

# The Modern Laws of Both Tort and Contract: Fourteenth Century Beginnings?\*

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## I. INTRODUCTION – THE ACTION ON THE CASE

The title of my talk has a question mark at the end of it, but I hope that when you read it you thought that I must be mad. After all, surely the modern laws of both tort and contract go back further than that. How about the Code of Hammurabi? Or Cain's slaying of his brother Abel (Genesis 4)? Or Abraham's purchase of the field in Machpelah from Ephron the Hittite (Genesis 23)? Even if we confine ourselves to England after the departure of the Romans, I can hear arguments that both tort and contract are to be found in Aethelbert's Code in the early seventh century.<sup>1</sup> On the other side, I can hear someone say: 'You are quite wrong, Donahue. The modern law of tort and contract

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<sup>1</sup> See L Oliver, *The Beginnings of English Law* (Toronto: University of Toronto Press, 2002) at 60-81, for the text and translation, from which the relevance to 'tort' is obvious enough. For contract, see R L Henry, "Forms of Anglo-Saxon Contracts and Their Sanctions" (1917) 15:7 Michigan L R, (1917) 552-65, 639-56.

in the Anglo-American legal system goes back no further than the nineteenth century in the case of tort, perhaps to the mid-eighteenth century in the case of contract.’

I have to be careful. I have been working for some time on a large book that will appear in the Oxford History of the Laws of England, and my assignment is the years 1307 to 1399. Any historian who works on a particular period for a long time has a tendency to see his period as containing the origins of everything, both good and bad.

So what I want to do is tell you what happened in the fourteenth century that is relevant to the modern law of tort and contract, and let you make up your own minds.

Our knowledge of what happened in the fourteenth century has been revolutionized in my lifetime. In 1949—I was eight years old at the time—C. H. S. Fifoot, published a book called *History and Sources of the Common Law: Tort and Contract*.<sup>2</sup> It was largely a collection of reported cases, but it was accompanied by a commentary that made it clear that Fifoot thought that the origins of the modern law of tort and contract were to be found in the rise of the action of trespass on the case. That action first appeared in the central royal court shortly, as Fifoot saw it, before the last quarter of the fourteenth century. My argument is going to be that Fifoot, at least in some sense, was right about the general proposition: the origins of the modern Anglo-American law of tort and contract are to be found in the rise of the action of trespass on the case. However, he got many of the details wrong, and much of the last sixty-five years has been spent trying to get them right.

Fifoot’s first, and perhaps most fundamental mistake, was to focus on what seems to be the first mention in the Year Book reports of the action of trespass on the case, *The Miller’s Case* of 1367.<sup>3</sup> We get the impression that he thought that this was close to, or perhaps it was, the origin of that action. In *The Miller’s Case*, the plaintiff attempted to bring an action on the case against a miller who took some of the plaintiff’s grain as a fee for grinding it. The plaintiff claimed that he was entitled to have his grain ground for free. The court did not allow the action. One of the justices

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<sup>2</sup> (London: Steven & Sons, 1949).

<sup>3</sup> For the text of the Year Book case, see Appendix, no 1. So far as I am aware, the record in the case has not been found.

thought that a property-type of action was the appropriate one, another that the regular action of trespass was available.

The following year, 1368, sees the first Year Book report of an action on the case that is allowed to proceed.<sup>4</sup> The plaintiff brought an action against an innkeeper. Money had been stolen from the plaintiff's room in the inn while the plaintiff was away from the room. The innkeeper claimed that he had nothing to do with the loss of the money, but the court ruled for the plaintiff on a demur.

The proximity of these two cases allows us to imagine a process whereby lawyers were trying a new action, an action on the case, like trespass, but not quite the same thing. At first the court does not allow it, but finally it does, and a development that was to go on for centuries was started around this action on the case.

We might imagine such a process, but we would be wrong if we did so. Indeed, we should have known just on the basis of the report of *The Miller's Case* that this was not the first time that someone had attempted to bring an action on the case, or even close to the first time. If it had been, we would expect that the defendant would have argued, and the justices probably would have agreed, that no such action of trespass on the case existed. But that is not the argument that is made in the case. Both of the arguments in favour of denying the action in this case assume that there is such an action; the question is whether it is appropriate in this situation. The answer that the court gives is 'no'.

Research on the action on the case has proceeded in a number of directions. The first, and perhaps the most fundamental, was to ask what distinguished the action on the case from simple trespass. The answer to that question is complicated, and to some extent still controversial, but let me try to summarize what I think is the current understanding.

## II. THE ORIGINS OF TRESPASS

To begin with the action of trespass: are the origins of this action to be found in Anglo-Saxon times or in the mid-thirteenth century or in the eighteenth century? It depends on what you are looking for. If it is the notion of a legal wrong or the notion of the king's peace then look to

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<sup>4</sup> Appendix no 2.

Anglo-Saxon times. If it is the notion that trespass is a direct forcible injury to the person, or property in the possession, of the plaintiff (like assault or trespass to land), then look to the eighteenth century.<sup>5</sup> If it is a writ called ‘trespass’ that will be heard in the central royal courts, then look to the mid-thirteenth century.

The origins of the trespass writ in the central royal courts are obscure. At the beginning of the thirteenth century we find in the plea rolls actions like the following: ‘Walter de Grancurt brings a plea against Hugh de Polestead about why (*ostensurus quare*) he made his granddaughter a nun’.<sup>6</sup> What writ is this? It does not identify itself, and there was no writ in regular use in this period that contained the *ostensurus quare* formula. Obviously, however, someone had thought of the possibility of calling someone into the central royal courts to explain why he had done something.

The earliest examples of trespass writs in the registers of writs come from late in the reign of Henry III, between 1261 and 1272.<sup>7</sup> The classic form of the writ is as follows:<sup>8</sup>

The king to the sheriff, greeting. If A. shall give you security for pursuing his claim, then put by gage and safe pledges B. that he be before our justices at Westminster on the octave of St. Michael to show wherefore (*ostensurus quare*) with force and arms (*vi et armis*) he made an assault upon the same A. at N. and beat wounded and ill-treated him so that his life was despaired of, and other outrages there did to him, to the grave damage of the same A. and against our peace (*contra pacem*).

Other examples make clear that this writ was also available for trespass to land and trespass for taking or damaging personal property.

Part of the problem with finding the origins of the writ of trespass is the word.<sup>9</sup> The Latin *transgressio* becomes ‘transgression’ in English; the

<sup>5</sup> It is frequently said that this definition was not settled until *Scott v Shepherd*, 2 Wm Bl 892 (CP 1773), 96 Eng Rep 525 (KB 1773).

<sup>6</sup> D M Stenton, ed, *Pleas before the King or his Justices*, (London: Selden Society 1953) 187, no 2148 (Michaelmas 1199): ‘Hugo de Polstede [lessoniavit se] uersus Galterum de Grancurt de placito quare fecit neptem eius monialem per Robertum filium Ade’. I have imagined what was in the writ on the basis of the essoin roll. For the plea itself, see F Palgrave, ed, *Rotuli curiae regis* (London: Record Comm’n, 1835) 1:126-7.

