... *Herle*. He has only two-thirds of a house and four shillings worth of rent which he took in marriage with his wife.

STANTON, J. He will have to say whether he has land or tenement in sufficiency.

Scrope. The statute is in our favour, and says nothing of sufficiency. We demand judgment.

BEREFORD, C.J. We ought to maintain ancient writs wherever they can be maintained rather than the new ones. Since he has offered to aver that he has land and tenement whereby he can be justiced, it therefore behooves you to answer.

Malberthorpe. That would be a great hardship. For my bailiff might owe me two hundred pounds in arrears, and buy just two acres of land and two pennyworth of rent, and then I could never bring him to render account.

Scrope. It will be to the King's prejudice to maintain this writ of account, for as long as he has lands and tenements the Sheriff shall answer for the issues, and that is to the King's advantage.

Herle. We are ready to aver that he has no land or tenements whereby he can be distrained to render account.

Scrope. We are ready to aver that he has land and tenements whereby he can be distrained to render account.

The averment was received; it was said that he had no land.

C. TRESPASS IN THE CENTRAL ROYAL COURTS[1]

WRITS OF TRESPASS

from *Registrum Brevium* (London, 1687) fols. 93, 110[2]

The King to the sheriff of Lincoln 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 with force and arms 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. And have there the names of the pledges and this writ.

The King to the sheriff of Lincoln 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 with force and arms he broke the close of the same A. at T., and cut down his trees there lately growing and fished there in his several fishery and mowed his grass there lately growing, and took and carried away the hay thus made and the fish from the aforesaid fishery and also the aforesaid trees and other of his goods and chattels to the value of twenty marks and also forty pounds of his money in coined money there found, and other outrages there did to him, to the grave damage of the same A. and against our peace. And have there the names of the pledges and this writ.

BRAINTON v. PINN,

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

ed. G. Sayles, *Select Cases in the Court of Kings Bench*, vol. 1, Selden Society 55 (London, 1936) no. 120, pp. 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

[1] From C.H.S. Fifoot, *History and Sources of the Common Law* (London, 1949), 80–3, 340–55. Other references given as they occur.

[2] The text probably dates from the 14th century.

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[1] 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 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.

FERRERS v. DODFORD

K.B. 42/189 (Trin. 1307)
id., vol. 3, Selden Society, 58 (London, 1939), no. 97, pp. 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[1] 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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[1] 20 August 1288.

[1] 9 June 1306.

And the aforesaid John, the vicar, comes and defends all tort and deceit and whatever etc. And he says that he sold no horse to the aforesaid John and made no contract with him and is in no way guilty of the aforesaid trespass and deceit. And concerning this he puts himself on the country. And the aforesaid John de Ferrers likewise. Therefore a jury thereon is to come before the king a fortnight after Michaelmas wherever etc., and who neither etc. Because as well etc.

RATTLESDENE v. GRUNESTON

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

ed. M. Legge & W. Holdsworth, *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 vill 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.

Translation of Record

Richard of Gruneston and Mary his wife were attached to answer Simon of Rattlesdene on a plea wherefore whereas the same Simon had lately bought a certain tun of wine from the aforesaid Richard at Orford for six marks six shillings and eightpence and had left that tun in the same place until he asked for it to be sent, the aforesaid Richard and Mary drew out a great part of that wine from the aforesaid tun with force and arms, and filled up that tun with salt water in place of that wine thus drawn out, whereby the whole of the aforesaid wine became rotten and utterly perished, to the grievous damage of the said Simon and against the peace etc. And wherefore the same Simon complains by his attorney that whereas the same Simon had bought the aforesaid tun from the aforesaid Richard at Orford and left it at the same place until etc., the aforesaid Richard and Mary drew out a great part of that wine from the aforesaid tun on the Thursday[1] on the octave of St John the Baptist in the ninth year of the reign of the lord King who now is, 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., to the grievous damage etc. against the peace etc. Whereupon he says that he is injured and has damage to the value of ten pounds. And thereof he brings forward his suit etc.

And Richard and Mary come by John of Hoxene their attorney and deny force and injury when etc. And well they deny that they ever drew out the aforesaid wine from the aforesaid tun by force and arms on the day and in the year aforesaid, or put salt water in the place of that wine, or did him any trespass as the aforesaid Simon complains above. And upon this he places himself on the country, and Simon likewise. Therefore the sheriff is commanded to cause to come here on the morrow of St John the Baptist twelve etc. by whom etc. and who neither etc. to make recognition etc. because as well etc. by the Justices at the instance of Thomas of Elingham.

BUKTON v. TOUNESENDE
THE HUMBER FERRY CASE

Liber Assissarum, 22 Edw. III, pl. 41 (CR 1348)[1]

in J. Baker and S.F.C. Milsom, *Sources of English Legal History* (London, 1986), 358–9

Translation of Record

[1] July 1st, 1316.

[1] Corrected from LI MS. Hale 116

Yorkshire. It is found by the jury upon which John de Bukton of Cave, plaintiff, and Nicholas atte Tounesende of Hessle, ferryman, put themselves that the same Nicholas on the Monday next after Martinmas in the twentieth year of the king's reign [13 November 1346] at Hessle received a certain mare from John to carry safely across the River Humber in Nicholas's boat, and the same Nicholas so loaded the boat against John's will that he lost the aforesaid mare through Nicholas's fault, in the way that the same John complains by bill, to John's damage of 40s.; but that the same John did not lose any goods or chattels there, as he complains by the same bill. Therefore it is decided that the same John should recover against the said Nicholas his aforesaid damages; and that the same Nicholas should be taken, etc.; and that the same John should be in mercy for his false claim with respect to the aforesaid chattels. ...

John de [Bukton] complains by bill that [Nicholas atte Tounesende] on a certain day and year at B.[3] 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[4] 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.

THE MILLER'S CASE

Y.B. Mich. 41 Edw. 3, fol. 24, pl. 17 (CB 1367)

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.*[1]

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*[2] against the tenant of the soil and thus it shall be tried, and not on a writ against the defendant.

