Scienter goes only so far; animals account for most of the actions. It has recently been suggested that the courts were concerned with limiting the new action. Perhaps that is right. In any case people sue either in vi et armis (battery) or assumpsit.
   a. The Case of Thorns (1466) (Mats., p. IX-165) a mistaken attempt to plead accident. This clearly weren’t no accident.
   b. Weaver v. Ward (1616) (Mats., p. IX-165), a shooting accident case, again the plea of accident is offered and rejected with dicta about “inevitable accident.”
   c. We are still in world of pleading. If the defendant has a justification he can plead confession and avoidance. If his story is “not my fault,” he should plead not guilty. “Not my fault” is

3. *Mitchell v. Alestree* (1676) (*Sources*, p. IX-172) waiver of force and suit on the case for negligence. Lord Hale and breaking in horses in Lincoln’s Inn Fields. The case is pled in case and rejected at nisi prius on the ground that the horses were not badly controlled. But a new action is allowed on the ground that they were *improvide* brought into the fields. This may be the beginning of a generalized notion of negligence. It was certainly so seen at later times.

4. 18th century emergence of the reasonable man standard and the notion of duty of care. Also the continuing problem of trespass vs. case, culminating in *Scot v. Shepherd*, 2 Wm. Bla. (1773). *Williams v. Holland*, 10 Bing. 112 (1833) allows waiver of trespass and suit on case except where there is a direct, *willful* injury.

5. 19th century abolition of the forms of action and rearrangement according to the plaintiff’s fault

6. Meanwhile other torts are developing around other actions:
   a. Trover last of the great fictions parallels *assumpsit* in development, including a resolution around 1600 of the problem of concurrence of detinue and trover.
   b. Assize of nuisance and the action on the case for nuisance—same resolution at the same time as *Slade’s Case*—gradual development thereafter. Note this is the action for interference with easements. Lots of interesting smells cases in the 16th and 17th centuries. Private vs. public is, alas, also a distinction of this period.
   c. Defamation—the ecclesiastical courts—the 16th and 17th centuries and the *mitior sensus* rule—criminal libel is another story
   d. Economic torts—the most important one in our period is the public law story of the *Case of Monopolies*, 11 Co. Rep. 84 (1602) and the subsequent statute. Tortious interference with economic relations: loss of services of apprentices, wives and daughters, inducing breach of contract; unfair competition: commercial slander, misuse of trademarks, intimidation (a notion that will have unfortunate consequences in 19th century cases about trade unions)

7. It is a commonplace that English law knows no generalized conception of tort, only a law of torts (in the plural). In the 19th century the idea of intention/negligence/ultrahazardous came to develop a unifying capability. We are probably mistaken in seeing too much of this before the 19th century. Like the contract problem, it’s not that the roots of the 19th century development are not found in our period; they are. But if we look at the whole range of tort actions, their multiplicity strikes us. If in contract the old notion of contract lasted for a long time, in tort that old notion that not doing is no trepass lasted for a long time. The converse of this proposition is that if you did it, you’re going to have to show a pretty good reason why you did it, or persuade the jury. Relatively few direct inflictions of harm will escape going to the jury, practically no intentional inflictions of harm will escape going to the jury, except competition.