G. CONTRACT AND TORT: EARLY MODERN DEVELOPMENTS 1. CONTRACT: THE DEVELOPMENT OF THE MONEY COUNTS

in Baker and Milsom, *Sources*, 458–81

(1) Actions on bills of exchange

WOODFORD v. WYATT (1626)

HLS MS. 106, fo. 263 (Exchequer Chamber).

An action on the case upon an assumpsit was brought by Woodford against Wyatt, grounded on a bill of exchange. Judgment was given in the King's Bench, and upon a writ of error brought [these] errors were assigned:

1. It was laid to be a custom of the city of London that if any merchant in London sent his bill of exchange to a merchant in parts beyond the sea, and that merchant accepted and subscribed it, this amounted to an assumpsit: whereas the custom of London can only extend to London, and not to any place beyond the sea. But this was not allowed, for this action is founded on a particular promise made by Wyatt and not on the custom of merchants.

2. The custom is laid as extending to places beyond the sea, but the execution of this custom is laid at Hamburg in the parish and ward of Cheap, London, which is not a place in parts beyond the sea. But this was not allowed, for it is so laid for necessity of trial according to the books. . . .[1]

3. The assumpsit is laid 'that if D. E. did not pay, he would pay', and D. E. is not any known name. But this was not allowed, for he ought to be named in the same way as he is named in the promise.

And [so] the judgment was affirmed in the Exchequer Chamber.

BROWNE v. LONDON (1671)

1 Mod. 285, pl. 32 (untr.)[2]

Notes from the Record[3]

In Michaelmas term 1669 Alexander Browne brought a bill of trespass on the case against William London, merchant. The first count set out the custom of merchants that the acceptor of a bill of exchange was chargeable (*onerabilis*) with the payment of the sum mentioned in the bill; and that on 18 January 1668 the defendant accepted a bill drawn by Philip Willimson, merchant, at Newcastle, requesting him to pay £53. 4s. 8d. to the plaintiff; and that in consideration thereof the defendant undertook to pay that sum to the plaintiff. The second count set out more generally—omitting the custom—that the defendant was on 1 May 1668 indebted to the plaintiff in £53. 4s. 8d. unpaid upon another[4] bill of exchange drawn by Willimson and accepted by him according to the custom of merchants, and in consideration thereof undertook to pay. London pleaded *non assumpsit*, and on 2 August at Newcastle assizes (Christopher Tumor and Littleton BB.) the jury found for the plaintiff on the second count, with £59. 4s. 8d. damages. The defendant moved in arrest of judgment in Michaelmas term 1670.

Judgment was given for the defendant (Twisden J. hesitating) in Michaelmas term 1671: record; 2 Keb. 822; 1 Vent. 152. But it was agreed that if money had been paid to the acceptor, the payee could have brought *indebitatus* for money had and received.

Indebitatus assumpsit for £53 due to the plaintiff upon a bill of exchange drawn upon the defendant, and accepted by him according to the custom of merchants. After a verdict for the plaintiff, it was moved in

---

[1] E.g., Y.B. Pas. 20 Hen. VI, fo. 28, pl. 21 (bond made in Paris); Mich. 15 Edw. IV, fo. 14, pl. 18 (Calais in Kent). See also Hil. 48 Edw. III, fo. 2. pl. 6 (Harfleur in Kent).

[2] Also reported this term in 2 Keb. 695, 713; 1 Lev. 298; (Pas. 1671) 2 Keb. 758; (Mich. 1671) 2 Keb. 822; 1 Vent. 152.

[3] KB 27/1919, m. 523.

[4] Plainly a fiction, designed to prevent recovery on both counts.

arrest of judgment that, though an action upon the case does well lie in such case upon the custom of merchants, yet an *indebitatus* may not be brought thereupon . . . .

RAYNSFORD J. This is the very same with *Milton's Case*,[5] lately in the Court of Exchequer, where it was adjudged that an *indebitatus assumpsit* would not lie. In this case he added that the verdict would not help it; for though [Hale] C.B. said it were well if the law were otherwise, yet he and we all agreed that a bill of exchange accepted was indeed a good ground for a special action upon the case, but that it did not make a debt. First, because the acceptance is but conditional on both sides: if the money be not received it returns back upon the drawer of the bill; he remains liable still, and this is but collateral. Secondly, because the word 'chargeable' (*onerabilis*) doth not imply debt. Thirdly, because the case is *primae impressionis*; there is no precedent for it . . . .

SARSFIELD v. WITHERLEY (1689)

1 Show. K.B. 125 (untr.)[6]

Notes from the Record[7]

Francis Sarsfield brought a bill in the King's Bench against Hamond Witherley and set out the custom among merchants and other persons living and trading (*negotiantes*) in Paris and London respectively that if such a person made a bill of exchange in Paris directed to another such person in London, and the payee indorsed it to another, who in turn indorsed it to another, and notice of the indorsements was given to the drawee, and the drawee did not pay the second indorsee the latter could protest the bill according to the custom of merchants and if the first indorsee then paid the sum in the bill the drawer became chargeable to him in that sum. The bill then alleged that the defendant, on 5 August 1677 at Paris (in the parish of St. Mary-le-Bow, London), drew a bill on Thomas Witherley M.D. in London, requiring him to pay £74 to William Ellis, merchant; that Ellis on 10 August indorsed the bill to order of Francis Sarsfield, merchant (the plaintiff), and that on 1 September Sarsfield indorsed it to John Comyn, merchant; that the sum was not paid to Comyn who protested the bill; that on 20 September 1681 Sarsfield paid Comyn himself, as a result of which the defendant became chargeable to him in £74 and that the defendant, in consideration thereof, undertook on 20 September to pay him. The bill also contained a count in *indebitatus assumpsit* for £74 as money laid out to the plaintiff's use. The defendant pleaded that he was the son and heir apparent of Dr. Witherley, who was never a merchant, and that at the time in question he was travelling abroad as an English gentleman in order to see foreign parts and people and to note and understand their customs and languages, and was at Paris as a gentleman traveller, without this that he was ever a merchant. The plaintiff demurred and on 12 February 1687 the King's Bench gave judgment for the defendant. Sarsfield brought a writ of error, and in May the record was removed into the Exchequer Chamber.

The record shows that the judgment was reversed on 23 November 1689. After a writ of inquiry as to the damages, judgment was signed in the King's Bench the following term for £128. 14s. 7d. damages and £38. 5s. 5d. costs.

. . . I[8] argued for the plaintiff that this plea was ill, because it did amount to the general issue . . . . Besides, the matter of the plea is ill, for it is repugnant in itself; for he admits himself to have drawn the bill, and yet traverses that he never was a merchant, whereas the bare negotiating of a bill of exchange makes him a merchant for that purpose. The very act of taking up moneys in a foreign country, and undertaking for the repayment here by bill of exchange, is such an act of merchandise as you will take notice of. Moneys are now become merchandise, and some men's business is wholly in its exchange . . . . Besides, the inconveniency will be great both at home and abroad and work a manifest wrong. If a bill be payable to him he has the advantage of it, though a gentleman, and by the same argument he ought to be bound. If a traveller's bill, drawn beyond sea, shall not enforce a payment upon a protest, our English gentry must suffer in their credit . . . .

Hoyle to the contrary. By their own showing he must be a merchant, else not within the custom; and [the defendant] traversed that, and they have confessed it by their demurrer.

---

[5] (1668); see [*Sources*], p. 248. It was actually an action of debt, but the point was the same.

[6] Also reported in Comb. 152; 2 Vent. 292. Abridged in Holt 112.

[7] KB 27/2056, mm. 645–646.

[8] Sir Bartholomew Shower, the reporter.

[POLLEXFEN C.J.][9] It is not every plea that amounts to a general issue that is ill; and the custom is the foundation, and the plea is an answer to that, and therefore well enough. But this drawing a bill must surely make him a trader for that purpose; for we all have bills directed to us, or payable to us, which must be all avoidable if the negotiating a bill will not oblige . . . .

And so we had judgment reversed . . . .