Belknap. If a market be set up to the nuisance of my market, I shall have against him such a writ of *Quod Permitat*; 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*.

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[3] 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).

[4] Some MSS. say 'and not'. The printed edition of 1679 says 'or', which gives quite the wrong sense.

[1] ["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."]

[2] ['The king to the sheriff greeting. Command B. that justly etc. he permit A. to grind 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.' *Early Registers of Writs*, G.D.G. Hall, ed. (SS no. 87, 1970) CC 120 at 96.]

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.

THE INNKEEPER'S CASE [NAVENBY v. LASSELS]

(a) Y.B. Easter 42 Edw. III, fol. 11, pl. 13 (KB 1368)[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[2] 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 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. And the court taxed the damages, and he will not get the damages just as he counted them.

Kirton asked for an *Elegit* to have execution on the lands that the defendant had on the day that the writ was purchased.[3]

KNIVET. You will not have [them], except from the day of the inquest taken and the judgment rendered.

Kirton. There was no inquest taken, but we demurred in judgment.

KNIVET. Then you will have execution on the lands that he had the day judgment was rendered.

Kirton. There is strong reason to grant them as of the day he entered in plea.

INGLEBY, J. It is more than a half a year since you first pleaded;[4] you shall not have [execution] for that [period]. But if the day of the beginning of the plea and the day the judgment was rendered were in one term, then you would have it; otherwise not.

Kirton. Then we demand *Capias ad satisficiendum* against them.

KNIVET. That would not be reasonable unless there was some fault (*culpe*) in them. But now there is no fault in them, because no manner of wrong (*tort*) is supposed in their persons; for since they are charged by the law and no manner of fault is in them, it would not be reasonable to put them in prison—no more than in the case where a man is robbed in a hundred and the hue and cry is levied and he sues for his damages on the statute,[5] you will not have *Capias ad satisficiendum* against them for the damages, because it would not be reasonable to put them in prison where there is no manner of fault in them but they are charged by the law; no more should you have [it] here.

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[1] Translation expanded and corrected by CD.

[2] The record shows that this, in fact, happened in Huntingdon.

[3] For the basics on *Elegit*, see Holdsworth, *History of English Law*, vol. 3, p. 131. For "Kirton" (Richard de Meres, *alias* Kirkton, serjeant from 1362, JCP, 1371–80), see Baker, *Serjeants*, p. 526.

[4] The text may be corrupt here, but this seems to be what it means.

[5] Statute of Winchester, 13 Edw. 1, stat. 2, c. 2 (1285).

And afterwards he had *Elegit* of the lands that they had the day the judgment was rendered.

(b) Liber Assisarum, 42 [Edw. III], pl. 17 (KB 1368)[6]

… William came and pleaded that the plaintiff was not damaged through his fault.

Childrey.[7] You shall not get to that, since he has not denied that he is a common innkeeper or that the plaintiff was lodged with him; and so long as that is so, he comes under your protection and safeguard. We demand judgment whether he can succeed in saying that the plaintiff was not damaged through his fault. And we pray that he be convicted.

The other side to the contrary; inasmuch as the plaintiff did not say that the damage was done by the defendant, he demands judgment.

KNIVET, CJ and INGLEBY, J, by the advice of their fellows, and of the serjeants, awarded that the plaintiff recover the principal his damages taxed by the court at [£] 15. For KNIVET said that a similar case had previously been adjudged in the Council, and the cause of the judgment was that an innkeeper should answer for himself and his household in respect of the rooms and stables.

Translation of and Notes from the Record[8]

Huntingdonshire. Walter Lassels of Huntingdon and William of Stamford, ostler of the aforesaid Walter, were attached to answer both the lord king and Thomas of Navenby, the king's under-escheator in the county of Northampton, concerning a plea … to the damage and in contempt of the lord king and to the no small expense and burden of the selfsame Thomas, and against the peace etc. And thereupon the same Thomas of Navenby, who sues for the king as well as for himself, by William of Stathern his attorney, complains that, whereas according to the law and custom the king's realm innkeepers who keep common inns in order to accommodate men travelling through the places where such inns are, and lodging the same, are bound to keep their goods (which are inside those inns) day and night without any removal or loss, so that damage does not befall such travellers in any way through the fault of the said innkeepers or their servants: certain wrongdoers on Tuesday before the feast of St. Denis in the forty-first year of the reign of the present lord king [5 October 1367], with force and arms (namely, with swords etc.),[9] broke by night into a certain chamber wherein the aforesaid Thomas was lodged in the aforesaid Walter's inn at Huntingdon, while he was coming to London on the king's business, and took and carried away goods and chattels of the same Thomas to the value of £4, namely one belt, a seal with a silver chain, one sword with a buckler, linen and woollen cloths, and one baselard,[10] and also £9 of the king's money which was in the same Thomas's keeping, through the fault of the same Walter and William, against the peace; whereby he says he is the worse and has damage to the extent of £15. And thereof he produces suit etc.

And the aforesaid Walter Lassels and William of Stamford, by John of St. Neot's their attorney, come and deny the force and wrong when etc., and whatever [is against the peace] etc., and make protestation that they do not confess that Thomas has lost any goods or chattels as he complains. And the aforesaid Walter Lassels says that at the time when the same Thomas supposes that aforesaid trespass to have been done to him and before and after that, he was out of the area (that is to say, he was in the county of Essex) and so the aforesaid Thomas was not lodged there by him, the said Walter, and did not lose any chattels through his fault. And of this he puts himself upon the country etc. And the aforesaid William says that the aforesaid Thomas, at the aforesaid time etc., was lodged by the selfsame William, and the same William delivered to the same Thomas and his servants a certain room with a sufficient lock, and they were at the time content with this room; and he says that the security (*claustrura*) of the said inn was sufficient, and therefore the aforesaid Thomas did not lose any goods or chattels through his fault as he complains. And of this likewise he puts himself on the country, etc.