<sup>7</sup> See G D G Hall, “Some Early Writs of ‘Trespass’”, (1957) 73 L Q Rev, at 67-73; G D G Hall, ed, *Early Registers of Writs* (London: Selden Society 87, 1970) at cix-cx.

<sup>8</sup> *Registrum brevium* (London 1687) fol 93 (the text dates from the 14th century).

<sup>9</sup> For what follows, see C Donahue, ‘The Emergence of the Crime-Tort Distinction in

French *trespas*, which is derived from the Latin *transgressio*, becomes *trespass* in English. These are generic words for ‘wrong’ or ‘sin’. None of them is confined to direct forcible injuries done with force and arms and against the peace of the king. ‘Forgive us our trespasses’ in the Lord’s Prayer, a translation that has been standard in English since the sixteenth century and which probably goes back to the fourteenth, is clearly referring to something broader than direct forcible injuries done with force and arms and against the peace of the king.

If we look to the mid-thirteenth century we see a bewildering variety of trespasses in the generic sense, but some more specific uses are reasonably clear:

A trespass may be felonious or non-felonious. (Non-felonious criminal trespasses will eventually be called misdemeanors.)

A trespass may be a plea of the crown or not. (If it is, it will usually be said to be with force and arms and against the peace of the king.)

A trespass may be prosecuted by public proceedings (indictment) or by private proceedings (appeal).

The *ostensurus quare* writ that emerged in the central royal courts in the mid-thirteenth century picked up characteristics of all three dichotomies. It was a private proceeding for a non-felonious plea of the crown. How this happened is anything but clear, but procedure may show the way, for we hear of yet a fourth distinction: A trespass in the generic sense may be either an appeal of felony or an appeal of trespass.

Appeals of felony were already on the decline, being forced out by the increasing use of indictment. Appeals of trespass proliferated. If they were for pleas of the crown, they had to be heard in the central royal courts because clause 24 of Magna Carta says that the sheriff cannot hear pleas of the crown. If they were not pleas of the crown, they might be heard by the sheriff in the county court, and we suspect that they normally were, unless they were heard in some even more local court.

This should make it clear that a great deal of legal history on this topic is wrong. What looks like a development of ideas in the mid-fourteenth century, when the requirement of force and arms was dropped in the action on the case, is in fact a jurisdictional shift, and the origins of the

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England”, in W C Brown & P Górecki, ed, *Conflict in Medieval Europe: Changing Perspectives on Society and Culture* (Ashgate: Aldershot, 2003) at 219–28.

idea of wrongs by nonfeasance, negligence, or even just caused indirectly, must be found, if at all, in the local courts.<sup>10</sup>

In the last years of Henry III *contra pacem* writs and bills usually alleging *vi et armis* and, if successful, leading to damages begin to appear in large numbers in the central royal courts. As we just suggested, the decline of the appeal of felony may have something to do with it. The disturbances of the Barons' Wars may also have something to do with it. The Statute of Gloucester of 1278 limits trespass in the central royal courts to matters where the damages were more than 40 shillings.<sup>11</sup> There are also some trespass writs that get central royal court jurisdiction other ways. There are special writs for failing to repair of dikes (the rivers are the king's highway) and for breach of market franchises (the king gave the franchise).<sup>12</sup> In all of these writs there is a criminal element: the general issue is 'not guilty', the defendant was arrested (a process known as *capias*): (1) to reply to the writ, (2) to hear the judgment, and (3) to pay the judgment. If he defaulted, he could be outlawed.

### III. TRESPASS IN THE FIRST HALF OF THE FOURTEENTH CENTURY

Trespass in the first half of the fourteenth century presents a number of puzzles. Let us take a look at a couple of cases:

*Ferrers v. Dodford* is a 1307 case on the plea rolls of King's Bench.<sup>13</sup> It tells us that John vicar of Dodford was attached to answer the following bill: 'whereas lately the king had by his letters ordered his beloved and

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<sup>10</sup> Fundamental to our understanding of this development is S F C. Milsom, 'Trespass from Henry III to Edward III' (1958) 74 L Q Rev at 195-224, 407-36, 561-90, *reprinted* in Milsom, *Studies in the History of the Common Law* (London: Hambledon Press, 1985) 1-90. See also the same author's *Historical Foundations of the Common Law*, 2d ed (London: Butterworth-Heinemann, 1981) at 283-313. Robert Palmer's, *English Law in the Age of the Black Death: 1348-1381* (Chapel Hill: University of North Carolina Press, 1993) at 139-293, challenges Milsom's account in a number of ways. This is not the occasion to explore the details of the disagreement. We will say something about their varying explanations of the rise of the action on the case below, text at notes 23-25.

<sup>11</sup> Statute of Gloucester, 6 Edw I, c 8 (1278).

<sup>12</sup> See Palmer, *supra*, note 10, at 283-93, 395-407.

<sup>13</sup> Appendix no 3.

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'. The horse collapsed in the next town, and by the time that Ferrers got to Scotland the war was over.

In 1348, in the case of the *Humber Ferryman*: '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'.<sup>14</sup>

These cases illustrate the royal interest. It is obvious in the case of *Ferrers v. Dodford*. In the case of the *Humber Ferryman*, it lies in the fact that River Humber is part of the king's highway. These cases also illustrate the fact that a contract action will eventually emerge out of the trespass action. Today, *Ferrers v. Dodford*, would probably be brought as a contract action, and the *Humber Ferryman* certainly could be.

Things are not always what they seem to be:

In *Brainton v. Pinn* in 1290, plea roll entries record the bill: 'Why they burnt the houses of Walter at Howley and his goods and chattels to the value of 200 pounds'.<sup>15</sup>

Then they give us the plaintiff's count: 'By their foolishness and lack of care and through a badly guarded candle they burned the aforesaid houses, along with all his goods'.

Then they give us the defendants' plea: 'If any damage happened to the houses and other goods of that Walter through fire or other means, that was by accident and not by any lack of care or wickedness on their part'.

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<sup>14</sup> Appendix no 4.

<sup>15</sup> Appendix no 5.

Finally, quite unusually, they give us a detailed jury verdict: The steward of the plaintiff did not let the defendants put out the candle before they went to bed, and when they woke up the bed was in flames.

What looks at first like a case of arson turns out to be a case about who was responsible for a candle that fell into hay with disastrous consequences.

In *Rattlesdene v. Grunston* in 1317, the plaintiff's count alleges that: 'The defendants drew out a great part of that wine from the aforesaid tun . . . with force and arms, to wit, swords and bows and arrows etc., and filled up that tun with salt water in place of that wine thus drawn out, whereby the whole of the aforesaid wine perished etc.'<sup>16</sup>

Here a case of commercial fraud is being made to look like trespass *vi et armis*.