CLERKE v. MARTIN (1702)

2 Ld Raym. 757 (untr.)[10]

The plaintiff brought an action upon his case against the defendant upon several promises; one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another count was upon the custom of merchants as upon a bill of exchange, and showed that the defendant gave a note subscribed by himself by which he promised to pay [a certain sum] to the plaintiff or his order. Upon *non assumpsit* a verdict was given for the plaintiff, and entire damages. And it was moved in arrest of judgment that this not, was not a bill of exchange within the custom of merchants, ant therefore the plaintiff (having declared upon it as such) was wrong but that the proper way in such cases is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be goo evidence of it.

But it was argued by *Sir Bartholomew Shower* the last Michaelmas term for the plaintiff, that this note—being payable to the plaintiff or his order—was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to John Style or bearer, which he admitted was not a bill of exchange because it is not assignable nor indorsable by the intent of the subscriber . . . . There is no difference in reason between a note which saith, 'I promise to pay John Style or order etc.', and a note which saith, 'I pray you to pay john Style or order etc.': they are both equally negotiable. And to make such a note a bill of exchange can be no wrong to the defendant, because he by the signing of the note has made himself to that purpose a merchant (*Sarsfield v. Witherley*[11]), and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants.

But HOLT C.J. was *totis viribus* against the action, and said that this note could not be a bill of exchange; that the maintaining of these actions upon such notes were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street—which attempted in these matters of bills of exchange to give laws to Westminster Hall; that the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method (as to declare upon a general *indebitatus assumpsit* for money lent.) As to the case of *Sarsfield v. Witherley*, he said he was not satisfied with the judgment of the King's Bench and that he advised the bringing of a writ or error . . . .

And judgment was given that the plaintiff take nothing by his bill, by the opinion of the whole court.

As a consequence of this and similar pronouncements by Holt C.J. against the actionability of promissory notes in this manner, Parliament enacted in 1705 (3 & 4 Ann., c. 8/9) that notes should be negotiable and actionable in the same manner as bills of exchange.

---

[9] The report says Holt, who was C.J.K.B. It must have been Pollexfen C.J.C.P. who gave judgment in the Exchequer Chamber: cf. Comb. 152.

[10] Also reported in 1 Salk. 129, 364.

[11] (1689); see p. [15] above

(2) Quantum meruit

SHEPHERD v. EDWARDS (1615)
Cro. Jac. 370, pl. 4 (untr.)

Error of a judgment in Exeter, before the mayor and bailiffs there. The error assigned was because that Edwards the plaintiff declared that, he being a professor of physic and surgery,[12] and so having been for divers years, and the defendant being troubled with a disease called a fistula and in danger of his life by reason of that disease, the defendant on 26 March 1603 in consideration that the plaintiff at the defendant's request would with his best skill apply wholesome medicines for the curing the defendant of his disease, and would also give and bestow his labour and counsel to the said defendant in that behalf, assumed and promised to pay to him upon request 'such a sum of money as the plaintiff should deserve for his labour and counsel in and about the cure of the aforesaid disease'; and alleges in fact that the plaintiff on the said 26 March 1603 and on various other days and occasions betwixt the said 26 March and the last of February following, according to his best skill, caused to be applied divers medicines for cure of the said disease, and gave his counsel and bestowed his labour in that behalf throughout that time; and that the defendant, as well by the means of the said medicines as by the labour and counsel of the plaintiff, was by the said last of February [1604] well cured of the said disease and made whole; and he saith in fact that 'he well deserves £100 for his labour and counsel bestowed about the curing of the said disease', and that the defendant, although he had been required, had not paid the said £100 or any part thereof. The defendant pleaded *non assumpsit*, and it was found against him, and thereupon the plaintiff had judgment; although it was objected that 'as much as he should deserve' (*quantum mereret*) is insufficient and uncertain.

(3) The general *indebitatus* count

WOODFORD v. DEACON (1608)
Cro. Jac. 206, pl. 2 (untr.)

Error in the Exchequer Chamber of a judgment in the King's Bench. The error assigned because the plaintiff in an *assumpsit* declares that the defendant, being indebted unto him, assumed to pay etc., and doth not shew for what cause the debt grew: viz. for rent, or by specialty, or by record; and if by any of those means, a general *assumpsit* lies not.

And for this cause all the judges and barons held it to be error. But if it had been, that he 'being indebted for divers wares sold' (or for such like contract) assumed to pay etc., it had been good enough for the generality thereof. And because a recovery in this action should be a bar of such a debt, therefore for this reason it was reversed; although it was objected that there be many precedents of such actions in the King's Bench.

The like judgment was given between *Fayreclough* and *Seed*. And Mich. 6 Jac. *Buckingham v. Costerden, quod vide postea*.[13]

---

[12] Dr. Edwards was also the successful plaintiff in a famous libel case heard in Star Chamber in 1607. See *Sources* p. 648.

[13] Cro. Jac. 213 (K.B.). See also *Tirwhit v. Kynaston* (1607) CUL MS. Gg. 5.6. fo. 56v; Noy 146; *Ivers v. Ingram* (1609) ibid.; *Limbey v. Hemmurse* (1610) 1 Buls. 67; *Paschall v. Russell* (*c.* 1610), cited in Palm. 171; *Occould's Case* (1612) Godb. 186; *Beckingham v. Vaughan* (1616) 1 Rolle Rep. 391; *Barker v. Barker* (1621) Palm. 171; *Mayor v. Harre* (1622) Cro. Jac. 642; *Anon.* (1624) Hetley 107; *Holme v. Lucas* (1625) Cro. Car. 6; *Foster v. Smith* (1626) Cro. Car. 31; *Hern v. Stubbs* (1627) Godb. 400; *Cooke v. Samburne* (1664) 1 Sid. 182; *Moore v. Lewis* (1669) 1 Vent. 27; *Wise v. Wise* (1675) 2 Lev. 152; *Potter v. James* (1693) Comb. 187, 12 Mod. 16, 1 Show. K.B. 347.

(4) Goods Sold

BELLINGER v. GARDINER (1614)

1 Rolle Rep. 24, pl. 1; LI MS. Maynard 22, fo. 76.[14]

An action on the case was brought in the King's Bench upon a promise, and the plaintiff declared that the defendant, being indebted to him 'both for depasturing [his beasts in the plaintiff's ground] and for wheat and various other merchandises bought' undertook to pay this money. Upon this judgment was given, and it was now assigned as error [in the Exchequer Chamber] by Coventry that 'for various merchandises' is uncertain, and so the declaration wants substance; just as an action on the case upon a general *indebitatus assumpsit* is ill.

But it was resolved that the declaration here is good enough.

ALTHAM B. If a man brings debt on an *insimul computaverunt*, it is too general and uncertain; but if he says that the defendant accounted 'for various sums of money' it is good enough. And in our case some things are specified, and therefore it is good enough.

TANFIELD C.B. The reason why a general *indebitatus assumpsit* is not good was always given in the King's Bench, when I was a practitioner there, to be that it might be he was indebted for rent—which is real [and not][15] personal—because you ought not to put them in hotchpot together. But here it is apparent that all are personal, for 'merchandises' imports as much: though if he had said 'for various things' I think it would not have been good.

The judgment was affirmed by them all.

(5) Money had and received

BECKINGHAM AND LAMBERT v. VAUGHAN (1616)

1 Rolle Rep. 391, pl. 11.[16]

It seems from the two reports that the declaration was to the effect that, whereas the defendant was indebted to the plaintiffs in various sums amounting in all to £24 which were received by him by the hands of various persons to the use of the plaintiffs: the defendant, in consideration thereof, undertook to pay the £24 to the plaintiffs, but did not do so. The jury found for the plaintiffs.

It was moved in arrest of judgment by *Harris* that the declaration is not good. The case is as follows: a man delivers money to my use, may I have an action on the case for it? It seems not, because I shall not have an action of debt for it, but account; as in 41 Edw. III[17] . . . .

COKE C.J. thought the contrary, and that he may have debt or account at his election . . . .

But *Harris* took another exception: namely that the declaration says, 'whereas the defendant was indebted for various sums received by him by the hands of various persons', without stating what persons.

COKE C.J. and HOUGHTON J. thought it sufficient, since this is not traversable.[18]

And judgment was given for the plaintiff.