[The parties were adjourned from Gloucester, where the King's Bench was sitting, to Westminster; and in Easter term 1368, the plaintiff demurred specially, on the grounds that Walter had not denied that he kept a common inn and

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[6] From Baker and Milsom, *Sources*, pp. 553–4.

[7] Edmund de Cherle, sjt. from 1354; KS 1361–71; JKB 1371–2; Baker, *Serjeants*, p. 504.

[8] KB 27/428, m. 73. From Baker and Milsom, *Sources*, pp. 552–3, from Sayles (ed.), Selden Society, vol. 82, p. 152.

[9] Note that the force is alleged in the wrongdoers, not in the defendants.

[10] A species of dagger or hanger, usually worn at the girdle; *Oxford English Dictionary*, s.v.

that William was his ostler, nor that Thomas was lodged in the inn by William, who received his goods into the inn, nor that Thomas lost goods there.]

[In Michaelmas term 1368 the court gave judgment for the plaintiff to recover £13 for the chattels and 40s. damages, taxed by the court.]

WALDON v. MARSHALL[DALTON v. BERETON][1]

Y.B. Mich. 43 Edw. III, fol. 33, pl. 38 (CB 1370)

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*.[2]

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. ...

THE FARRIER'S CASE [TOUNDU v. MARESCHALL][1]

Y.B. Trin. 46 Edw. III, fol. 19. pl. 19 (CB 1373)

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.[2]

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,[1] that he lamed it, etc.

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[1] 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*, pp. 191–3, 434–44.

[2] '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.'

[1] 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*, pp. 226, 368.

[2] '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.'

[1] *absque hoc*, [a form of pleading later known as a "special traverse."]

THE SURGEON'S CASE [STRATTON v. SWALOND][1]

Y.B. Hil. 48 Edw. III., fol. 6, pl. 11 (KB 1374)

A man brought a writ of *Trespass 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*)[2] 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 Trespass 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.

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.

BERDEN v. BURTON *et al.*

Y.B. Trin. 6 Ric. II, pl. 9, pp. 19–23 (1382)
ed. S.E. Thorne, *et al.*, 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

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[1] For the tangled history of this case and a fuller report, see Baker and Milsom, *Sources*, pp. 360–2; cf. Palmer, *English Law in the Age of the Black Death*, pp. 193–6, 346–7. The names of the serjeants given here are probably wrong.

[2] *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*, *supra*, p. [23]. [Fifoot's suspicion is confirmed by Palmer, *English Law in the Age of the Black Death*, p. 346.]

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 feasor, for in trespass no one is an accessory etc.

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

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

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

And later the parties reached an agreement etc.

Translation of the Record[1]

Yorkshire. § Thomas de Burton of Ingerthorpe, William Farnham of Ingerthorpe, Thomas Bland of Ingerthorpe, John Taylor of Ingerthorpe, John de Farnham of Ingerthorpe, John Smith of Ingerthorpe, Robert de Brunton of Ingerthorpe, Thomas Winkburn of Ingerthorpe, Richard Smith of Ingerthorpe, John Wrightson of Markington, Thomas Taylor of Markington, Adam Smith of Markington, John de Methly of Markington, William Parkinson of Markington and Richard Johnson of Markington were attached to answer John de Berden of York, about a plea of why with force and arms they entered the close of this John de Berden at Burton Leonard and seized and led away his eighteen oxen and two hundred sheep found there, priced at forty pounds, and burned his buildings there together with his goods and chattels in the same buildings, worth a hundred pounds, and committed other outrages against him, to the grave damage of this John de Berden and against the king's peace etc. And whereon the same John de Berden by William Savage, his attorney, complains that the said Thomas de Burton and all the others aforenamed, on Sunday in the first week in Lent in the fifth year of the present lord king's reigns,[2] with force and arms, specifically, with swords, bows and arrows, entered the close of this John de Berden at Burton Leonard and seized and led away his eighteen oxen and two hundred sheep found there, worth etc., and burned his buildings, namely, two granges, together with his goods and chattels he had in them, specifically, wheat, barley, beans, peas and oats and hay, and other outrages etc., to the grave damage etc., and against the peace etc. Wherefore he says that he has suffered loss and may have damage to the value of a hundred pounds. And about this he produces suit etc.

And the said Thomas de Burton and all the others come by John Seymour, their attorney. And they deny force and wrong when etc. And as to coming with force and arms and seizing and leading away forty of all the said sheep they say they are in no way guilty thereof. And about this they put themselves on the country. And John de Berden does likewise. And as to breaking the close and seizing the said oxen and the remaining hundred and sixty sheep, the same Thomas de Burton says that one Peter Bekard, knight, late lord of Burton Leonard, was seised of the manor of Burton Leonard in his demesne as of fee, and thus seised thereof he granted to one Thomas de Burton, knight, great-grandfather of this Thomas de Burton, whose heir he is, namely, the son of Nicholas, the son of Nicholas, the son of the same Thomas de Burton, knight, a certain annual rent of twenty marks, to be received from the said manor in equal portions at the feasts of Pentecost and St. Martin-in-Winter, in perpetuity, and because the said annual rent had been in arrears to the same Thomas for twelve years before the time when it is supposed that the trespass was done and since the death of the said Nicholas, his father, he [Thomas] entered the premises of the said manor through open doors, with the constable of the said vill and others, and by way of distraint for the twenty marks of the arrears of the same annual rent being thus in arrears from the first year of the said twelve years, he seized the same oxen and the hundred and sixty sheep within the premises of the said manor which was thus burdened with the said annual rent. And he says that afterwards the aforesaid John de Berden sued a certain complaint in the court of Knaresborough about the seizure of the same beasts, wherein by this writ he [John] complain[ed] against those Thomas de Burton and David Houlgrave, and he had delivery of those beasts, and still has. And afterwards the said complaint was removed hither from that court by a certain writ of *recordari* of the lord king, and that writ is still pending here in court, and the same John de Berden has counted here in court against him [Thomas] and the said David about the same writ and the same seizure. Wherefore as to the seizure of the said oxen and the hundred and sixty sheep he asks judgment of this writ of trespass about the same

[1] CP/40/486, m. 217

[2] 2 March 1382.

seizure whereof the other writ, of *recordari*, is pending here in court. And he proffers here in court a certain writing that attests the grant of the said annual rent in the said form. And the said William Farnham and all the others say that on the alleged occasion they came in aid of Thomas de Burton to seize the said oxen and the hundred and sixty sheep, and that about the same seizure another writ, of *recordari*, between the said John de Berden and the aforesaid Thomas de Burton is pending here in court, and that the same John de Berden has [had] release of the same beasts, wherefore as to the seizure of the same oxen and the hundred and sixty sheep they ask judgment of this writ of trespass etc.