Both *Brainton* and *Rattlesdene* illustrate how allegations of force and arms can be a mask for quite different problems. But few cases give us this much detail. Most give us the common form of the writ and count followed by a plea of not guilty, with the jury coming up with an equally blank verdict of 'guilty' or 'not guilty', with an assessment of damages if the plaintiff is successful. Occasionally, as in *Brainton* and *Rattlesdene*, we can see what is really going on.

Here are some more such cases:

In 1348, in an action for battery and false imprisonment, defendants, who say they are plaintiff's kin, admit that they shut him up and beat him: he was having a fit, and this was the treatment.<sup>17</sup>

Beginning in the 1340s there are a large number of cases in which various people are accused of having murdered horses.<sup>18</sup> That seems odd, until we look at the names of the defendants: They are Ferrer in French, or Faber in Latin, or Smith in English. The words all mean the same thing. These are blacksmiths who were shoeing horses and botched the job.

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<sup>16</sup> Appendix no 6.

<sup>17</sup> Appendix no 7.

<sup>18</sup> See Palmer, *supra*, note 10, at 364-5.

#### IV. THE RISE OF THE ACTION ON THE CASE – TORT

By mid-century it seems that the jurisdictional distinction between actions done with force and arms and against the peace and those that are not is breaking down.

In the *Farrier's Case* in 1372: 'Trespass was brought against a farrier for that he had lamed his horse, and the writ contained the words 'Why he fixed a nail in the foot of his horse in a certain place by which he lost the profit of his horse for a long time, etc.'<sup>19</sup>

Counsel for the defendant argues: 'He has brought a writ of trespass against us and it does not contain the words *vi et armis*: judgment of the writ'.

The Chief Justice replies: 'He has brought his writ on his case (*en son case*) so his writ is good'.

Counsel for the defendant persists: 'The writ should say *vi et armis* or "he wickedly fixed it," and it has neither the one nor the other: judgment. Also he has not supposed in his count that he bailed us the horse to shoe; so otherwise it should be understood that if any trespass was done, it should be against the peace; wherefore judgment'.

'And then', the reporter tells us, 'the writ was adjudged good, and issue was joined that he shod the horse, without this, that he lamed it, etc.'

Not all the features of the later action are here (which is probably why this case is reported),<sup>20</sup> but it soon becomes clear that in the action on the case there will be no *capias* or outlawry. The action is an action on the special case with a 'whereas' (*cum*) clause, the essential purpose of which is to lay out some duty. We still have a way to go but the course is set.

In *Berden v. Burton* in 1382, a case that deals with the line between trespass and case, every possible standard of liability is mentioned: absolute liability, negligence, direct vs. indirect injury, intentional vs. accidental injury, proximate vs. remote cause.<sup>21</sup> Someplace in here lie the lines between trespass and case and between case and no liability. No conclusion is reached in *Berden*, but these fourteenth-century justices and

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<sup>19</sup> Appendix no 8.

<sup>20</sup> Palmer's explanation (*supra*, note 10, at 226) that this case involves a change in the form of writs for such cases is plausible.

<sup>21</sup> Appendix no 9.

counsel clearly saw what the possibilities were. No conclusion was reached until the nineteenth century; some would argue that we have not reached one yet.

At least by 1390, a final step in the process so far as tort was concerned seems to have been reached.<sup>22</sup> In an anonymous case, the plaintiff attempted to bring an action of trespass where he had bailed his horse to a man and his wife, and the horse died in their custody. Counsel for the defendant argues that only the action on the case is appropriate in such circumstances. Counsel for the plaintiff seems to have agreed; he asked for, and got, permission to settle the case.

What is going on here, or to put the question another way, why did this happen?

Once it became apparent, that we are not dealing with a sudden discovery in the middle of the fourteenth century that one could commit a wrong by some means other than punching someone in the nose, it seemed that procedural reasons were likely to provide a clue as to why the development occurred. One suggestion was that the forty-shilling minimum for damages in trespass became less and less significant as forty shillings came to be less and less valuable. The problem with this explanation is that it fits uneasily with the date of these developments. The mid-fourteenth century was, if anything, a deflationary time, not an inflationary one.

Certainly a contributing factor, if not the total cause, is that the county court declined over the course of the fourteenth century. Various reasons have been suggested for what seems to be a fact. It is possible that the county court became more and more political, and, hence, plaintiffs became dissatisfied with the quality of the justice that they were getting there. There may be something to this as an explanation for the rise of the action on the case. I rather doubt that there is much to it. The vast majority of trespass cases were decided by local juries, and the sheriff, who was the chief officer of the county court, was also responsible for empanelling juries. This was a political problem, but it was not a problem that one could avoid by bringing one's case in the central royal courts.

The late S. F. C. Milsom was inclined to think that the emergence of the action on the case had something to do with the process of *capias*.<sup>23</sup>

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<sup>22</sup> Appendix no 10.

<sup>23</sup> Milsom, *Historical Foundations*, *supra*, note 10, at 293-5.

*Capias*, as we have seen, was available in the common-law action of trespass *vi et armis*, probably from the beginning. It is generally thought to have been more effective than the other methods of getting a defendant before the court. There is nothing quite like putting a defendant in gaol until he posts bond that he will appear in court to ensure he is aware that he is being sued. That *capias* was regarded as a particularly effective process is shown by the fact that it was extended by the statute of Westminster II (1285) to account and by statute in 1352 to debt, detinue and replevin, but it was not available in the action on the case until 1504.<sup>24</sup>

Milsom's argument is that *capias* was thought inappropriate for the less serious wrongs that were involved in the action on the case, and that the distinction between the two actions developed in order to make clear what was not appropriate for *capias*. There is almost certainly something to this argument, but its power depends on the assumption that a large number of cases that were later to be called 'case' were already being brought under the rubric of trespass in the first half of the fourteenth century. We have already seen that some were. The question is whether there were enough of them to cause the differentiation of the writs for procedural reasons. Otherwise, the decision not to allow *capias* in the action on the case was *post hoc*, taken after the action had been developed.

More recently Robert Palmer has constructed an elaborate argument that the Black Death explains the rise of the action on the case.<sup>25</sup> As is well known, in the years 1348-49 between a third and a half of the English population died of the plague. As Palmer sees it the Black Death caused a crisis in traditional services. The blacksmith died in the plague, and someone who thought he knew what he was doing tried to do his job. The result was a number of dead or lamed horses. The decision, in Palmer's view, was consciously taken by the chancery (I would incline to see, as well, the oversight of the king's council here) to expand trespass to include professional incompetence. The evidence from the writ files, which Palmer examined in great detail, certainly suggests that different types of activities were brought in under the rubric of trespass on the case at different times. Palmer also suggests that there was a conceptual breakthrough in that

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<sup>24</sup> Statute of Westminster II (1285), c 11; 25 Edw. III, stat 5 (1352), c 17; Statute, 19 Hen VII (1504), c 9.