But *Harris* said that this[19] is to be proved by evidence.

---

[14] Also reported in Hob. 5, where there is an incorrect plea roll reference.

[15] MS. Garbled in print.

[16] Also reported in Moo. K.B. 854.

[17] See [*Sources* p. 291].

[18] Cf. Moo. K.B.: '. . . because it is a consideration executed, and so not traversable.'

[19] I.e. the receipt of money from various people.

ARRIS v. STEWKLY (1677)

2 Mod. 260, pl. 148 (untr.)

Notes from the Record[20]

Thomas Arris, sen., M.D., and Thomas Arris, jun., brought a bill of *quominus* in the Exchequer against Scipio Stewkly in an action of *indebitatus assumpsit* for £200 had and received to the plaintiffs' use at Totnes, Devon, on 10 July 1676. The defendant pleaded *non assumpsit*, but failed to appear at the trial. On 24 March 1677 the jury at Exeter Castle (before Jones J.) found a special verdict: that by letters patent dated 17 August 1660 the king granted John Holle and the defendant the office of comptroller of the port of Exeter, during pleasure, that Holle died in 1669, and the defendant continued to execute the office and receive fees and that after Holle's death the king by letters patent granted the office to the plaintiffs; but whether upon the whole matter the defendant *assumpsit* in the manner alleged, the jurors did not know. They assessed the damages as £100, in case this should be adjudged a verdict for the plaintiff. The first question argued in banc was whether the later patent was valid, but counsel for the defendant also questioned the form of action.

The record confirms the report that in Michaelmas term 1677 the court gave judgment for the plaintiffs, to recover £100 damages and £25 costs. It also shows that on 27 November the defendant obtained a writ of error, and that on 9 February 1678 in the Council Chamber,[21] (in the presence of Raynsford C.J.K.B. and North C.J.C.P.) the judgment was affirmed.

. . . *Pollexfen*, for the defendant. A general *indebitatus assumpsit* will not he here for want of a privity, and because there is no contract. It is only a tort, a disseisin, and the plaintiff might have brought an assize for this office, which lies at the common law, . . . [or] an action on the case against the defendant for disturbing of him in kits office; and that had been good, because it had been grounded on the wrong. In this case the defendant takes the profits against the will of the plaintiff, and so there is no contract. But if he had received them by the consent of the plaintiff, yet this action would not lie, for want of privity. It is true, in the case of the king where his rents are wrongfully received, the party may be charged to give an account as bailiff; so also may the executors of his accountant, because the law creates a privity; but it is otherwise in the case of a common person . . . because in all actions of debt there must be a contract, or *quasi ex contractu* . . . .

Winnington S.-G. and *Sawyer*, to the contrary, said that an *indebitatus assumpsit* would lie here; for where one receives my rent, I may charge him as bailiff or receiver; or if anyone receive my money without my order, though it is a tort, yet an *indebitatus* will lie, because by reason of the money the law creates a promise. And the action is not grounded on the tort, but on the receipt of the profits in this case.

THE COURT. An *indebitatus* will lie for rent received by one who pretends a title; for in such case an account wild lie.[22] Wherever the plaintiff may have an account, an *indebitatus* will lie. . . And in the Michaelmas term following the court gave judgment for the plaintiff.

MARTIN v. SITWELL (1691)

1 Show. K.B. 156, pl. 123 (untr.)[23]

Indebitatus assumpsit for £5 received by the defendant to the plaintiff's use. *non assumpsit* pleaded. Upon evidence it appeared that one Barksdale had made a policy of assurance upon account for £5 premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that Barksdale had no goods then on board, and so the policy was void and the money to be returned by the custom of merchants. At the trial I[24] urged these two points. First, that the action ought to have been brought in Barksdale's name,

---

[20] E13/706, m. 17.

[21] I.e. the statutory court of error erected by 31 Edw. III, stat. 1, c. 12. It is usually referred to as the Exchequer Chamber, though the statute refers to 'any council chamber near the Exchequer' and this terminology is followed in the record.

[22] Cf. *Tottenham v. Bedingfield* (1572); see [*Sources* p. 295].

[23] Also reported in Holt 25.

[24] Sir Bartholomew Shower, the reporter.

for the money was his: we received it from him, and if the policy had been good it would have been to his advantage; and upon no account could it be said to be received to Martin's use, it never being his money. Besides, here may be a great fraud upon all insurers, in this, that an insurance may be in another man's name, and if a loss happen then the insurer shall pay for that some cestuy que trust had goods on board: if the ship arrive, then the nominal trustee shall bring a general *indebitatus* for the premium as having no goods on board.

To all which HOLT C.J. answered that, the policy being in Martin's name, the premium was paid in his name and as his money; and he must bring the action upon a loss, and so upon avoidance of the policy for to recover back the premium. And as to the inconveniences, it would be the same whosoever was to bring the action; and therefore the insurers ought with caution to look to that beforehand.

Then, secondly, I urged that it ought to have been a special action of the case upon the custom of merchants, for this money was once well paid, and then by the custom it is to be returned upon matter happening *ex post facto*. I argued, if the first payment were made void, then the law will construe it to be to the plaintiff's use, and so an *indebitatus assumpsit* will lie. But when a special custom appoints a return of the premium, an *indebitatus* lies not as for money received to the plaintiff's use, but a special action of the case upon that particular custom.

To which HOLT C.J. answered me with the case adjudged by Wadham Wyndham J.[25] of money deposited upon a wager concerning a race, that the party winning the race might bring an *indebitatus* for money received to his use, for now by this subsequent matter it is become as such. And as to our case, the money is not only to be returned by the custom, but the policy is made originally void, the party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion or consideration, and consequently it was originally received to the plaintiff's use.

And so judgment was for the plaintiff against my client.

ANON. (*Nisi prius*,[26] 14 June 1695)
Comb. 341 (untr.)

An *indebitatus assumpsit* was brought for money had and received to the plaintiff's use, and the plaintiff gives in evidence that he is a burgess of Westminster and the defendant bailiff there, and that the plaintiff gave the defendant £9 to be excused from fines for nonappearance at the court and from the offices of constable and scavenger,[27] which the defendant took, promising to excuse him; and at the next court the plaintiff was fined.

HOLT C.J. Away with your *indebitatus*, 'tis but a bargain.

Shower, for the plaintiff. Where a Custom House officer hath taken a bribe not to make a seizure, it hath been often ruled that an *indebitatus* lieth.

HOLT C.J. Never by me. I think it hath been carried too far, and I will retrench them. I confess, where a man is overreached upon an account etc. and pays more than is due, it hath prevailed that an *indebitatus* lieth: and that is as far as it ought to go. I would discourage such foolish bargains as this.

Shower. It hath been resolved that if A. pays money to B. to the use of C., and B. fails to pay it over, either A. or C. may bring an *indebitatus*.

HOLT C.J. Aye, but that's not like this case. I have known an *indebitatus* brought 'for various amercements'; but tis most certain no *indebitatus* lieth for a duty.

Plaintiff non-suited.

---

[25] J.K.B. 1660–68.

[26] At Guildhall, London

[27] See [*City of London v. Goray*, p. 15], below.

ANON. (*Nisi prius*,[28] 22 June 1697)

Comb. 446 (untr.)

HOLT C.J. An *indebitatus assumpsit* hath been carried too far. There was one before me for money received to the plaintiff's use, and it appeared it was upon a bond, and the plaintiff would suggest the contract was usurious: but I would not allow it. Where, upon a reckoning, a man receives more from me than he ought, an *indebitatus* will lie; nay, it hath prevailed further, where money [was] paid for fees which were not justly due (though it is hard to maintain that). But where there is a bargain, though a corrupt one, or where one sells goods that were not his own, I will never allow an *indebitatus.*

HUSSEY v. FIDDALL (1699)

12 Mod 324 pl. 558 (untr.)[29]

Error of a judgment in the Common Pleas, in an *indebitatus assumpsit* by the assignee of a commissioner of bankrupt[cy]. The exception was that it was for goods sold after the bankruptcy committed, and the action should be trover; and debt would not lie therefor, because trover might be brought for it again.