And because the said John de Berden does not deny this, it is therefore adjudged as to the same oxen and the hundred and sixty sheep that the said John de Berden take nothing by his writ but be in mercy for his false claim. And hereupon, both as to this matter whereof the plea has gone to the country and as to all that remains of the said plea and is contained in the writ, a day is given to all the said parties, here, in the quindene of Michaelmas, in the state they are now in, saving to the parties etc. On which day the said John de Berden did not prosecute his said writ. Therefore he and his sureties of prosecution are in mercy. And the said Thomas de Burton and all the others shall go thence without a day.

ANON.

Y.B. Hil. 13 Rich. II (CB 1390)
ed. T.F.T. Plucknett, *Year Books 13 Richard II*, Ames Foundation (London, 1929), pp. 103–4

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.

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 *brief sur son cas*. (*Quod nota*.

So *Woodrow* said, we wish to imparl.[1]

WATTON v. BRINTH

Y.B. Mich. 2 Hen. 4, fol. 3, pl. 9 (CB 1400)

One Laurence Watton brought a writ *forme sur son especial matter* against Thomas Brinth, and the writ was thus:—*Quare cum idem Thomas ad quosdam domos ipsius Laurentii bene et fideliter infra certum tempus de novo construendo apud Grimesby assumpsisset, praedictus tamen Thomas domos ipsius Laurentii infra tempus praedictum, etc. construere non curavit ad dampnum ipsius Laurentii decem librarum, etc.*[1]; and he counted accordingly.

Tirwhit. Sir, you see well how he has counted of a covenant and of this shows nothing: judgment, etc.

Gascoigne. Since you made no answer, we demand judgment and pray our damages.

Tirwhit. This is merely a covenant.

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[1] Imparlance or *licentia loquendi*: leave to 'end the matter amicably without farther suit, by talking with' the other party. See Bl. Comm. III, 298.

[1] ['Why whereas the same Thomas had assumed to reconstruct well and faithfully within a certain time certain houses of this Laurence at Grimsby, the aforesaid Thomas nonetheless did not take care to construct the houses of this Laurence within the aforesaid time to the damage of this Laurence of ten pounds.']

Bryn. So it is; and peradventure if he had counted, or in the writ mention had been made, that the thing had been commenced and then by negligence not done, it would have been otherwise.

HANKFORD, J. He could have a writ on the Statute of Labourers,[2] and this carpenter is an artificer, whereby you might have a good action against him on the Statute, but you know well that a man cannot have an action of covenant against his servant if he does anything against his covenant, if there is no deed about it.

RICKHILL: Because you have counted on a covenant and shown nothing for it, you shall take nothing by your writ, but be in mercy.

ANON.

Y.B. Mich. 11 Hen. IV, fol. 33, pl. 60 (CB 1409)

A writ was brought against a carpenter *sur tiel mattere*, that, whereas he had undertaken to make the plaintiff a new house within a certain time, he had not made the house, a tort, etc.

Tildesley. Sir, you see well how this matter sounds in a manner of covenant, of which covenant he shows nothing. Now therefore we ask judgment if he shall have an action without a specialty.

Norton. And we ask judgment, sir; for if he should have made my house badly and should have destroyed my timber, I should have had an action sure enough on my case without a deed.

THIRNING, C.J. I grant well in your case, because he shall answer for the tort he has done, *quia negligenter fecit*. But if a man makes a covenant and shows nothing done beyond the covenant, how shall you have your action against him without specialty?

HILL, J. He could have had an action on the Statute of Labourers in this case, supposing him to have been retained in his service to make a house, but this action is too feeble. Because, therefore, it seems to the court that this action, which is taken at common law, is founded on a thing which is a covenant in itself, of which nothing is shown, the court awards that you take nothing by your writ, but be in mercy.

WATKINS' CASE

Y.B. Hil. 3 Hen. VI, fol. 36, pl. 33 A.D. 1425

A writ of Trespass was brought by one W. B. against Watkins of London, millmaker. And he counted by *Strangeways sur ce cas*, that is to say, that on such a day and year in London in such a ward he took upon himself (*emprist sur luy*) to make a mill for the said plaintiff; and he showed that the mill was to be all ready and built by the following Christmas, but that by this time the mill was not built, *a tort* and to the damage of the plaintiff ten marks.

Rolfe. Judgment of the writ: for by the writ it is supposed that the defendant should make a mill, and he has not declared for certain how much he should have for the making.

Strangeways. Since you have said nothing, we ask judgment and pray our damages.

BABINGTON, C.J. If I bring a writ of Deceit against one, for that the defendant was my attorney and that by his negligence I have lost my land, etc., in this case I must declare how he was retained by me, or else the writ shall be abated. So here.

MARTIN, J. I do not know that I have seen in the Law that a writ *sur tiel mattere* lies, where no tort is alleged in the writ, but only that the defendant has promised to do something and he has not done it; for in such case a good writ of Covenant lies, supposing that he has a specialty. But if he had made a mill which was not good but altogether badly made, then a good writ of Trespass would lie. Suppose we put the case that a farrier makes a covenant with me to shoe my horse, and by his negligence he lames my horse, on this matter shewn a good writ of Trespass lies, for, notwithstanding that in the rehearsal of the matter a covenant

[2] See Holdsworth, H.E.L II. 460–4.

is supposed, I say that, inasmuch as he has done badly what he had covenanted to do, the covenant is thereby changed and made into a tort, for which a good writ of Trespass lies. But in the case at bar there is no such thing; for no tort is alleged in the writ by any feasance, but only a nonfeasance, which sounds only in covenant.