<sup>25</sup> See Palmer, *supra*, note 10, at 139-293.

there was a breach in the traditional notion that not doing is no trespass.<sup>26</sup> Not everyone accepts all of this argument, but some of it is probably right. The absence of Year Book reports for the critical years (the years from 1357 to 1363 are all missing) is annoying. There were clearly many actions on the case in those years. Some of them were almost certainly discussed by court and counsel, but the first discussion that we have is in 1367, and by that time the action was already there.

## V. THE RISE OF THE ACTION ON THE CASE – CONTRACT

Now let us turn to the contract side. In order to do this, we have to back up a little. Before there was a trespass action in the central royal courts there were four personal actions, debt, detinue, covenant and account, that have something to do with what we call contract, but which for procedural reasons (our term not theirs) were not to develop into the modern contract action. Two are particularly relevant here:<sup>27</sup>

Debt is an action for a specific sum of money owed by the defendant to the plaintiff. The loan transaction is typical of one that gives rise to debt, also the sale transaction where the seller has delivered the goods but the buyer has not paid. The underlying idea seems to be that there is an imbalance in accounts between the plaintiff and the defendant. If the plaintiff does not have sealed evidence of the contract the defendant may wage his law – swear that he does not owe and get 11 oath-helpers to support him. The oath-helpers were available for hire in the central royal courts. This is contract in medieval parlance. We would call it a partially performed contract.

Covenant is an action for the enforcement of promises. The successful plaintiff gets the performance or its value, but not incidental damages. Proof is by jury. Early in the fourteenth century, perhaps earlier, the central royal courts, probably for procedural reasons, decided that one

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<sup>26</sup> The breach, however, was only partial. As we shall see, in most cases the defendant had to do something, just not enough to prevent the harm.

<sup>27</sup> Of a number of good general accounts, I still find that in Milsom, *Historical Foundations*, *supra*, note 10, at 243–82, compelling. It is brought up to date in J H Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) at 317–28.

must have a sealed instrument to support the covenant. This is covenant in medieval parlance, but we would call it contract.

Our outline of the development of the action on the case from the action of trespass in the central royal courts emphasized jurisdictional and procedural developments, not conceptual ones, because our notion was that the concepts were already there. The question was which court would handle it and how. I do not want to retreat from that account. There is no question that people in the thirteenth century well knew that one could commit a wrong by ways other than punching someone in the nose and that one could breach a contract even if the promise was not under seal. But there was no law on these topics, at least not in the central royal courts, no law because those courts were nominally limited to injuries against the king's peace normally with force and arms and to covenants under seal and partially executed contracts. No law, too, because of the general issue: 'not guilty', 'he did not make the deed', 'he did not breach the covenant', 'he owes nothing', put the case in the hands of oath-helpers or a jury which normally returned an inscrutable verdict. Complicated issues of responsibility, such as that raised by *Brainton v. Pinn*, were left to the jury. The rise of the action on the case did create substantive law, in the sense that it became possible by the use of the 'whereas' (*cum*) clause in the writ to allege the violation of a more specific duty than the general one not to commit breaches of the peace or to perform what one had agreed to perform under seal. The question then became where would these duties come from, and the earliest cases suggest that the first source of such duties was customary rules about how certain types of providers of services ought to behave: the miller, the innkeeper, the smith, the horse doctor. But how much further would this go? No one knew in the late fourteenth century, and a process of groping began. There are two stories to tell here, one about how the action on the case came to take over for covenant and the other about how it came to take over for debt. The first is eminently a problem of how far will we go; the second much less so. We can say a few words about the first; the second is a story of the sixteenth century.

Not doing is no trespass is a brooding omnipresence. It is breached in a few cases, but relatively few. A good example of where it is breached is the *Innkeeper's Case* of 1368.<sup>28</sup> Here the allegation of the custom of the

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<sup>28</sup> *Supra*, note 4; Appendix no 2.

realm that innkeepers were absolutely liable for the loss of their guests' goods survives a demur. Normally, however, 'not doing is no trespass' is the end of the story. As the *Innkeeper's Case* shows, it is a problem in tort as well as in contract, but I cannot tell you the tort story in this paper. It is a story, once more, largely of the early modern period.

A number of the cases in which trespass on the case broke through had a contractual element in them:

In *The Humber Ferry Case*, the bill said: 'that Nicholas atte Tounesende on a certain day and year at B. upon Humber had *undertaken* [there are various Latin words for this; the one that was ultimately to prevail was *assumpsit*] 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'.<sup>29</sup>

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.'

In *Waldon v. Mareschal*, in 1370: 'William Waldon brought a writ against one J[ohn] Marshall [the word means horse doctor], and alleged by his writ that the aforesaid John took in his hand the horse of the aforesaid William to cure it of its infirmity, and afterwards the aforesaid John so negligently did his cure that the horse died'.<sup>30</sup>

And defendant's counsel answers: 'Because he has counted that he had undertaken to cure his horse of his malady, for which he should have had an action of covenant, judgment of the writ'.

And plaintiff's counsel replies: 'That we cannot have without a deed [that is, a sealed instrument]; and this action is brought because you did your cure so negligently that the horse died, wherefore it is right to maintain this special writ according to the case; for we can have no other writ'.

Which provokes the response: 'You could have a writ of trespass, that he killed your horse generally'.

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<sup>29</sup> *Supra*, note 11; Appendix no. 4.

<sup>30</sup> Appendix no 11.

To which plaintiff's counsel replies: 'A general writ we could not have had, because the horse was not killed by force, but died by default of his cure. . . .'

'And then', the reporter tells us, 'the writ was adjudged good. . . .'

The *Surgeon's Case* of 1375 was in an action against a surgeon for having botched the job of repairing the plaintiff's hand so that the hand was permanently damaged.<sup>31</sup> The defendant attempted to wage his law, an appropriate response in a writ of debt and perhaps in other contractual actions as well. Though the court seemed willing to accept his wager, the defendant, curiously, dropped his wager, but ultimately won because the writ did not allege where the undertaking took place.

In all of these cases, 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 *Waldon v. Mareschall* it is not clear that he did anything at all. But not doing is no trespass remains a principle, except in the case of innkeepers – why? Gradually, at least so far as the Year Book discussion is concerned, the requirement was dropped. This is a 15th century story. The cases are fascinating, but I am not going to be able to do justice to them here.<sup>32</sup>

The story comes to final close in 1499.<sup>33</sup> In Gray's Inn, a reporter tells us: '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 [the Chief Justice of King's Bench].<sup>34</sup> And [FYNEUX] 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.'

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<sup>31</sup> Appendix no 12.

<sup>32</sup> The relevant cases may be found in J H Baker & S F C Milsom, *Sources of English Legal History: Private Law to 1750*, Sir John Baker, 2d ed (Oxford: University Press, 2009) at 421-42.

<sup>33</sup> Appendix no 13.

<sup>34</sup> There are some things that do not change; perhaps in Canada the carpenter always comes when he says he will, but in the U.S. he does not.

The last remark is telling. *Subpoena* is the process used by the court in the Chancery, and Fyneux is clearly concerned about competition.

