

## **TORT AND CONTRACT—INTRODUCTION AND THE OLD PERSONAL ACTIONS**

1. Background institutional changes of the 14th century:
  - a. The development of a bicameral parliament.
  - b. The gradual growth of its involvement in taxation and legislation and the custom of consulting it on great matters of the realm.
  - c. The growth of the power of the council and of the departments of state.
  - d. The attempt of the magnates to control them by controlling appointments.
  - e. The attempt of the king to control them through the wardrobe and the chamber.
  - f. Statutes that attempt to deal with social change, e.g., the statutes of labourers and statutes concerning livery and maintenance *Mats.* § 6G.
2. General outline of the personal actions
  - a. Debt, detinue, covenant, and account are the contract actions, all exist in the thirteenth century, and all are deficient from the point of view of plaintiff:  
Debt—the necessity for a sum certain, the requirement of a *quid pro quo*, and wager of law  
Detinue—only for specific goods, the problem of bailment, wager of law  
Covenant—the requirement of a sealed instrument, no general damages  
Account—elaborate procedure, manorial stewards and guardians in socage
  - b. Trespass is the tort action  
Trespass—*vi et armis* and *contra pacem*  
Case—appears mid-14th century, the rise of the notion of negligence?
  - c. *Assumpsit*—mysterious if we’re thinking in these terms, because it is a trespass action for breach of contract. In the 16th century it comes to replace debt and covenant, a development that is capped by *Slade’s Case* 1597-1602.
  - d. 16th & 17th centuries—case takes over: trover, nuisance, ejectment—the forms of action you learned in the first year (to the extent that you learned them at all) are all variants of the trespass action
3. Problems with this way of looking at it
  - a. Assumes that changes in the forms of action reflect changes in fundamental substantive ideas
  - b. It forgets about other courts
  - c. Our ideas are not theirs: property (real and personal), tort, and contract; owing vs. owning; obligation vs. property; money vs. fungibles vs. specific goods
4. Debt-detinue
  - a. “The King to the sheriff greeting. Command N. that justly and without delay he render to R. one hundred marks which he owes, as he says, and whereof he complains that he unjustly deforces him. And unless he will do this, summon him by good summoners that he be

before me or my justices at Westminster within fifteen days of the close of Easter to show [why he has not done it].” *Glanvill, Mats.* p. VII-3.

- b. The original notion in the action is that you have something of mine—be it because you owe me money or because I lent you my goods but not that I lost them.
- c. Paid and so *non debet* is a possible plea, a concession to the jury.
- d. Important exceptions to the general rule of availability of wager: the defendant cannot wage his law against his own bond. He must plead *non est factum* (which will go to the jury) or accord and satisfaction, and for this he needs a specialty. The defendant’s executor cannot wage the debtor’s law. Thus, if your debtor is dead you must have a bond.
- e. Debt splits off from detinue probably for remedial reasons in the mid-thirteenth century.
- f. By the sixteenth century debt has become an action for a specific sum (no general damages please) of money or fungibles. The action for fungibles is called debt in the *detinet* in the 16th century, maybe a bit earlier. The general action of debt has two important subcategories.

Debt on an obligation—the penal bond, avoids incidental damage question, non-performance will go to the jury

Debt on a contract—the medieval idea of contract, what we would call a partially executed contract—the notion of *quid pro quo*—to this the law admits an exception in the 15th c. in the case of sales which need not have a delivery of the goods if the seller could have delivered them.

- g. Detinue, the general action for return of goods, e.g., the buyer’s action in a sales contract, also has two subcategories:

*Sur bailment*—*Glanvill* suggests that all debts are like the Roman *mutuum*, strict liability (c.13 *Mats.*, p. VII-3: “I lend my chattel to you gratuitously to be taken and used in your service. When the term of service is completed, you are bound to return my chattel to me without deterioration, provided that it still exists. But if the chattel itself has perished or has been lost, in whatever way, while in your custody, you are bound absolutely to render me a reasonable price for it.”); Bracton gives the opposite answer (*Mats.*, p. VII-5: “he who has taken a loan for use is bound to restore the very thing, and, [though] he is not excused if he shows as much care in its safekeeping as he ordinarily bestows on his own goods if another could have safeguarded the thing with greater care, [he] is not held liable for *force majeure* or accidents unless there has been *culpa* [‘fault’] ... .”); 14th c. cases tend to follow Bracton but in the late 15th c. liability tightened up as to bailment—only an act of God, or the king’s enemies will do because the bailee can sue a robber.

*Sur trover*—an odd ball which doesn’t fit our emerging scheme that is at once contractual and proprietary. This one seems to be purely proprietary. Perhaps the first case involves a woman named Haliday (1355) (*Mats.*, p. VII-10), and the process of fictions leads to the proposition that the loss and finding alleged in the count cannot be traversed. The development is related to the *devenit ad manus* count in detinue of charters and to *de re adirata*, an action in the local courts for recovery of stolen goods. Detinue *sur trover* is not fixed until mid-15th c. (*Carles v. Malpas*; *Mats.*, p. VII-11). The key thing about it is that in detinue *sur trover* it is a total defense that the defendant does not have the thing .