BABINGTON, C.J. I think the contrary. Put the case that one makes a covenant with me to roof my hall or a certain house by a certain time, and within this time he does not roof it, so that by default of the roofing the furniture of the house is all damaged by the rain; in this case I say that I shall have a good writ of Trespass *sur le mattere monstre* against him who made the covenant with me. So too I shall recover damages because I have suffered loss by the not making the mill.

COKAYNE, J. To the same intent. As to the first argument, that he should have declared that he made the covenant with him for a sum certain, it seems to me, Sir, that he has thus declared in effect. For it is not to be supposed that he should make the mill for nothing, and so it is all one as if he had expressly said so in his pleading, and on the matter shown the writ is well enough. And put the case that one makes a covenant to repair certain ditches on my land, and he does not do so, so that by his default the water which should run into the ditches floods my land and destroys my corn; I say that I shall have a good writ of Trespass for this nonfeasance. So here.

Rolfe. On the first point, it seems to me that he should have made express mention in the writ what he is to have; and I say that there is a great difference where one agrees to do a thing and where one is a common labourer. For one who is a labourer is put in certainty by the Statute,[1] whereby, notwithstanding that nothing is said in the covenant as to what he shall have, the servant shall have a good action of Debt against me for his salary according to the Statute. But if I make a covenant with one to go with me or to do a certain thing, and I do not say for certain what he is to have for his feasance, in this case I say that the covenant is void for both parties; for if he does not perform the covenant I will never have action against him, and no more shall he, if he performs the act, demand anything for his work, unless it is expressed for certain what he shall have. So it seems to me that, if this action *sur cest mattere* is to be maintained. the principal thing which is the cause of the action should be expressly declared in the writ, and that is the covenant, which is not good unless it be stated for certain what he is to have.

Strangeways. I think the contrary. And as to what Master Martin has argued, that, because no tort is supposed by the writ, the writ should not lie, Sir, it seems to me that it will lie. For suppose one makes a covenant with me to be my servant. and then I order him to go out with my cart and he refuses, I say that I shall have a writ of Trespass against him for this refusal; and this is a mere nonfeasance. So here.

MARTIN, J. That I grant well; for the refusal is a departure from your service, for which a good action lies. But truly, as it seems to me, if this action be maintainable *sur cette mattere*, for every broken covenant in the world a man shall have an action of Trespass.

BABINGTON, C.J. All our talk is vain; for as yet they have not demurred in law.

Wherefore he said to *Strangeways* and *Rolfe*, Plead and say what you will or demur; and then there can be debate and dispute enough.[2]

Wherefore *Rolfe* pleaded over, and said that, long after the time when it was supposed that he made the covenant, that is to say, on such a day, etc., the defendant came to the plaintiff in such a ward and said to him that the mill was quite ready and built, and asked him when he would have the mill, and discharged himself completely of the mill. And so we demand judgment if the action lies.[3]

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[1] I.e., Statutes of Labourers.

[2] I.e. You must either demur in law and thus fight on the law, or plead and fight on the facts: decide first which you will do.

[3] The 'prefabrication' suggested by this plea was a common mediaeval practice. See John Harvey, *Gothic England* (1947) at p. 33: 'In most parts of the country the ordinary small house or cottage was built of timber framing, the panels filled with hurdles or wattling and daubed over with clay or a composition of clay, lime and chopped straw. ... Quite frequently houses were framed by

Strangeways. He did not discharge himself.

Issue joined.

Quare de l'opinion de MARTIN.[4]

SOMERTON'S CASE

Y.B. 11 Hen. VI, Hil. fol. 18, pl. 10; Pasch. pl. 1; Trin. pl. 26 (CB 1433)[1]

The Writ[2]

The King to the sheriff. greeting, etc. Distrain John Colles of Northaston ... to show why, whereas the said William Somerton retained at Northaston the aforesaid John Colles to be of his counsel for the purchase of the manor of Northaston from John Boteler to the aforesaid William and his heirs, or at least to procure a term of years therein, for a certain sum paid to the said John Colles by the aforesaid William as agreed between them under a certain form of agreement, and whereas the aforesaid John Colles agreed and undertook (*assumpsit*) for the said certain sum as promised between them, to obtain the aforesaid manor to the said William and his heirs, or at least a term of years to be held from the aforesaid John Boteler, yet the aforesaid John Colles, by collusion between himself and John Blunt at Northaston, contriving basely to defraud the said William in this behalf, maliciously revealed all the counsel of the said William in this behalf to the aforesaid John Blunt, and there and then falsely and fraudulently became of the counsel of the same John Blunt and, contrary to his aforesaid promise and assumption, procured the said manor to the said John Blunt for a term of years to be held of the aforesaid John Boteler, to the damage of the said William, etc.

... COTTESMORE, J. The matter of the writ is single enough.[3] For if I retain you to serve me, and you undertake to serve me, that is no double matter; since he does not undertake to do anything more than he is retained to do, and so it is all one thing. So, if I retain you to make me a house, and you grant that you will make the house, this is but one thing, and you will be in default if you misframe the timber and ruin the house. And in the same way, if I retain a Surgeon to aid me, and he undertakes to aid me, and he gives me contrary medicines, whereby I am harmed, here is a good action on the case. So here. ...

MARTIN, J. ... To allege that one retains another to do a certain thing, and that he undertakes to do it, this is not double; as if I sell to you a tun of wine and I warrant the wine to be sound and not corrupt. Likewise you shall have an action supposing that one sells you a horse and warrants the horse to be sound in its limbs and he knows the horse to have a certain malady. So here; for the cause of the action is neither the retainer nor the warranty, but the cause is that the other has discovered his counsel and has become of counsel with another.