HOLT C.J. They may avoid the sale, if they will, and bring trover for the goods; but if they bring the one, they shall not afterwards bring the other . . . . And without doubt the action well lies here, and even a general *indebitatus* would have done.

Northey, at the bar. If a man receives a thing to my use I may say that it was received to my use, and bring the proper action in such case; or, without any such suggestion, bring trover.

HOLT C.J. *Indebitatus* was brought for money received upon a usurious contract, but it was held that it would not lie.[30] KELYNG C.J.[31] would allow it against a receiver or factor, but HALE C.J.[32] would not. By my consent it shall go as far as it has gone, but not a step further. It has been held to lie for a fine by custom,[33] but surely that was hard, for it was to leave matter of law to a jury.

But *Northey* said, some strains had been in favour of remedy; and he said that if a man, pretending title to my land, receive my rent, and get my tenants to attorn to him, an *indebitatus* had been maintained for the money.

Which HOLT C.J. agreed; but said that had been very hard too.

LAMINE v. DORRELL (QB 1705)

2 Ld. Raym. 1216

In an *indebitatus assumpsit* for money received by the defendant to the use of the plaintiff as administrator of J.S., on *non assumpsit* pleaded, upon evidence the case appeared to be that J.S. died intestate possessed of certain Irish debentures, and the defendant (pretending to a right to be administrator) got administration granted to him, and by that means got these debentures into his hands and disposed of them; then the defendant's administration was repealed, and administration granted to the plaintiff, and he brought this action against the defendant for the money he sold the debentures for. And it being objected upon the evidence that this action would not lie, because the defendant sold the debentures as one that claimed a title and interest in them, and therefore could not be said to receive the money for the use of the plaintiff which indeed he received to his own use, but the plaintiff ought to have brought trover or detinue

---

[28] At Guildhall, London

[29] Also reported in 3 Salk. 59; Holt 95.

[30] *Tomkins v. Bernet* (1693) 1 Salk. 22.

[31] Sir John Kelyng, CJKB, 1665–71.

[32] Sir Matthew Hale, CJKB, 1671–76.

[33] *Shuttleworth v. Garnet* (1689); p. [15], below.

for the debentures: the point was saved to the defendant. And now the court was moved, and the same objection made.

POWELL J. It is clear the plaintiff might have maintained detinue or trover for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of *assumpsit*. But the plaintiff may dispense with the wrong[34] and suppose the sale made by his consent, and bring an action for the money they were sold for as money received to his use. It has been carried thus far already. *Howard v. Wood*[35] is as far: there the title of the office was tried in an action for the profits.

HOLT C.J. These actions have crept in by degrees. I remember, in the case of Mr. Aston,[36] in a dispute about the title to the office of clerk of the papers in this court, there were great counsel consulted with; and Sir William Jones and Mr. Saunders were of opinion. an *indebitatus assumpsit* would not lie, upon meeting and conferring together and great consideration. If two men reckon together. and one overpays the other, the proper remedy in that case is a special action for the money overpaid,[37] or an account; and yet in that case you constantly bring an *indebitatus assumpsit* for money had and received to the plaintiff's use. Suppose a person pretends to be guardian in socage, and enters into the land of the infant and takes the profits, though he is not rightful guardian, yet an action of account will lie against him. So, the defendant in this case pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator? If an action of trover should be brought by the plaintiff for these debentures after judgment in this *indebitatus assumpsit* he may plead this recovery m bar of the action of trover . . . . This recovery may be given in evidence upon not guilty in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.

Afterwards, the last day of the term, upon motion to the Court they gave Judgment for the plaintiff.

And HOLT C.J. said that he could not see how it differed from an *indebitatus assumpsit* for the profits of an office by a rightful owner against a wrongful, as money had and received by the wrongful officer to the use of the rightful.

(6) Money laid out and work done.

WIDDRINGTON v. GODDARD (1664)

Bill of complaint, from KB 27/1865 m. 778 A. Vidian, *The Exact Pleader* (1684), p. 12 (omitting the names).

The bill contains both a special *assumpsit* (including a *quantum meruit* claim) and an *indebitatus*. The record shows that on 10 June 1664 the defendant pleaded *non assumpsit* and a jury was summoned. No more is entered.

Cambridgeshire. Ralph Widdrington, S.T.P., complains against Guybon Goddard,[38] esquire, in the custody of the marshal etc., that, whereas the same Ralph on 21 February [1660] in the twelfth year of the reign[39] of the lord Charles the second now king of England etc. and continually from thence until 1 March [1661] in the thirteenth year of the reign of the said present lord king has been and still is one of the fellows of Christ's College in the university of Cambridge, being apt and able by the laws and statutes both of the aforesaid university and of the aforesaid college to undertake the care, tuition and instruction of the young students dwelling and studying in the college and university aforesaid, as the tutor of such students, and (the

---

[34] I.e. 'waive the tort'.

[35] (1680), see p. [15], below.

[36] Freem. 429. Francis Woodward brought *indebitatus assumpsit* against Richard Aston for £10 had and received to the plaintiff's use at the parish of St. Clement Danes on 4 February 1676. Both parties are named as clerks of Robert Henley, chief clerk of the King's Bench, but there is no mention of the office of clerk of the papers. Aston pleaded *non assumpsit*, and we know only from the response that the dispute about the clerkship emerged in evidence at the trial. Although nothing is recorded beyond the *venire facias*, the reports indicate that the plaintiff was successful, but there was no discussion of the propriety of the form of action.

[37] Presumably a special *indebitatus*, setting out the overpayment in the count.

[38] Bencher of Lincoln's Inn; serjeant at law 1669, d. 1671.

[39] *De jure*, but before the restoration on 29 May 1660.

said Ralph thus being, as before mentioned, a fellow of the aforesaid college and being apt and able as aforesaid) the same Guybon afterwards namely on the aforesaid 1 March in the above-mentioned thirteenth year, at Cambridge aforesaid in the county aforesaid, in consideration that the same Ralph at the special instance and request[40] of the selfsame Guybon had for the space of one year (between 21 February in the above-mentioned twelfth year and the aforesaid 1 March in the above-mentioned thirteenth year) at Cambridge aforesaid in the county aforesaid undertaken the care, tuition and instruction of a certain Thomas Goddard, son of the aforesaid Guybon and a young student in the college aforesaid during the aforesaid period, as tutor of the selfsame Thomas, and had bestowed his labour and worked to instruct and help the selfsame Thomas in his studies during the aforesaid period, and had laid out and disbursed venous sums of money amounting m all to £9[9]. 1s. 1d. of lawful money of England for the instruction of the selfsame Thomas in music, for food and drink, books, clothing and other things apt, necessary and suitable for the same Thomas according to the degree and quality of the selfsame Thomas, did take upon himself and then and there faithfully did promise the same Ralph that he the same Guybon would well and faithfully pay and content the same Ralph both the aforesaid £9[9]. 1s. 1d. and all such sums of money as the same Ralph reasonably deserved[41] to have for the tuition and instruction of the aforesaid Thomas during the period aforesaid; and the same Ralph says in fact that he the same Ralph reasonably deserves to have £8 of lawful money of England for the tuition and instruction of the aforesaid Thomas during the aforesaid period:

[42]Whereas also the aforesaid Guybon afterwards, namely on 2 April [1661] in the aforesaid thirteenth year, at Cambridge aforesaid in the county aforesaid, was indebted to the said Ralph in another £99. 1s. 1d. of similar money, both for his labour in the tuition of the aforesaid Thomas Goddard, son of the selfsame Guybon Goddard, bestowed by him the said Ralph before that time at the special instance and request of the selfsame Guybon, and for various sums of money before that time laid out and disbursed for the necessary and suitable learning and upkeep of the aforesaid Thomas at the like special instance and request of the selfsame Guybon; and, being so indebted, the same Guybon in consideration thereof afterwards (namely on the same day and in the same year) at Cambridge aforesaid in the county aforesaid took upon himself and then and there faithfully promised the same Ralph that he the same Guybon would well and faithfully content and pay the same Ralph the aforesaid £99. 1s. 1d.:

[43]Nevertheless the aforesaid Guybon, little regarding his several promises and undertakings aforesaid, but scheming and fraudulently intending wickedly and craftily to deceive and defraud the same Ralph, has not yet paid the aforesaid several sums of money (amounting in all to £198. 2s. 2d.) or any penny thereof to the same Ralph, nor contented him for the same, although the same Guybon was afterwards (namely on 1 May [1662] in the fourteenth year of the reign of the said present lord king), at Cambridge aforesaid in the county aforesaid, often requested to do it; whereby the same Ralph says he is the worse and has damage to the amount of £100. And thereof he produces suit etc.