- 5. When did English law perceive the property/obligation distinction the way we do?

- a. Not at the time of the origins of the debt/detinue action, for there property and obligation were merged.
  - b. Not at the time that debt and detinue split in the mid-thirteenth century, because then debt is available only for money as between the original parties to the transaction.
  - c. *Bracton* probably perceives the distinction between property and obligation, but *Britton* does not (*Mats.*, p. VII–7): “[An obligation] is clothed by a material thing, when anything is lent and borrowed, to be restored on a certain day; and by such loans the debtors are bound to restore to the creditors the things borrowed in as good or better condition than they received them, or else their value, unless by accident of fire, water, robbery or larceny, they have lost them; for against such accidents no one ought to answer for things lost, unless they happened by his own fault or negligence. But if a debtor carries money about him, and foolishly shows it among thieves, and is robbed of it, it does not follow that he is not bound to the creditor; because he did not use his diligence to keep the money, for he might have taken better care of it.”
  - d. At the end of the 15th century the notion that property passes with sale will give the seller an action for the money even if he has not delivered, but after some hesitancy the buyer will not have an action in detinue for the goods unless he has paid. On the one hand, the rule about passage of property suggests that the property-obligation distinction is being perceived but, on the other hand, the imbalance in the two actions suggests that the emerging idea has still not been integrated into the actions.
  - e. Bracton’s rule about the bailee’s liability is followed in the 14th century, so that there is little need in this situation to distinguish between the bailee or the finder. When the bailee’s liability becomes stricter in the 15th century we also see the emergence of a distinction between detinue sur bailment and detinue sur trover. In the latter the trover is fictional (property), and the defendant has no liability if he or she doesn’t have the goods.
  - f. CONCLUSION: The original idea is imbalance of accounts and this can be seen most clearly in the admittedly relatively few restitution cases in the 14th century. Hints of the distinction between property and obligation emerge at the end of the 15th century in both sales and bailment cases, but the original idea is never completely lost. This is a problem to which we will have to return when we ask the question whether England had really developed a unified notion of contract by the time of or shortly after *Slade’s Case*. The dramatic thing about this development is how it parallels what happened about real property. Property emerges out of obligation.
6. Covenant.
- a. The tyranny of words: contract is not contract as we understand it but covenant does come pretty close to what we mean by contract.
  - b. The problem of proof may account for the emergence of the sealed instrument requirement early in the 14th century. The *S/Wales* (*Mats.* pp. VII-12; 1284) tells us that covenant goes to the jury but there’s a problem with the jury unless they know both ends of the story. The problem is quite dramatically illustrated in the *Waltham Hay Carrier’s Case* (*Mats*, p. VII–13) from the eyre of London of 1321. The defendant was alleged to have agreed to carry a carry a barge load of hay from Waltham, which is in Essex, to London. Indeed, he was alleged to have received the hay in Waltham, but to have failed to have carried it to London. The defendant’s counsel points out that Waltham was outside the court’s jurisdiction, but

the Chief Justice bullies him into taking another plea, and he asks what the plaintiff has to show for his covenant. The latter replies that it was a simple agreement. The defendant alleges that the plaintiff must show a specialty, to which the plaintiff replies: “For a cartload of hay?” But the CJ has the last word: “We shall not undo the law for a cartload of hay. Covenant is none other than the assent of parties that lies in specialty.” And the plaintiff was non-suited.

- c. The remedy is performance, perhaps specific performance, then the value of the performance. No incidental or consequential damages and that fact perhaps more than the need for a seal is what causes the rise of the penal bond. Building contracts seem to lead the way. In 1352 the availability of *capias* is extended to debt actions but not to covenant actions, but by that time the action is dead, except for leases and apprenticeship.
7. Account. Another you have my money action, but with the extra attraction of obligation to account. The procedure is complicated. One first establishes the obligation to account. The taking of the account is then committed to auditors. The result of their accounting could then be recovered by way of writ of debt. The action was at first available, it would seem, only against manorial bailiffs, who had an obligation to account to their principals. In 1267 the action was extended to guardians in socage, who had a similar obligation. Early in the 14th century, it became available against receivers more generally, particularly mercantile ones, perhaps as a result of the statute of Westminster II of 1285. At various periods in the later Middle Ages and early modern periods the action seems to have been used for quasi-contractual recoveries, but for reasons that are not completely clear, the action died out in the 16th century. Perhaps its complexity did it in, but the problem may be that the central royal courts did not trust the merchants.
8. *Paris v. Page*, (*Mats.* p. VII–1). We may not have time for this, but if we do, it’s a great case to illustrate how personal actions worked throughout the Middle Ages.