BABINGTON, C.J. To the same intent. For if I retain one to purchase a manor for me, and he does not do so, I shall not have any action against him without a deed; but, if there had been a deed, I could have had an action of Covenant because he had not done what he was retained to do. But if he becomes of counsel with another in this matter, then, because I have been deceived, I shall have *accion sur mon cas*, for he is bound to keep my counsel when he is retained by me. But if a man shows his title-deeds to a man of Law, who afterwards becomes of counsel with another and then discloses the said title- deeds to him, he shall not have an action against him on this matter, because he did not previously retain him. As for the suggestion that he warranted to him to purchase the manor, for this matter he will have no action other than an action of Covenant; and for this he must have a deed to the effect that he was retained to buy the manor, etc., and that

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the carpenter at his yard, often placed beside a river, then transported in parts by barge or wagon to the site, and there erected in order. Every timber had to be marked at the joints with corresponding numerals to permit of correct assembly. These marks may often be seen quite clearly from the street, as on the Grammar School, Stratford-on-Avon, built by master carpenter John Hasill in 1427.'

[4] Note by the reporter.

[1] The case was argued and reported in three different terms. See Plucknett, *Concise History* 4th ed., p. 605, n. 3.

[2] Y.B. 11 Hen. VI Pasch., fol. 25.

[3] He is repelling the defendant's argument that the writ improperly contained a double allegation: (1) that the defendant was *retained*, (2) that he *undertook* to act as the plaintiff's counsel.

he warranted to him to do this. But this is only a covenant, and, if he has no deed, he cannot have an *accion of Trespass sur son cas*: for there is no more than a covenant broken. But if he betrays his counsel and becomes of counsel for another to purchase this manor for him, now here is a deceit for which I shall have *accion sur mon cas*. ...

COTTESMORE, J. To the same intent. And I say that matter which lies wholly in covenant can by malfeasance *ex post facto* be converted into deceit. For if I warrant to purchase for you a manor, notwithstanding that I fail to do this for you, no action will lie for these bare words without a deed to this effect. And in the same manner, if I warrant to pay you £20 without deed, you shall not have an action, since the warranty sounds in covenant. So here, the retainer of the one part and the warranty of the other sound wholly in covenant; yet, when he has become counsel for another, that is a deceit and changes all that came before, which was but covenant between the parties, and for this deceit he shall have *Accion sur son cas*. ...

ANON.

Y.B. 14 Hen. VI, fol. 18, pl. 58 (CB 1436)

Trespass was brought by one R. *sur son cas*. And he counted that the plaintiff had bargained for certain land for a certain sum from the defendant, and he showed everything in detail, and that the covenant of the defendant was that he should cause third parties to make release to him within a certain time and that they had not so released; and so the action accrued to him.

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

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

Ellerkar. I think your writ should abate, for several similar cases have been adjudged in the law before now. Thus, in the case that I make a covenant with a carpenter to make me a house within a certain time and he does not do so, l shall have no action save by a writ of Covenant. And the law is the same if one takes upon himself to shoe my horse and he does not do so, no other action shall I have save a writ of Covenant; and so, if he does not do it and there is no specialty, the action fails. So here, he has taken upon himself to make a stranger release, which is a covenant, and he shows that he has not released, which is nothing but a covenant broken; wherefore I think the writ should abate.

Newton. I think the contrary, and that the writ is good. In the case of the carpenter which *Ellerkar* has put, I agree well that it is law that, if a carpenter makes a covenant with me to make a house good and strong and of a certain form and he makes me a house which is weak and bad and of another form, I shall have an action of *Trespass sur mon cas*. So, too, if a farrier makes a covenant with me to shoe my horse well and properly and he shoes and lames him, I shall have a good action. So, too, if a leech takes upon himself to cure me of my maladies and he gives me medicines but does not cure me, I shall have *Action sur mon cas*. Again, if a man makes a covenant with me to plough my land in good season and he does so in unseasonable time, I shall have *Action sur mon cas*. And the cause in all these cases is that there is an undertaking and a matter in fact beyond that which sounds in covenant. So, in the case at bar, he has taken upon himself that a stranger shall release to the plaintiff, which is an undertaking, and, inasmuch as this has not been done, the plaintiff has tort, as in the cases before rehearsed.

PASTON, J. I think the same. As to what has been said, that, if the carpenter takes upon himself to make me a house and does not make it, I shall not have *Accion sur mon cas*, I say, Sir, that I shall. And, Sir if a farrier makes a covenant with me to shoe my horse and he does not do it, and I go on my way and my horse has no shoes and is ruined for lack of shoes, I shall have *Accion sur mon cas*. And if you, who are Serjeant at Law, take upon yourself to plead my cause and do not do it, or do it in some other manner than I wish, whereby I suffer loss, I shall have *Accion sur mon cas*. So it seems to me that in the case at bar the writ is good.

JUYN, J. I agree. And, as PASTON has said, if the farrier does not shoe my horse, I shall have an action against him as much as if he had shod him and lamed him. For all this is dependent upon the covenant and accessory to it, and, as I have an action for the accessory, so I shall have an action for the principal.

PASTON, J. That is very well said.

DOIGE'S CASE
[SHIPTON v. DOGGE]

Y.B. Trin. 20 Hen. VI. fol. 34. pl. 4 (Ex. Ch. 1442)[1]

Note from the Records[2]

The CB roll for Easter term 1442 (CP 40/725 m. 49d) records an action on the case brought by one William Shepton against Joan, widow of John Dogge of London: "[W]hereas the same William had bargained with the said Joan in London to buy from her two messuages, 28 acres of arable land and one acre of meadow with the appurtenances in Hoxton in the county of Middlesex, for a certain sum paid in advance to the same Joan; and the same Joan had there undertaken to make a feoffment thereof to the said William and his heirs within a certain period now elapsed: the aforesaid Joan, craftily scheming to defraud him the said William in that behalf, sold the aforesaid messuages, land and meadow with the appurtenances within the aforesaid period to John Melburne, and within the same period falsely and deceitfully made a feoffment thereof to the same John and his heirs; to the damage of the selfsame William £40 etc."