R. v. W. (*c.* 1670)

The Clerk's Manual (1678), p. 83.

This precedent illustrates three common counts laid as alternative claims in a King's Bench bill. A wigmaker sues for her charges (1) in an *indebitatus assumpsit* for work done, (2) on a *quantum meruit,*[44] and (3) on an *insimul computassent* or account stated

---

[40] This insertion of a request prevented any objection that the consideration was past.

[41] *Quantum meruit.*

[42] Alternative count in *indebitatus assumpsit* for labour and money laid out. The words 'another £99. 1s. 1d.' only thinly conceal a fiction. The practice of joining alternative counts in this way seems to have begun in the 17th century: the next case is another example.

[43] Assignment of breach in respect of both counts.

[44] Cf. T. Wood, *Institute of the Laws of England* (1724 ed.). p. 536: 'where a *quantum meruit* is laid, you need not prove any price agreed on . . . so that in an action for goods sold or work done it is the best way to lay a *quantum meruit* with an *indebitatus assumpsit*; for if you fail in the proof of an express price agreed you will recover the value'.

Middlesex. Eleanor R. complains of Robert W., in the custody of the marshal etc., for this:

[1: indebitatus for work done]

Whereas the aforesaid Robert on 1 February [1668] in the twentieth year of the reign of the present lord King Charles II, at the parish of St. Margaret's, Westminster, in the aforesaid county was indebted to the aforesaid Eleanor in £3 of lawful money of England for her work and labour in making various periwigs (*capillamenta vocata perrywigs*) for the aforesaid Robert, and being so indebted, the aforesaid Robert afterwards (namely on the same day in the same year) at the aforesaid parish of St. Margaret's Westminster, in the county aforesaid, in consideration thereof took upon himself and then and there faithfully promised the same Eleanor that he the same Robert would well and faithfully content and pay the aforesaid £3 to the same Eleanor when he should be thereafter requested to do so;

[2: quantum meruit]

And whereas the aforesaid Eleanor, before the aforesaid 1 February [1668] in the twentieth year of the reign of the said lord king that now is, at the special instance and request of the aforesaid Robert, made and wove various periwigs for the aforesaid Robert; and the aforesaid Robert afterwards (namely on the aforesaid 1 February in the aforesaid twentieth year), at the aforesaid parish of St. Margaret's, Westminster, in the county aforesaid, in consideration thereof, took upon himself and then and there faithfully promised the same Eleanor that he the same Robert would well and faithfully content and pay the same Eleanor as many sums of money as the aforesaid Eleanor should reasonably deserve to have for the same, when he should be requested to do so; and the same Eleanor says in fact that she reasonably deserved to have £3 of lawful money of England from the said Robert for the same;

[3: *account stated*]

And whereas also the aforesaid Eleanor and Robert afterwards, namely on 1 February [1668] in the aforesaid twentieth year of the reign of the said lord king that now is, at the aforesaid parish of St. Margaret's, Westminster, in the county aforesaid, accounted together for various sums of money owed by the said Robert to the same Eleanor and not paid before that time; and upon that accounting the same Robert was then and there found to be in arrears as against the said Eleanor in another £3 of lawful money of England; and (being thus in arrears) the aforesaid Robert afterwards (namely on the same day in the same year), at the aforesaid parish of St. Margaret's, Westminster, in the county aforesaid, in consideration thereof, took upon himself and then and there faithfully promised the same Eleanor that he the same Robert would well and faithfully content and pay the same Eleanor the aforesaid £3 last mentioned, when he should be requested to do so;

[*Assignment of breach*]

Nevertheless the aforesaid Robert, little regarding his several promises and undertakings,[45] but scheming and fraudulently intending wickedly and craftily to deceive and defraud the same Eleanor of the aforesaid sums of money, has not paid the aforesaid sums of money or any penny thereof to the aforesaid Eleanor according to his several promises and undertakings aforesaid, though often requested by the aforesaid Eleanor to do so (name on etc., at etc. in the county aforesaid), but until now has utterly refused to pay them to her and still refuses to do so. And thereby she says she is the worse and is damaged to the amount etc. And thereof she produces suit etc.

---

[45] The printed precedent ends here with an 'etc.' and refers generally to previous precedents. What follows is adapted from the precedent on p. 72 of *The Clerk's Manual* (1678).

HIBBERT v. COURTHOPE (1693)

Carthew 276 (untr.)[46]

Assumpsit etc., and judgment against the defendant by default. And now upon a writ of error brought, the error insisted on was that the declaration was general, namely, that the defendant was indebted to the plaintiff in so much money 'for the work and labour of the selfsame plaintiff before that time done and performed for the aforesaid defendant at the special instance and request of the aforesaid defendant', without setting forth what manner of work it was, so that it might appear to the court to be lawful—for it might be about some unlawful matter for which the law will not imply any promise etc.

But this was not accepted; for, *per curiam*, the only reason why the plaintiff is bound to shew wherein the defendant is indebted is that it may appear to the court that it is not a debt on record or specialty, but only upon a simple contract; and any general words by which that may be made to appear are sufficient.

The judgment was affirmed.

(7) Customary dues

CITY OF LONDON v. GORAY (1676)

3 Keb. 677, pl. 52 (untr.)[47]

Notes from the Record[48]

In Hilary term 1675 the mayor of London brought a bill of trespass on the case against Nicholas Goray.[49] The first count recited the custom of the city of London to receive a toll called scavage (or shewage)[50] on the goods of alien merchants brought into the port of London; and said that the defendant, an alien merchant, claimed 8,718 lb. of wrought silks (worth £17,436) brought into the port at Southwark; and that scavage was due on this merchandise at the rate of 1d. per 20s., that is, £72. 13s.; and that Goray, being so indebted, undertook in consideration thereof to pay the £72. 13s. on request. The second count was that on 1 January 1675 the defendant, being indebted to the mayor in another[51] £72. 13s. for scavage due upon merchandise, undertook in consideration thereof to pay the sum. On 24 January 1676 the defendant pleaded *non assumpsit*, and on 6 March 1676 at Southwark assizes in Surrey (Twisden J., Pemberton Sjt.) the jury found for the defendant on the first count; and on the second count found a special verdict setting out the custom and circumstances in terms closely similar to the wording of the first count, so as to show that the £72. 13s. was due, but concluding that there was no 'actual' promise to pay. The case was argued in banc in Michaelmas term 1676.

The record confirms the report that on 26 October 1676 judgment was given for the plaintiff, with £5. 6s. 8d. damages and £20. 3s. 4d. costs. It is not clear why the jury assessed the damages at such a low figure.

. . . *Simpson*, for the plaintiff: that in *Carpenter's Case* here, and for the duty of water-bailage, *indebitatus* lieth.

And, by RAYNSFORD C.J.: in the Exchequer on argument it was adjudged that *indebitatus* lay upon acceptance of a bill of exchange.[52] And on a policy of assurance *indebitatus* lieth . . . . And all the actions for wharfage, cranage and duties of the city are thus: and in *Bradshaw v. Proctor* for fees as judge of the

---

[46] Also reported, sub nom. *Hebbert v. Corsthorp*, in Skin. 409, where (in the previous term) another objection was taken: that the sum (£12) was expressed in figures as 'xii'. This was held not to be error, though it was said that '12' in Arabic numerals would have been.

[47] Also reported in 1 Freem. 433; 2 Lev. 174.

[48] KB 27/1972, m. 636.

[49] Spelt 'Goree' in the report. He had previously been sued in debt for the same scavage, but in that case some problem arose concerning the city charter: KB 27/1965, m. 199 (undetermined demurrer).

[50] Keble says 'duty of waiage', which is perhaps a misprint. For scavage, see the statute 19 Hen. VII, c. 8.