That is the end of the objection. In *Orwell v. Mortoft* (1505) Common Pleas under Frowyk, CJCP, accepted what King's Bench had done: 'If I covenant, in return for money, to make a house by a certain day, and do not do it, an action on the case lies for the nonfeasance'.<sup>35</sup> But prepayment, as seems to be posited in this dictum, raises the issue of what will support the covenant if there is no prepayment, and will result in a huge snarl that has become known as the doctrine of consideration.

## VI. BY WAY OF A CONCLUSION

Let me return to the claim with which we began, that the modern Anglo-American law of both contract and tort had their beginnings in the action on the case of the fourteenth century, and to those who would argue either that the beginnings of both laws are much older or that the beginnings of both are much later. Certainly the claim cannot be that the notion of an actionable legal wrong began in the fourteenth century, nor can it be that the fourteenth century sees the beginning of the notion that breach of certain kinds of agreements is actionable. For those ideas we should look to the Anglo-Saxons, the Romans, or even the Bible. Similarly, if we are looking for a substantive doctrinal construct that we can trace directly to what we have today, the fourteenth century is far too early. Substantive doctrine in the fourteenth century, to the extent that it existed, was intimately connected with the forms of action, and there was no single form of action in the fourteenth century that we can label 'tort' and no single form of action that we can label 'contract'. In such a world, a robust theory of either tort or contract cannot develop.

What did happen in the fourteenth century was the development of a form of action that had the potential of being transformed into something that encompassed, on the one hand, all that we call contract, and, on the other, all that we call tort. It happened sooner in the case of contract than it did in the case of tort. We have already seen that by the end of the fifteenth century, the action on the case for *assumpsit* was allowed to substitute for the action of covenant, and by the end of the sixteenth

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<sup>35</sup> Appendix no 14.

century it was allowed to substitute for debt.<sup>36</sup> There was thus a single action within which a unified theory of contract could develop, and more specific contractual doctrines could be hung around it.

And yet contract law as we know it today – offer and acceptance, covenants and conditions, general and special damages – is largely the creation of the late eighteenth and nineteenth centuries.<sup>37</sup> Lord Mansfield had a great deal to do with it, though not all his proposals were accepted. Continental law also has a great deal to do with it. Comparativists, at least some of them, are fond of saying that the civil law of contracts and the common law are fundamentally the same.<sup>38</sup> Little, if any, of this can be found in the fourteenth century or even in the sixteenth. What the fourteenth century gave us was an action that had the dynamic potential of developing into an action that allowed one to think about contract under one heading.

That many, perhaps most, people did not do so may be the result of the fact that the medieval idea of ‘contract’, an agreement that had been performed on one side but not on the other, persisted. Assumpsit broke into general and special assumpsit, the former of which, with accompanying ‘common counts’, reflected the medieval idea of contract, and only the latter focused on the formation of the agreement rather than on its partial performance. Far more cases seem to have been brought in general assumpsit than in special.

Tort is a somewhat different story. The distinction between trespass and case remained until the abolition of the forms of action beginning in the 1830s. Whatever sense can be made out of that distinction – and much effort was spent trying to make sense out of it – it clearly did not, in the minds of most lawyers, correspond to the distinction between intentional and negligent wrongs. Further, there was a variety of other actions, spin-offs of the action on the case, that acquired a life of their own, libel and slander, nuisance, trover, and, somewhat later, various

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<sup>36</sup> *Slade v Morley*, 4 Co Rep 92 (Exch Ch 1602); see Baker & Milsom, *supra*, note 32, at 460–79.

<sup>37</sup> For what follows about contract, see Baker, *supra*, note 27, at 347–61; about tort, *id.*, at 401–21.

<sup>38</sup> It is, for example, the premise of J Gordley, *The Philosophical Origins of Modern Contract Doctrine* (Oxford: Clarendon Press, 1991).

actions for tortious interference with economic relations. All of these prevented the development of a unified theory of the law of wrongs.

And yet most of the elements that the nineteenth century put together in its unified theory of torts were there from a quite early period. We hear of a distinction between intentional actions and accidents. The word 'negligence' is in quite frequent use. The idea of strict liability also seems to be there. The concept of foreseeability is certainly there by the end of the 17th century, perhaps earlier. We must be careful. Words do not always mean the same thing in the past as they do today. We are likely to get into a lot of trouble if we think that 'negligence' always means the breach of some objective standard of care. Nonetheless we must ask the question why a world that had quite sophisticated moral theories and was certainly capable of speculative reasoning never put together the elements that seem to us to be fundamental to a coherent law of wrongs in a package that looks anything like what the nineteenth century created and which we still, to some extent, have today.

If in contract the older notion of contract lasted for a long time, in tort the older notion that not doing is no trespass also lasted for a long time. The converse of this proposition is that if you did it, you are going to have to show a very good reason why you did it, or persuade the jury not to hold you liable. Relatively few direct inflictions of harm will escape going to the jury; relatively few intentional inflictions of harm will escape going to the jury, except some kinds of economic competition, and that only in a case where a royally protected activity was not involved.

For a long period, then, the system relied on ordinary people's instincts, as reflected in the jury, to solve the problem of most civil wrongs. In a world in which technology did not change very rapidly and the potential of technology for doing harm was not so great as it is today, that system had its advantages, particularly when there were few judges. That may be an explanation of why the potential of the action on the case took so long to realize in the area of tort. The potential, however, was there in both tort and contract, and in both cases the potential was ultimately realized. That is my claim about the fourteenth century.

# APPENDIX

In what follows Baker and Milsom, *Sources* = J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750*, Sir John Baker, 2d ed. (Oxford: University Press, 2009); Fifoot, *History and Sources* = C. H. S. Fifoot, *History and Sources of the Common Law: Tort and Contract* (London: Stevens & Sons, 1949); Palmer, *English Law in the Age of the Black Death* = R. Palmer, *English Law in the Age of the Black Death: 1348–1381* (Chapel Hill: University of North Carolina Press, 1993); Sayles, *Select Cases KB* = G. O. Sayles, ed., *Select Cases in the Court of Kings Bench*, vol. 1, Selden Society 55 (London 1936); vol. 3, Selden Society 58 (London 1939).

## 1. THE MILLER'S CASE

Y.B. Mich. 41 Edw. 3, fol. 24, pl. 17 (CB 1367)  
in Fifoot, *History and Sources*, 80

A writ of *Trespass sur le case* was brought against a Miller, and the plaintiff counted that, whereas he was wont to grind his corn at the mill of T. for himself and his ancestors for all time without toll and he had brought his corn there to be ground, the defendant came and took two bushels' weight with force and arms, etc. And the writ ran: *Quod cum praedictus Johannes, etc. et antecessores sui a tempore cujus memoria non existit molere debuerunt sine multura, etc. praedictus defendens, etc. praedictum querentem sine multura molere vi et armis impedivit, etc.*<sup>1</sup>

*Cavendish*. You see well how the writ runs, that he will not suffer him to grind without toll, and he has declared in his count that he took toll; and in this case he should have a general writ (*general briefe*) that he carried off the corn with force and arms, and not this writ: judgment of the writ.