The defendant did not appear. No continuance is recorded beyond Michaelmas 1442. In Trinity term 1442, Shepton (now called 'Shipton') commenced another action in similar form, but in the court *coram rege* (KB 27/717, m. 111). The bill is entered as 'a plea of falsity and deceit' and adds the details that Mrs. Dogge had undertaken to convey the land in fee simple within a fortnight of the sale, which was on 12 February 1439, and that she had been paid £110. The words 'in that behalf' were also replaced, so that she was alleged to have craftily schemed to defraud the plaintiff of the messuages, land and meadow. The damage was laid as £200. Mrs. Dogge entered a special demurrer, on the express grounds that the facts alleged amounted to a covenant, and so the plaintiff should have brought an action of covenant rather than deceit The court took advisement until Hilary term 1443. Meanwhile the matter was adjourned in the Exchequer Chamber for consultation with the other judges, and the Y.B. reports the argument there in Trinity term 1442.

A bill of deceit was brought against John Doige in the King's Bench. And the plaintiff counted that he bargained with the said John on such a day and year to buy from the said John so much land for £100 to him paid. Of which land he was to enfeoff the said plaintiff within fourteen days, and that the said John enfeoffed one A. of the same land and so deceived him. And the defendant demurred on this bill, for that, on the matter thus shown, the plaintiff should have a writ of Covenant and not this action. And now in the Exchequer Chamber.

AYSCOUGH, JCB. If a carpenter takes upon himself to make me a house and does not do so, I shall not have a writ of trespass, but only an action of covenant (if I have a specialty). But if he makes the house badly, I shall have an action of trespass on my case; for this misfeasance is the cause of my action. So in our case, if the defendant had kept the land in her hands without making feoffment, then the plaintiff would only have a writ of covenant. And I think the case is all one when the defendant makes feoffment to a stranger and when he keeps the land in his hands. Wherefore the action does not lie. Also, the bill says 'he had bargained to buy', and those words do not prove that bought. Consequently, it cannot be taken as deceit, when the bargain did not reach the state of an accord.

PASTON, JCB. Yes, sir. The bargain proves an accord, namely when the money is paid.

BABTHORPE, B. Suppose the defendant had charged the land after making the bargain, and then enfeoffed the plaintiff; he would not have a writ of deceit. (AYSCOUGH agreed with this.) And the law is the same in my view, whether the defendant charged the land or whether she enfeoffed another of all the land.

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[1] See another transcription by Dr. Hemmant, Selden Society, vol. 51, p. 97. [Fifoot's translation is collated with that of Baker and Milsom, *Sources*, pp. 390–5.]

[2] From Baker and Milsom, *Sources*, pp. 390–5.

Wangford. The defendant has done some wrong, on which the action of deceit is founded; for by the act of enfeoffing a stranger she has disabled herself from making feoffment to the plaintiff, even if she buys back the land afterwards and enfeoffs him.[3] ... So, if I retain a man to buy for me a manor for a certain sum and then he buys it for himself, on this I shall have an action of deceit.[4] And so in our case.

Stokes, to the same intent: Suppose I retain one who is skilled in the law to be of counsel with me in the Guildhall at London on a certain day and he does not come on that day, whereby my cause is lost, now he is liable to me in an action of deceit; and yet he has done nothing. But because he has not done what he undertook to do and I am thereby damaged, he is liable in deceit. ...

PASTON. Suppose a man bargains to enfeoff me, as in our case here, and he afterwards enfeoffs another, and then he re-enters and enfeoffs me and the other ousts me. Now here the action of covenant may not be brought, because he has at last enfeoffed me according to his covenant; and yet the deceit remains upon which an action may be based. Wherefore it does not always follow that where there is a covenant the action of deceit will not lie.

BABTHORPE. Suppose the defendant had enfeoffed a stranger, reserving to himself an estate tail, and had then enfeoffed the plaintiff, is not this a great deceit? (Implying that it would have been.) And yet it sounds in covenant.

AYSCOUGH. If the feoffment has been made wrongly by such a fraud, it is a wrong in the nature of a misfeasance. But in our case no feoffment is made to the plaintiff, properly or improperly, and so there is nothing done save the breach of covenant.

NEWTON, CJCB. The defendant has disabled herself from keeping her covenant with the plaintiff because she has enfeoffed another and, moreover, the day has passed by which the feoffment should have been made. To what effect, then, would he have a writ of covenant, when the defendant cannot be held to any covenant with him, even if there was a specialty? (Implying that it would be pointless.) Now, when the plaintiff has made a firm bargain with the defendant, the defendant can demand the purchase price by a writ of debt, and in conscience and in right the plaintiff ought to have the land, even though the property cannot pass to him in law without livery of seisin. For it would be amazing law (*merveillous Ley*), then, if there should be a perfect[5] bargain under which one party would be bound by an action of debt and yet be without remedy against the other. Wherefore the action of deceit well lies.

FORTESCUE, CJCR. If by a deed of indenture I lease land to a man for a term of years by deed indented and then I oust him within the term, and twenty years (say) after the end of the term he brings an action of covenant against me, the action lies well; and yet he cannot recover the term itself, but damages only. So in this case. And as to the argument that, because he has disabled himself from executing the covenant, the action of deceit lies, I will put you a case where the party has disabled himself and yet no action lies save covenant. For suppose I make a lease for a term of years to *Paston*, and then I lease the same land to *Godrede*,[6] who goes into occupation: now I have disabled myself from giving *Paston* his lease, and yet he shall have only a writ of covenant against me.

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

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[3] A complicated argument about warranty is omitted here.

[4] See *Somerton v. Colles* (1433), above.

[5] Reading ‘par fait’ as ‘parfait’.