[51] Evidently a fiction: cf. *Browne v. London* (1671), p. [15], above.

[52] The contrary was held in *Milton's Case* (1668). [*Sources*, p. 248]. The mistake was doubtless the reporter's: cf. Raynsford J., p. [15], above.

Sheriffs' Court; and this term in *Woodward v. Aston*,[53] *indebitatus* by one clerk against the other for fees. And the reason of *Slade's Case*[54] was not on the wager of law, but because he was not indebted. And by the act of parliament confirming the custom, this is a duty that ariseth *ex quasi contractu* and not *ex delicto*, though it were originally but a charge upon the subject; for, it being agreed that debt lieth, a fortiori an *indebitatus*.

Judgment for the plaintiff.

HOWARD v. WOOD (1680)

Mich. 1678: 2 Show. K.B. 21, pl. 14 (untr.) (= I) Hill 1679: 2 Show. K.B. 24, pl. 14 (untr.) (= II)

Notes from the Record[55]

Sir Robert Howard and his son Thomas brought *indebitatus assumpsit* against Henry Wood, gentleman, for 60s. received to the plaintiffs' use on 2 April 1677, and for 1OOs. similarly received on 17 May 1677. Wood pleaded *non assumpsit*; and on 1 February 1678 the jury at bar in Westminster Hall (before Raynsford C.J.) found the following facts by special verdict: the honour of Pontefract had in 1619 been leased in trust for Prince Charles, who became King Charles I in 1625; in 1629 the lease was assigned to trustees for Queen Henrietta, and in 1640 they granted the stewardship of the honour to the earl (later to become the duke of Newcastle); and in 1660 the lease was reassigned in trust for Queen Henrietta for life and then for King Charles II; and in 1672 (after the queen mother's death) the king and the lessees granted the stewardship in reversion to the plaintiffs; later in 1672 the lease was reassigned to trustees for Queen Catherine, and in 1676 the queen and her trustees sub-let the honour to the above-mentioned duke of Newcastle, who further sub-let it to one Richard Mason; and Mason granted the stewardship to Henry Wood during pleasure; and after the death of the duke of Newcastle (in 1676) Wood claiming the stewardship, had taken the sums of money as due to the steward. The principal question was whether the stewardship belonged to the plaintiffs or the defendant, but it was also argued that the form of action was inappropriate to try such a title.

T. Jones 125 reports that in Hilary term 1680 it was 'resolved by the whole court that the action lay, for it is an expeditious remedy, and facilitates the recovery of just rights; and this manner of action hath now prevailed for a long time, and the point hath been ruled often by the judges in their circuits, and actions frequently brought in this manner . . .'. The record confirms that in January 1680 judgment was entered for the plaintiffs to recover 21s. damages and £58. 19s. costs.

I

. . . The next point is if the plaintiff, having a right to the place, can have an *indebitatus assumpsit*.

It was argued[56] that he might, because it is his money, and he has a right to it, and by construction of law the defendant received it to his use; and then the plaintiff, by bringing his action, gives his subsequent assent thereto. In the case of *Tottenham v. Bedingfield*[57] it is agreed that if one receives my rents I may implead him in a writ of account; and then by the bringing of my action there is privity. For I may make a privity by my own consent, and I may as well bring case as an account: and so is the case of *Lady Cavendish v. Middleton*.[58] And for late authorities there have been two known cases express in the point: as that of *Arris v. Stukely*[59] in the Exchequer, about a year since . . . . There was also in this court the cause of *Aston v. Woodward*;[60] the two present clerks of the papers, concerning that office, tried at this bar in this action . . . .

---

[53] (1676); see p. [15], fn. 11, above.

[54] (1602); see [§7E], above.

[55] KB 27/1987, m. 573.

[56] By Holt: 1 Freem. 473.

[57] (1572); see [*Sources* p. 295].

[58] (1628); see [*Sources* p. 523].

[59] (1677); see p. [15], above.

[60] (1676); see p. [15, fn. 36], above.

Mr. Bigland to the contrary. An assize properly lies of an office. The books are full thereof. A special action of the case will lie, but not a general *indebitatus assumpsit*. There must be a contract or agreement of the parties before ever the law will raise a promise; therefore he thought the action would not lie. The declaration ought to be according to the fact. It is laid that the defendant received the fees 'to the use and profit of the plaintiff', whereas in truth he received them to his own use. This course will turn out assizes and ejectments too, for they will now try all such titles by this action: nay, they may by the same reason try titles to land by bringing this action for the profits thereof . . . .

II

SCROGGS C.J., in Hilary term following, delivered the opinion of the court: we have considered of the case by ourselves, and discoursed it together, and are agreed on both points. First, whether an *indebitatus assumpsit* lies against a man who receives the profits of an office, claiming a right. If this were now an original case, we are agreed it would by no means lie; for nothing then which might not be tried by itself. But because judgments have been upon it, and that on solemn arguments, and many judgments—though some passed *sub silencio*, yet others have been debated and settled, and particularly in the Exchequer[61]—we are therefore willing to go the same way, and are of an opinion that it is better to comply with things once used, that are not of very pernicious consequence, than to make one court thwart and contradict another in its judgments: and certainly the inconvenience is not so very great, since the title must be given in evidence, and so is well tried. We do upon that account adjudge that the action doth well lie . . . .

[But at the importunity of Jones A.-G., to be further heard in this case, it was adjourned.][62]

SHUTTLEWORTH v. GARNETT (1689)

1 Show. K.B. 35, pl. 34 (untr.)[63]

Notes from the Record[64]

Lady Katharine Shuttleworth, widow and administratrix of Sir Richard Shuttleworth, brought a bill against John Garnett complaining that, whereas the defendant (being tenant of certain customary tenements in the manor of Barbon, Westmorland, the inheritance of which had descended to Sir Richard) was indebted to Sir Richard in £27 for a reasonable customary fine payable by him for the tenements which he had held of Sir Richard's father, and on 1 June 1686 in consideration thereof undertook to pay the £27; and whereas he was indebted in another £27 for a similar fine,[65] and on 20 June 1687 undertook to pay it: nevertheless the defendant, little regarding his undertakings, but scheming to defraud Sir Richard and his administratrix, had still not paid. Garnett pleaded *non assumpsit*; and on 25 August 1688 at Appleby assizes (Wright C.J.K.B., Jenner J.C.P.) the jury found for the plaintiff with £27 damages and 40s. costs.

. . . [*Thompson*][66] moved in arrest of judgment that the action doth not lie, because it savours of the realty, no more than *indebitatus* will lie for rent . . . .

Against this it was argued by *Hoyle* and *Levinz* that this is flower fallen. It is debt, and why should not an assumpsit lie? If reasonable, it is a contract; if unreasonable, it is void. Debt hath been held to lie. It is after a verdict. This is no more than a contract. If I agree to give my tenant a freehold estate, and he agree to give me a fine for it, an action on the case lies; so it does for the purchase money upon sale of lands. It will not lie

---

[61] *Arris v. Stewckley* (1677). p. [15], above. In *Woodward v. Aston* (1676), p. [15 fn. 36], above, the point passed *sub silencio*.

[62] From the different report in 2 Lev. 245 (dated Pas. 1679).

[63] Also reported in 3 Lev. 261; Carthew 90; Comb. 151; 3 Mod. 239.

[64] KB 27/2068, m. 965.

[65] This looks like a fiction: cf. pp. [15, 15, 15, 15], above, for alternative counts. Probably there were two undertakings to pay the same fine.

[66] Cf. Comberbach's report '*Thompson* moved in arrest of judgment (the last term) that the action did [not] lie. That this fine don't arise by contract of the party, but by custom out of the land . . . . An *indebitatus assumpsit* don't lie on a policy of assurance or bill of exchange. That no *indebitatus assumpsit* lieth where the cause of action is grounded on a custom.'

for rent, because it is entirely in the realty. This is but a contract . . . . In the case of *Howard v. Wood*,[67] an *indebitatus* for the profits of an office, there they founded a contract upon a wrong. In the case of *The Mayor and Commonalty of London v. Gory*,[68] an *indebitatus* was held to lie for scavage money. Where money is due, the law doth imply a contract . . . .