*Belknap*. The writ is taken *sur ma mater*, and, if he has taken toll where he should not have taken it, I shall have a writ against him.

THORPE, C.J. You shall have *Quod Permittat*<sup>2</sup> against the tenant of the soil and thus it shall be tried, and not on a writ against the defendant.

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<sup>1</sup> ['That whereas the aforesaid John, etc. and his ancestors from a time the memory of which runneth not to the contrary could grind without toll, etc., the aforesaid defendant, etc., impeded the aforesaid complainant from grinding without toll by force and arms, etc.']

<sup>2</sup> ['The king to the sheriff greeting. Command B. that justly etc. he permit A. to grind

*Belknap*. If a market be set up to the nuisance of my market, I shall have against him such a writ of *Quod Permittat*; but if a stranger disturbs folks (*gents*) so that they cannot come to my market, I shall have against him such a writ as this and shall make mention of the circumstances; and so here I shall have a writ of Trespass against him, because I cannot have *Quod Permittat*.

WICHINGHAM, J. Suppose he had taken all your corn or the half of it, should you have such a writ as this, because he had taken more than he should take by way of toll? You should not have it, but a common writ of Trespass; and so you shall have here. Therefore take nothing by your writ.

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his demesne wheat at the mill of the said B. quit of multure as he ought to do, as he says. And if he does not etc. Witness etc.' G. D. G. Hall, ed., *Early Registers of Writs*, Selden Society 87 (London 1970) CC 120, at 96.]

2. *THE INNKEEPER'S CASE* [*NAVENBY v. LASSELS*]  
 Y.B. Easter 42 Edw. III, fol. 11, pl. 13 (KB 1368)<sup>1</sup>  
 in Fifoot, *History and Sources*, 80-1

Trespass was brought by one W. against one T., an innkeeper, and his servants; and he counted that, whereas throughout the whole kingdom of England it was the custom and use, where a common inn was kept, that the innkeeper and his servants should keep (*garde*) the goods and chattels which their guests had in their rooms within the inn while they were lodged there, the said W. came there on such a day, etc., into the town of Canterbury<sup>2</sup> to the said T. and there lodged with him together with his horse and other goods and chattels, to wit, clothes, etc. and twenty marks of silver in a purse, and he took a room there and put these goods and chattels and the silver in the room, and then went into the town for other things; and while he was in the town, the said goods and chattels and silver were taken out of his room by evildoers through the default of the innkeeper and his servants in keeping them, *per tort et encounter le peace*, to his damage, etc. And he had a writ *sur tout le mattere accorde al cas*.

And the innkeeper demanded judgment, because he had not alleged in his count, nor in his writ, that he had delivered to him the goods and silver, nor that the goods were taken by them, so that he had supposed no

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<sup>1</sup> [Translation expanded and corrected by CD.]

<sup>2</sup> [The record shows that this, in fact, happened in Huntingdon.]

manner of blame in them; and also he had delivered to him a key of his room to keep the goods therein; and he asked judgment if this action lay; and on this matter they demurred.

And it was adjudged by KNIVET, CJ, that the plaintiff should recover against them. . . .

3. *FERRERS v. DODFORD*

K.B. 42/189 (Trin. 1307)

in Sayles, *Select Cases KB*, vol. 3, no. 97, at 179–80

*Northamptonshire*. John, vicar of the church of Dodford, in mercy for several defaults.

The same John was attached to answer John de Ferrers on this plea: 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, and the said John de Ferrers, having paid the aforesaid John, the vicar, for the aforesaid horse with the aforesaid sum of money, had caused the said horse to be brought to his manor of Bugbrooke, wherefore did he find the aforesaid horse maimed in the left shoulder. And because this horse was maimed and imperfect the aforesaid John de Ferrers came too late to the said parts of Scotland to assist the king's said expedition, and he did not get any good out of the aforesaid horse, as the king has learned from the plaint of the same John de Ferrers, to that John's serious loss and deceit and the manifest deceit of the king himself. And with respect to this he complains that on Thursday<sup>1</sup> before the Feast of St. Barnabas the Apostle in the thirty-fourth year of the present king's reign the aforesaid John, the vicar, did him the aforesaid trespass, wherefore he says that he is wronged and has suffered loss to the value of a hundred pounds. And he produces suit thereof etc.

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<sup>1</sup> 9 June 1306.

4. *BUKTON v. TOUNESENDE*

*THE HUMBER FERRY CASE*

*Liber Assissarum*, 22 Edw. III, pl. 41 (KB 1348)<sup>1</sup>  
in Baker and Milsom, *Sources*, 399

John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B.<sup>2</sup> 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.

*Richemund*. 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<sup>3</sup> by way of trespass.

*BAKEWELL*. It seems that you did him a trespass when you overloaded your boat so that his mare perished. So answer.

*Richemund*. Not guilty.

[The plaintiff's counsel.] Ready to aver our bill.

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<sup>1</sup> Corrected from LI MS. Hale 116.

<sup>2</sup> According to the record, this should be Hessle; but BL MS. Harley 811, fo. 38 extends it as 'Brokst'—perhaps Brough (which is where Ermine Street met the Humber).

<sup>3</sup> Some MSS. say 'and not'. The printed edition of 1679 says 'or', which gives quite the wrong sense.

5. *BRAINTON v. PINN*,

K.B. 42/122 m. 22 (Hil. 1290)

in Sayles, *Select Cases KB*, vol. 1, no. 120, at 181-2

*Devon*. Herbert of Pinn and John his son in mercy for several defaults.

The same Herbert and John were attached to answer Walter de Brainton on the plea why they burnt the houses of that Walter at Holewey and his goods and chattels within them to the value of two hundred pounds, and other outrages etc., to the grievous loss of that Walter and against the peace etc. And with regard to this he complains that, whereas the aforesaid Herbert and John on Friday after the Assumption of the Blessed Mary in the sixteenth year of the present king's reign<sup>1</sup> were being entertained at the house of that Walter in his manor of Kenn, by their foolishness and lack of care and through a badly guarded candle they

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<sup>1</sup> 20 August 1288.

burned the aforesaid houses, along with all his goods, that is to say, the corn in the barns and granaries, flesh-meat, fish, wool and linen cloths, silver spoons, gold rings, charters, deeds, household utensils and other goods, to the value of two hundred pounds, whereby he says that he is wronged and has suffered loss to the value of two hundred pounds, and thereof he produces suit etc.

And Herbert and John come by John Gerneis their attorney and say that they were being entertained in the houses of that Walter by his own good will, so that if any damage happened to the houses and other goods of that Walter through fire or other means, that was by accident and not by any lack of care or wickedness on their part. And concerning this they put themselves on the country etc. And Walter likewise. Therefore let a jury come three weeks after Easter wherever etc., unless the justices first etc.