PARIS v. PAGE<sup>1</sup>

Y.B., Pasch., 1 Edw. II, pl. 1 (1308)

ed. F.W. MAITLAND, *YEARBOOKS 1 & 2 EDW. II: 1307–9*, Selden Society, 17 (London, 1903), pp. 11–12<sup>†</sup>

Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony, and divers others, and complained that on a certain day they took and imprisoned him etc. wrongfully and against the peace etc.

- a. Simon of Paris brought a writ of trespass against Walter Page, bailiff of Sir Robert Tony and various others. Here’s the writ. And complained [here’s the count] that on a certain day they took and imprisoned him etc. wrongfully and against the peace, etc.

*Passeley* for all, except [Walter] the bailiff, answered that they had done nothing against the peace. And for the bailiff he avowed the arrest for the reason that Simon is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest,<sup>2</sup> and Walter tendered to him the office of reeve and he refused and would not submit to justice etc.

- b. *Passeley* for all, except the bailiff, answered that they had done nothing against the peace. A general denial. We have no idea what was going on here. And for the bailiff he avowed [a strange word in this context, normally used in *replevin*] the arrest for the reason that Simon

<sup>1</sup> Proper names are taken from the record.

<sup>†</sup> <Public domain?>

<sup>2</sup> For this phrase, see Y.B. 21–2 Edw. I, p. 449; 33–5 Edw. I, p. 205.

is the villein of Robert, whose bailiff Walter is, and was found at Necton in his nest [which would, under certain circumstances, justify the seizure] and Walter tendered to him the office of reeve [which only a villein could have] and he refused and would not submit to justice etc.

*Toudeby* rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years and has been the king's sheriff in the said city and has rendered account at the Exchequer;<sup>3</sup> and this (said he) we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person.

- c. *Toudeby* rehearsed the avowry and said that to this avowry he ought not to be answered, for that Simon is a free citizen of London and such has been these ten years [a year and a day] and has been the king's sheriff in the said city and has rendered account at the Exchequer; and this we will aver by record; and to this very day he is an alderman of the town, and we demand judgment whether they can allege villeinage in his person. [There's no triable issue of fact here because the contrary appears as a matter of record.]

*Herle*. With what they say about his being a citizen of London<sup>4</sup> we have nothing to do; but we tell you that from granddam and granddam's granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire's grandsire, and all those who held his lands in the manor of Necton; and Robert's ancestors were seised of the villein services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest.

- d. *Herle* [senior serjeant, about to become chief justice]. With what they say about his being a citizen of London we have nothing to do [essentially he admits the allegation], but we tell you; but we tell you that from granddam and granddam's granddam he is the villein of Robert, and he and all his ancestors, grandsire and grandsire's grandsire, and all those who held his lands in the manor of Necton; and Robert's ancestors were seised of the villein services of Simon's ancestors, such as ransom of flesh and blood, marriage of their daughters, tallaging them high and low, and Robert is still seised of Simon's brothers by the same father and same mother. And we demand judgment whether Robert cannot make avowry upon him as upon his villein found in his nest. Pleading in the right of villeinage. Can't I make this avowry?

*Toudeby*. We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein.

- e. *Toudeby*. We are ready to aver that he is a free man and of free estate, and they not seised of him as of their villein. Backs off, he concedes that the avowry may be proper under certain circumstances. Mentions this strange word 'seisin'.

BEREFORD, J. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not he remain in the city?

- f. BEREฟอร์ด. I have heard tell that a man was taken in a brothel and hanged, and if he had stayed at home no ill would have befallen him. So here. If he was a free citizen, why did not

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<sup>3</sup> Simon of Paris was sheriff of London in 1302–3. For his election see R. Sharpe, Letter Book C, p. 114. It appears from the civic Letter Books that he was mercer, alderman, chamberlain and a very active citizen. For his will see Sharpe, Calendar of Wills, i, 309.

<sup>4</sup> Or 'a citizen of the king.'

he remain in the city? It looks like he's going to go the other way. Typical Bereford remark. The 3d year law students loved it. But it's misleading. The court refuses to decide, and adjourns.

At another day *Toudeby* held to the assertion 'not seised of him as of his villein nor of his villein services.'

*Passeley*. Whereas he says that we were not seised of him as of our villein, he was born in our villeinage, and there our seisin began, and we found him in his nest, and so our seisin is continued. We demand judgment.

BEREFORD, J. One side pleads on the seisin, and the other pleads on the right; in that way you will never have an issue.

*Herle*. Seised in the manner that we have alleged.

BEREFORD, J. The court will not receive such a traverse. You must say that you are seised of him as your villein and of his villein services.

And so [the defendant's counsel] did. Issue.

- g. The next exchange is hard to follow. Let me assert to you that the way Bereford sets it up, there's no way that Walter can win. And he doesn't as the record tells us. It took four years to get the jury, and by the time they get it, Sir Robert Tony is dead, and his heir is perhaps an infant. But the jury came in and rendered a verdict on behalf of Simon for 100 pounds, a huge sum.