EYRE J. Debt lies for a copyholder's fine, and for scavage. And a stronger case than this is the case of the Lord North,[69] for moneys due for the value of a marriage, where the register gives a writ *de valore maritagii*. This is a sum in gross, a fruit fallen, a duty.

HOLT C.J. *Indebitatus* lies where wager of law will lie,[70] but this seems of an higher nature, so that wager of law would not lie if debt were brought . . . . *Indebitatus* lies upon a personal contract for a sum in gross . . . if a man grants his land for a year and the party agrees to pay so much for it: this is a sum in gross for which an *indebitatus* lies. But here both the custom and tenure appear, and it is of an higher nature, so as the action will not lie.

DOLBEN J. It is a sum in gross, and a duty, for which the administrator of the heir to whom it was due upon the death of the lord hath no other remedy but this or debt. . . .

GREGORY J. After a verdict we must intend a promise, and then it lies.

EYRE J. I think the action lies, it being a fruit fallen, and a duty. And so, by three judges, judgment for the plaintiff (HOLT C.J. dissenting).

(8) Use and occupation of land

LEWIS v. WALLACE (1752)

F. Buller, *Nisi Prius* (1768), p. 195 (K.B.).

In case for use and occupation of an house by permission of the plaintiff, the defendant pleaded *Nil habuit in tenementis*; and upon demurrer the court held it not a good plea, as it would be upon a lease at common law, because there an interest is supposed to have passed from the lessor; but here the court must take it that there was an express promise, and therefore if the plaintiff had an equitable title, or no title at all, yet if the defendant have enjoyed by permission of the plaintiff it is sufficient, and it is not necessary for the plaintiff to say it is his house—any more than in *assumpsit* for goods sold to say they were the goods of the plaintiff.

---

[67] (1680), see p. [15], above.

[68] (1676), see p. [15], above. Holt C.J. said of this (Carthew 92): 'the cases are not parallel, for the duty of scavage doth arise out of things in the personalty; but the duty in the principal case issued out of the realty'.

[69] (1588) 2 Leon. 179.

[70] Cf. Comberbach's report (per Holt C.J.): 'It doth not follow that an *indebitatus* lies because debt lies; where wager of law doth not lie, there an *indebitatus* don't lie, and it is mischievous to extend it further than *Slade's Case*: for an *indebitatus* is laid generally, and the defendant can't tell how to make his defence, but debt is laid more particularly'.

2. TORT

in Baker and Milsom, *Sources*, pp. 567–80 (except as noted)

(1) Questions of Fault

HULLE v. ORANGE (CB 1466) THE CASE OF THORNS

Bod. Lib. MS. Lat. misc. C. 55, fol. 6[1] (= I)
Y.B. Mich. 6 Edw. IV, fol. 7, pl. 18 (= II)
ed. Baker and Milsom, *Sources*, 327–31

Notes from the Record[2]

---

[1] This ms. belonged to Robert Constable (d. 1500), who was admitted to Lincoln's Inn in 1477.

Henry Hulle brought a writ of trepass against Richard Orynge for breaking his close at Topsham, Devon, cutting and taking trees and underwood valued at £5, and trampling on grass valued at 5 marks. As to the trees, Orynge pleaded not gulty; and this was found against him at Exeter assizes. As to the breaking of the close and trampling on the grass, Orynge pleaded a plea which compelled the plaintiff to assign the trespass in five acres of meadow and six acres of arable. As to the meadow, the defendant pleaded not gulity, and this was also found against him at the assizes. As to the six acres of arable, Orynge pleaded that he was seised of another acre of land in Topsham, adjoining the plaintiff's six acres, and that a thorn hedge was growing on his land; that he cut the thorns in the hedge, and they fell against his will onto the plaintiff's land; and that he immediately went onto the plaintiff's land and took the thorns and threw them back onto his own land. To this plea, the plaintiff demurred.

The record shows that judgment on the demurrer was given for the plaintiff, but that the plaintiff released all the damages in respect of that part of the trespass. The outcome of the writ of error mentioned at the end of the first report is not known, but presumably it was withdrawn because of this compromise.

I

Trespass for breaking a close and trampling on his grass by walking.

Jenney. You ought not to have an action, because the plaintiff was seised of the land whereof the place where the alleged trespass occurred was part, and the defendant was seised of a close adjoining the plaintiff's land, and between the plaintiff's land and defendant's land there is a hedge on the defendant's land in the which various thorns were growing, and the defendant cut the thorns, and they fell on the plaintiff's land (part of which is the place in question), against the defendant's will and without his fault, and so the selfsame defendant at the time in question entered the land whereof the place in question is part and threw them back.

Fairfax. That is no plea, for there is a distinction between felony and trespass. In felony the intent and will of a man shall be construed,[3] and in accordance therewith he shall be acquitted or attainted. In trespass, however, one should not have regard to the intent or will but only to the matter in fact. For instance, if a man shoots at butts—which is a lawful game—and by misfortune or misadventure he wounds someone standing near the butts, he shall be punished by writ of trespass even though it was against his will. If, on the other hand, he killed the man, he would be acquitted of felony. However, if I drive my cattle along the highway, or else keep them in my several, and they escape against my will into your land, and I enter at once and take them back, this entry is lawful, for there the cattle trespassed by reason of their animal (*bestial*) nature, and here is no fault in my entering at once to take them back.

Catesby. If the case of my driving beasts along the highway is the law—as I think it is, for it is the usual pleading—it follows that the plea in bar is a good bar, for the defendant can look after his cattle just as well as he can look after his thorns, to ensure that they do damage to another's land. Suppose a man takes my goods and puts them on another person's soil; it is quite permissible for me to enter and take them back. (Query this case, which was conceded by all the serjeants except *Bryan*.)

LITTLETON. It seems to me that the plea is not good, and that the cattle case is not law, for a man is bound to keep his cattle and also his fire [from doing harm], and if he does not he shall be punished.

CHOKE, to the same effect. If he wants to make a good plea out of this, he should show what he did to prevent the thorns from falling, so that we judge whether or not he did enough to excuse himself. Similarly, if you wish to justify imprisoning someone because he was suspected of felony, you must set out the [grounds of] suspicion in your plea, so that we can judge whether or not he was suspicious. As to the cattle case, it seems to me that it is not law, for if their [entry][4] was against the law, as it was, then the entry to drive them out was against the law.

DANBY, CJ, to the same effect. Even though it was lawful for him to cut his thorns, it was not lawful to allow them to fall into another person's soil, for he was to cut them in such a way that they did not damage others. Similarly, if I put willow trees in my soil in a watercourse which runs to your mill, and they later grow so large that they stop up the water, I say that you shall have an assize of nuisance, and yet there is

---

[2] CP 40/815, m. 340; Kiralfy, *Source Book*, p. 128.

[3] Perhaps meaning 'inferred from his actions', or else merely 'taken into account'. Cf. [*Cuny v. Brugewode* (1506), in Baker and Milsom, *Sources*,] p. 317.

[4] Conjectural: the text says 'possession'.

not wrong done at the outset. The law is the same if I cut down my trees, and they fall into the water that runs into your mill so that the water does not run as freely as it did, you shall have an assize. Moreover, the cutting was his own act, and it is not right that he should take advantage of it. If two people take my horse to the use of one of them, and then he to whose use it was taken sells the same horse to the other in market overt, I may still take my horse [back], because the buyer was privy to the wrong, and yet if it were sold to a stranger I could not take it back.[5] I say also that if my apples fall onto someone else's land I may not enter to get them back. Moreover, if someone builds a house on his land so that my land is overshadowed, and my grass or grain will not grow as it did before, I may knock down the eaves (*esynges*) which overhand my land, so long as I do not go onto his soil. The law is the same concerning tree branches which overhang my soil. And I shall have an assize of nuisance for what I cannot break or cut [off], or else I can forgo the aforesaid breaking and cutting [altogether] and punish the whole in an assize of nuisance. (Query this.)