Afterwards, three weeks after Easter in the twenty-first year of the present king's reign, the parties came and likewise the jurors, who say on their oath that the aforesaid Herbert and John his son together with a certain Thomas de la Weye, parson of the church of Upton, steward of that Herbert, put up on the aforesaid day and year in the manor of the aforesaid Walter de Brainton and, whilst that Herbert was lying on his bed asleep in a certain grange of the aforesaid manor, the aforesaid Thomas did not allow the aforesaid John, son of that Herbert, to put out a certain candle which was fixed on a post of that grange, for which reason the aforesaid John went to bed whilst that candle was burning and immediately went off to sleep. And the aforesaid Thomas went away, and before he came back the aforesaid candle fell down and that grange was immediately set alight by it, and this at night, so that a certain part of the bed of the aforesaid Herbert was burned before he woke up, and also the whole manor aforesaid of that Walter, together with all his goods, was burnt by the aforesaid fire.

6. *RATTLEDENE v. GRUNESTON*

Y.B. Pasch. 10 Edw. II (CB 1317)

in M. Legge and W. Holdsworth, ed., *Year Books 10 Edward II*, Selden Society 54 (London, 1935), no. 37, at 140-1

Trespass against one who after he had sold a tun of wine drew out the wine and mixed it with salt water, as appears.

One [Simon] brought a writ of trespass against [Richard and Mary] and counted how he had bought a tun of wine for six pounds from this

same [Richard] on such a day etc.; he left it in his custody etc. There came [Richard] with force and arms and drew out a great part of the wine and refilled the tun with salt water, wherefore it became rotten and perished, against the peace etc.

*Ingham.* Judgment of the count, for you have said that we were used and that we came with force and arms, which is not to be understood and is worth nothing. Judgment again, for he has not said in which will the trespass was done.

*Scrope.* We have said in [Orford].

*Ingham.* You have said that the buying took place in [Orford] and not the trespass etc.

And nevertheless because he let it be understood etc. Afterwards, not guilty etc.

7. ANON.

Y.B. 22 Lib. Ass., pl. 56 (Assizes 1348)  
in Baker and Milsom, *Sources*, 353–4

In a bill of trespass for beating, wounding, maiming and imprisoning [the plaintiff]:

*Fyncheden.* As to the maiming and wounding, Not guilty. And as to the battery and the imprisonment, we tell you that at the time the plaintiff was in a mad fit and doing great harm; and for this reason the defendant and [the plaintiff's] other relations took him and tied him up and put him in a house and chastised him and beat him with a rod, without this that we imprisoned or beat him in any other manner; and we do not think that for such imprisonment and battery he can assign wrong inn our person.

*Richemund.* You did it of your own wrong, and without such cause; ready etc.

And the others said the opposite.

8. *THE FARRIER'S CASE* [*TOUNDU v. MARESCHALL*]<sup>1</sup>  
 Y.B. Trin. 46 Edw. III, fol. 19. pl. 19 (CB 1373)  
 in Fifoot, *History and Sources*, 81–2

Trespass was brought against a farrier for that he had lamed his horse, and the writ contained the words *quare clavem fixit in pede equi sui in certo loco per quod proficium equi sui per longum tempus amisit*, etc.<sup>2</sup>

*Persay*. He has brought a writ of trespass against us and it does not contain the words *vi et armis*: judgment of the writ.

FINCHEDON, C.J. He has brought his writ *en son case* so his writ is good.

*Persay*. The writ should say *vi et armis* or *maliciose fixit*, and it has neither the one nor the other: judgment. Also he has not supposed in his count that he bailed us the horse to shoe; so otherwise it should be understood that if any trespass was done, it should be against the peace; wherefore judgment.

And then the writ was adjudged good, and issue was joined that he shod the horse, without this,<sup>3</sup> that he lamed it, etc.

<sup>1</sup> [Professor Palmer has identified this case as William Toundu of York v. Peter Mareschall of Colliergate. Palmer, *English Law in the Age of the Black Death*, at 226, 368.]

<sup>2</sup> ['Why he fixed a nail in the foot of his horse in a certain place by which he lost the profit of his horse for a long time.']

<sup>3</sup> [*absque hoc* (a form of pleading later known as a 'special traverse'.)]

9. *BERDEN v. BURTON et al.*

Y.B. Trin. 6 Ric. II, pl. 9, pp. 19–23 (1382)  
 in S. E. Thorne, et al., ed., *Year Books of Richard II: 6 Richard II, 1382-1383* (Cambridge [MA]: Ames Foundation, 1996)

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.

*The defendants* appeared and denied etc. As to coming with force and arms, not guilty. As to the breaking of the houses, they say that they found the doors open. And because a rent-charge issuing from the same manor was granted to one A., ancestor of Davy, one of the defendants, by the ancestor of the person whose estate the plaintiff had in the same manor, they therefore entered and took the distress. And they asked judgment whether an action would lie for this entry etc., and they put forward a

deed of the grant of the rent etc., as if by compulsion of the court, for BELKNAP, C.J. said that the justification pleaded would have been worthless otherwise. And as to this matter the plaintiff offered to aver that the defendants broke his doors, without this, that they found them open, and a day was given in the octave of Michaelmas.

And as to the animals taken and driven off, the defendants showed how the plaintiff had an action of replevin pending for the same animals and the same taking (for he counted on the same day and the same place). And they asked judgment whether as to this action of trespass etc. concerning the animals. And, as to the animals, the writ of trespass was abated at once, and the writ of replevin was to remain in full force. And yet the replevin action was brought only against two of the defendants. But BELKNAP, C.J. said that all the others would be discharged by the bringing of replevin against the two men, and he also said that a writ of trespass shall abate in favor of a writ of replevin, but not the contrary, for replevin is in a form of a higher nature and is another kind of action etc.

And as to the battery of the servants, the defendants showed how after the taking they drove off the animals, as well they might, and some of the servants who were within [the manor] came after them, and they did not know whether this was in order to replevy the animals or to effect a rescue. And then by certain words which passed between them they clearly realized that their coming was for the purpose of effecting a rescue, and the defendants used force against them. And they asked judgment whether for such an interference an action would lie etc. And it was adjourned, as stated above.

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 feisor, 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 feisors. 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.

10. ANON.

Y.B. Hil. 13 Rich. II, pl. 2, pp. 103-4 (CB 1390)

in T. F. T. Plucknett, ed., *Year Books of Richard II: 13 Richard II* (London: Ames Foundation, 1929)

In trespass brought against a man and wife, *Woodrow* counted of a horse killed at a certain place with force and arms.

*Gascoigne*. We protest that we do not admit coming with force and arms, for we say that the wife had the horse as a loan from the plaintiff to ride to a certain place, and we ask judgment whether he can maintain this action against us (and this was held a good plea).

So *Woodrow* (for the plaintiff): The truth of the matter is that the wife had the horse as a loan to ride to a certain town; and we say that she rode to another town, whereby the horse was enfeebled to the point of death; then she brought him back to the place named, and there the husband and wife killed him; and we demand judgment.