[6] JKB, 1434–1443, although he does not speak in our report.

misfeasance. So here, though I can have a writ of covenant, yet, since she has disabled herself as aforesaid, I shall have deceit.

NEWTON. If I bail a certain sum of money to *Paston* to bail over to *Fortescue*, now, if *Paston* does not do this, he will be liable to me in an action of account and also in an action of debt, and it is at my pleasure which I shall bring,[7] but when I have brought the one, the other is extinguished. So in this case here there are two actions, covenant and deceit, and so the party may bring deceit if he wishes. Wherefore, etc.

FRAY, CB. If the defendant in our case had ousted her feoffee and had then enfeoffed the plaintiff, now all the covenants would be fulfilled; and suppose that later the feoffee were to oust the plaintiff, is the plaintiff to have no action now because he could not have an action of covenant? Surely, he shall. ...

PASTON. It is not true that in every bargain there must be a covenant. For if I buy from you a horse without your warranting him to be sound, here there is no covenant, and yet there is a bargain; and if he is unsound I shall have a writ of trespass on my case against you and shall allege that you sold him to me, knowing him to be unsound. A case came before the Common Bench, where the plaintiff bargained to have 14 bales of grain from the defendant and the defendant sold them to him, knowing the said grain to be diseased, and the action was upheld. [But look at the record of this case: for there it was warranted that the said grain was merchantable].[8] Wherefore it is right that the plaintiff should have an action of deceit on such a bargain even if, had he a specialty, he could also have a writ of covenant.

WESTBURY, JCR. If a man, after such a bargain as in our case and before the feoffment, made a statute merchant[9] and then made the feoffment, the party should have a writ of deceit. So here.

FORTESCUE. If this case be law that *Newton* has put, then indeed there would be no question of the law in our case; for if each party is bound by action on a bargain, then it will be proper to maintain this action of deceit.

PASTON. Come then to this case.

FORTESCUE. Willingly. I would agree that, if I buy a horse from you, now the property in the horse is in me, and for this you shall have a writ of debt for the money and I shall have detinue for the horse on this bargain. But that is not so in our case. For, though the plaintiff has a right to have this land in conscience, yet the land does not pass without livery. Wherefore, etc.

PASTON. In our case the contract is good without specialty, and a good contract will bind both parties. What reason is there, then, that the one shall have an action of Debt and the other shall have no action? (As if to say, there is no reason, since in right (*en droit*) he should have the land.

And it was adjourned.

[The record shows that in Hilary term 1443 judgment was given for the plaintiff to recover £20 damages, as assessed upon a writ of enquiry. It will be noted that the damages fell far short of the purchase price and the £200 claimed in the count.]

NOTE

Baker and Milsom, *Sources*, 395, note varying results in similar cases in the second half of the 15th century. They also report (*id.*, 395–400, a number of cases in the same period in which the court and the serjeants agonize over whether the action on the case may be brought for nonfesance. In the meantime, Professor Baker notes (*Introduction*, pp 380–1): "The plea rolls ... contain many undetermined actions based on nonfeasance dating back to the fourteenth century. It is unlikely that many of these cases came before the court judicially, but obviously the clerks of the court were happy to issue mesne process upon writs alleging nonfeasance, and presumably most of the cases were settled without recourse to legal argument. That it was so often ignored in practice may have been one reason why the distinction between misfeasance and nonfeasance broke down."

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[7] See [Fifoot, *History and Sources*, p. 272].

[8] These words would seem to have been inserted by the reporter.

[9]*Supra*, p. [VII–8].

A DICTUM IN GRAY'S INN (1499)

Trin. 14 Hen. VII, Fitz. Abr. *Action sur le case*, pl. 45[1]
in J.H. Baker and S.F.C. Milsom, *Sources of English Legal History* (London, 1986), 401

In Gray's Inn.[2] 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.[3] 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*.

[1] Also inserted in Y.B. Mich. 21 Hen. VII, fol. 41, pl. 66, from Fitzherbert.

[2] In margin of 1514 ed., but omitted from later editions.

[3] 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.

D. PERSONAL ACTIONS IN LOCAL COURTS[1]

FAIR COURT OF ST. IVES

Ed. C. Gross, *Select Cases Concerning the Law Merchant*, vol. 1: *Local Courts*,
Selden Society, 23 (London, 1908), 15, 22, 36, 39, 77

RIBAUD v. RUSSELL (1287)

Gilbert Ribaud complains of William Russell and Walter Clerk of Haddenham. Pledge to prosecute, his faith[2]; pledge of the defendants, feathers.[3]

And Gilbert appears and complains of the said William and Walter, for that they unjustly detain from him and do not pay him 9s. 6d.; and unjustly because, whereas it was covenanted between him, Gilbert, and the said William and Walter, in the town of Bury St. Edmunds in the house of Alice Coterun, on the Monday before the feast of St. Nicholas last past, a year ago, that the said Gilbert should sell eleven sacks of feathers and that he should receive as his stipend 12d. for each sack, the said Gilbert as broker of the said William and Walter sold these sacks to a certain John Waterbailie of Provins. And after the said sale had been made the said Gilbert firmly believed that his stipend, 9s. 6d., would be paid to him according to the covenant (*secundum convencionem*); but the said William and Walter have detained the said money from him and still detain it, to his damage a half-mark. And he produces suit.

The said Walter and William are present and deny all which should be denied word for word, and they are at their law. And because they cannot find pledges to make their law, the said Gilbert craves judgment against them, as against those who are convicted, both for the damages and for the principal.

Wherefore it is awarded that the said William and Walter make satisfaction to the said Gilbert and be in mercy for the unjust detention. They are poor: pledge, their bodies. And afterwards they were liberated, each on his own pledge of faith.

[1] From C.H.S. Fifoot, *History and Sources of the Common Law* (London, 1949) 308–21. Other references given as they occur.

[2] I.e. on his own recognizances.

[3] I.e. a pledge of those goods in which the defendants traded, as appears from the case itself.