*Gascoigne*. And now we demand judgment of his writ, which says “with force and arms,” for upon his own showing he ought to have had a writ on the case (Note this).

So *Woodrow* said, we wish to imparl.<sup>1</sup>

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<sup>1</sup> [Fifoot’s note:] Imparlance or *licentia loquendi*: leave to ‘end the matter amicably without farther suit, by talking with’ the other party. See Bl. Comm. III, 298.

11. *WALDON v. MARSHALL*[*DALTON v. BERETON*]<sup>1</sup>  
Y.B. Mich. 43 Edw. III, fol. 33, pl. 38 (CB 1370)  
in Fifoot, *History and Sources*, 81

William Waldon brought a writ against one J. Marshall, and alleged by his writ quod praedictus Johannes manucepit equum praedicti Willelmi de infirmitate [curare], et postea praedictus Johannes ita negligenter curam suam fecit quod equus suus interiit.<sup>2</sup>

Kirton. We challenge the writ, because it makes mention of contra pacem, and in his count he has counted of his cure ita negligenter so that the horse died, so that he should not have said 'against the peace.'

And the Judges were of opinion that the writ was ill framed. And then the writ was read, and he had not said contra pacem in the writ, and the writ was held to be good.

Kirton. Because he has counted that he had undertaken to cure his horse of his malady, for which he should have had an action of covenant, judgment of the writ.

Belknap. That we cannot have without a Deed; and this action is brought because you did your cure ita negligenter that the horse died, wherefore it is right to maintain this special writ according to the case; for we can have no other writ.

Kirton. You could have a writ of Trespass, that he killed your horse, generalement.

Belknap. A general writ we could not have had, because the horse was not killed by force, but died by default of his cure. . . .

And then the writ was adjudged good. . . .

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<sup>1</sup> [Professor Palmer has identified this case as William de Dalton of York v. William de Bereton marshal. Palmer, *English Law in the Age of the Black Death*, at 191-3, 434-44.]

<sup>2</sup> ['That the aforesaid John took in his hand the horse of the aforesaid William to cure it of its infirmity, and afterwards the aforesaid John so negligently did his cure that the horse died.']

12. *THE SURGEON'S CASE [STRATTON v. SWALOND]*<sup>1</sup>  
 Y.B. Hil. 48 Edw. III., fol. 6, pl. 11 (KB 1374)  
 in Fifoot, *History and Sources*, 82–3

A man brought a writ of *Trespas sur son case* against one J. M., surgeon, and the writ ran thus, that, whereas the plaintiff's right hand was wounded by one T. B., the defendant undertook (*emprist*)<sup>2</sup> to cure him of his malady in his hand, but that by the negligence of the said J. and his cure, the hand was so injured that he was maimed *a tort et a ses damages*. And note that in this writ there was no mention in what place he undertook, etc., but in his count he declared that he undertook in London in Tower Street in the parish of B. And the writ was not *vi et armis* nor *contra pacem*, etc.

*Gascoigne*. He did not undertake to cure him of the malady, as he has alleged: ready to wage our law.

*Honnington*. This is an action of *Trespas* and of a matter which lies within the cognisance of the country, in which case wager of law is not to be granted: wherefore, for default of answer, we demand judgment and pray our damages.

CAVENDISH, C.J. This writ does not allege 'force and arms' nor 'against the peace,' so that wager of law is to be allowed. . . . And this is the opinion of the whole court. . . .

[The case was then adjourned.]

Afterwards he waived the tender of law and said that he did not undertake to cure his hand: ready, etc.

Issue was joined on this.

*Gascoigne*. Now, Sir, you see well that the writ does not mention in what place he undertook to cure him, so that the writ is defective in this matter, for the court cannot know from what neighbourhood the jury shall come.

<sup>1</sup> [For the tangled history of this case and a fuller report, see Baker and Milsom, *Sources*, at 402–4; cf. Palmer, *English Law in the Age of the Black Death*, at 193–6, 346–7. The names of the serjeants given here are probably wrong.]

<sup>2</sup> *Emprist* is the reporter's translation from the Latin of the writ. The writ is not given, so that the original word may possibly have been *assumpsit*, though more probably *manucepit*, as in *Waldon v. Marshall* [no. 11]. [Fifoot's suspicion is confirmed by Palmer, *English Law in the Age of the Black Death*, at 346.]

*Persay*. He has not defined the place in his writ; wherefore we demand judgment of the writ.

*Honnington*. Because we have assigned in our count the place where he undertook our cure, therefore, though it is not mentioned in the writ, it is yet sufficient to bring together the jury from the place where we have affirmed the undertaking to have been made. Wherefore judgment if our writ be not good.

CAVENDISH, C.J. At this stage it is seasonable to challenge the writ for that he has not assigned the place of the undertaking, because it is necessary to summon the jury from that place; but if he had waged his law according to our first issue, then it would not have been necessary to have assigned a place in the writ. Moreover, this action of covenant of necessity is maintained without specialty, since for every little thing a man cannot always have a Clerk to make a specialty for him. . . .

And then, because the place was not named in the writ where the cure was said to have been undertaken, the action abated. And the plaintiff was in mercy.

### 13. A DICTUM IN GRAY'S INN (1499)

Trin. 14 Hen. VII, Fitz. Abr. *Action sur le case*, pl. 45<sup>1</sup>  
in Baker and Milsom, *Sources*, 442

In Gray's Inn.<sup>2</sup> 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.<sup>3</sup> 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*.

<sup>1</sup> Also inserted in Y.B. Mich. 21 Hen. VII, fol. 41, pl. 66, from Fitzherbert.

<sup>2</sup> In margin of 1514 ed., but omitted from later editions.

<sup>3</sup> Sir John Fyneux (CJKB 1495–1525) was a former bencher of Gray's Inn and regularly attended the readings there. This dictum may have been given at the summer reading of 1499.

14. *ORWELL v. MORTOFT*

Y.B Mich. 20 Hen. VII, fol. 8, pl. 18 (CP 1505).<sup>1</sup>  
in Baker and Milsom, *Sources*, 450

FROWYK [CJCP] . . . If I sell £10 worth of land, parcel of my manor, and covenant further to make an estate<sup>2</sup> by a certain day, and before the day I sell the whole manor to someone else: in this case an action on the case lies against me. Likewise, if I sell ten acres in my wood, and then I sell the whole wood to someone else. O[r] if I covenant, in return for money, to make a house by a certain day, and do not do it, an action on the case lies for the nonfeasance. Here, then, he has sold 20 quarters of malt to the plaintiff to be delivered at a certain day, and has not done this, but has converted them to his own use; and so it is right that he should be punished by an action on the case. . . .

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<sup>1</sup> Also reported by Caryll in Keil. 69, 77 (correctly dated Mich. 21 Hen. VII).

<sup>2</sup> I.e. execute a conveyance.