Neele. If I give you all the fish in my pond, you may [not] break the pond and make the water run out of it in order to catch the fish; but you must catch them with engines (*gynes*) and in other ways which cause me the least damage.[6] Likewise here, if the plea is to be good, it must be shown that he entered in the least damaging way he could.

Jenney. That shall be presumed unless the contrary is shown.

Later the plaintiff released part of his damages, and had judgment to recover; and the defendant put in a writ of error.

II

. . . *Catesby*. Sir, it has been argued that if a man does something whereby injury and damage are done to another person against his will, even though the thing is lawful, nevertheless if he could by some means have avoided this damage he shall be punished for it. But I, sir, think the contrary. In my view if a man does something lawful whereby damage befalls another, against his will, he shall not be punished. Let me put the case that I am driving my cattle along the highway, and you have an acre of land lying alongside the way, and my cattle enter your land and depsasture your grass, and I immediately come and drive them out of your land, in this case you shall not have an action against me because the driving was lawful and their entry in your land was against my will. Neither shall the plaintiff have an action here, for the cutting was lawful and the falling onto your land was against my will, and consequently the taking back was good and permissible in law. Suppose, sir, that I lop my trees and the boughs fall on a man and kill him; in that case I shall not be attainted of felony, because my cutting was permissible in law and their falling on the man was against my will. No more [is the defendant liable here].

Fairfax. I think the contrary. I say that there is a distinction between doing something from which felony will follow and doing something from which trespass will follow. In the case which *Catesby* has put it was not felony because felony is by malice aforethought, and when it was against his will it was not *animo felonico*. But if someone is lopping his trees[7] and the boughs fall on a man and injure him, in this case he shall have an action of trespass. Also, sir, if a man is shooting at the butts and his bow swerves in his hand and [the arrow] kills a man, against his will, this (as has been said) is not a felony. If, however, he injures a man by his archery, the man shall have a good action of trespass against him, and yet the archery was lawful, and the injury which the other suffered was against his will. Likewise here.

Pigot, to the same effect. . . .

Younge. I think the contrary. In cases where a man has *damnum absque injuria* he shall not have an action, for if there is not wrong it is not right that he should recover damages. So it was here when he went into the plaintiff's close to take the thorns which had fallen in; this entry was not wrongful, because when he cut them and they fell into the plaintiff's close against his will the property in them remained his all the

---

[5] [I do not understand this argument nor its relevance to the case at bar. CD.]

[6] *St. Quinton v. Gyrton* (1378), Fitz. Abr., *Barre*, 237; Y.B. Mich. 2 Ric. II, p. 38, pl 2. In trespass to land, the defendant pleaded a grant of fish by the plaintiff and said that he entered and drained the pond because there was no other way of getting the fish. The plea was held bad, because the defendant could have caught them in a less damaging way, e.g., with nets.

[7] Reads 'herbes', which must be a misprint for 'arbes'.

time, and consequently it was lawful for him to take them away from the plaintiff's close. Thus, although the plaintiff was damaged, he suffered no wrong.

Bryan. I think the contrary. To my mind, when someone does something he is bound to do it in such a way that no prejudice or damage is done to others by his action. For example, if I build a house, and when the timber is being hoisted a piece of it falls onto my neighbour's house and breaks it , he shall have a good action, and yet the building of the house was lawful, and the timber fell against my will.[8] Also, if a man assaults me, and I cannot get away from him without his beating me, and in my own defence I raise my staff to strike him, and there is someone behind me who is hurt when I raise my staff, he shall in this case have an action against me, and yet raising my staff to defend myself was lawful, and I hurt him against my will. Likewise here.

LITTLETON, to the same effect. If a man suffers damage, it is right that he should be compensated. In my view, the case which *Catesby* puts is not law, for if your cattle come onto my land and eat my grass, then even if you come at once and drive them out you must make amends for what your cattle have done, however or great or small it may be. . . . Sir, if it were the law that he could enter and take the thorns, he might by the same argument cut large trees, and come in with horses and carts to take them out, and that would be unreasonable, because the plaintiff might perhaps have corn or other crops growing. Neither is it reasonable here, for the law is the same in great things as in small; and he shall have amends according to the magnitude of the trespass.

CHOKE. I am of the same view, for when the principal thing was unlawful, then anything which depended on it was unlawful. When the defendant cut the thorns and they fell onto my land, this falling was unlawful, and consequently his coming onto my land was unlawful. As to the point that they fell against his will, that is no plea, but he must say that he could not have acted in any other way, or that he did all that he could to keep them out, or else answer to the damage. Sir, if the thorns (or a large tree) fell onto the plaintiff's land through the blowing of the wind, he could in that case have gone in to take them, because the falling was not his act but was caused by the wind.[9]

WEAVER v. WARD (CP 1616)

HLS MS. 112, p. 319 (= I) Hobart 134[10] (= II) in Baker and Milsom, *Sources*, pp. 331–3.

Notes from the record[11]

Thomas Weaver brought trespass against George Ward, and counted that on 18 October 1614 in the parish of St. Mary-le-Bow, London, with force and arms (namely with swords, clubs and knives), the defendant beat wounded and ill-treated the plaintiff so that his life was despaired of, against the king's peace. The defendant pleaded in bar that both parties were members of a band of 105 trained soldiers under the command of Captain Henry Andrews, having been trained and prepared in martial exercises under the direction of the Privy Council for the king's service in England whenever they should be called up; that the plaintiff and defendant were then and there armed with muskets charged with gun-powder, and by command of the said captain were skirmishing and discharging their muskets against a similar band under the command of Captain Hugh Hammersley; and that in these circumstances the defendant accidentally and by misfortune and against his will, in discharging his musket, injured and wounded the plaintiff; which wounding is the same trespass of which the plaintiff complains; without this that the defendant is guilty of the trespass and assault in any other way. To this plea the plaintiff demurred.

Contrary to what is said in the first report, the record does contain a judgment that the plea was bad, but the parties probably compromised upon the writ of inquiry into the damages.

I

. . . *Hutton* Sjt. argued that such a thing as this, which happened accidentally in doing something for the public good, and upon a lawful command, was excusable: as in 21 Hen. VIII, fo. 27, making bulwarks on another's soil; 13 Hen. VIII, fo. 16, pulling down a burning house to save a city; 8 Edw. IV, fo. [18], drying nets by fishermen on another's land; 5 Hen. VII, arresting night-walkers justifiable by anyone; 11

---

[8] Cf. *Jankyn's Case* (1378), [Baker and Milsom, *Sources*,] p. 322.

[9] The printed text does not mention Danby, CJ.

[10] Report by the presiding chief justice, Sir Henry Hobart.

[11] CP40/1973, m. 2136; abstracted in Kiralfy, *Source Book*, p. 132.

Hen. VII, fo. 23, if any damage befalls anyone in wrestling or jousting, where this is by the king's licence and authority, even if death ensues it is not felony.[12] See Keil. 108.

Harries Sjt., to the contrary. The plea in bar is bad, since he does not say that he could not by any means avoid it; and therefore the plea is short and defective in this respect: 6 Edw. IV, fo. 7[13] . . . And he cited the case of fish in Fitz. [Abr.], *Barre*, 237.[14] And he said there was a great difference between a felony and a trespass. For a felony may be excused, even though he could have avoided and eschewed it by some means: for instance, if a man strikes another by misfortune, *se invito*, he is still punishable in trespass, though if he kills him by misfortune he shall be excused and shall thereupon have his pardon of grace under the Statute of Gloucester, c. 9. This difference between felony and trespass is taken by Rede [J.] in 21 Hen. VII, fo. 28.[15] Also he said that if the defendant's plea were good he should not traverse that he was guilty in any other way. . . .

Afterwards, upon putting the case again, the truth was [disclosed], and so it was pleaded that the plaintiff and defendant were both of one company under the command of one captain, and, being fellows, this happened accidentally in discharging a musket by the defendant, the plaintiff being the nearest man to him in the ranks.

Afterwards in Hilary term 14 Jac. I [1617], HOBART C.J. and WINCH J. were of opinion that the justification was bad; but WARBURTON J. to the contrary. Afterwards the plaintiff had a day given him by mediation of the court, and so no judgemnt was entered.

II

. . . And upon demurrer by the plaintiff, judgment was given for him. For though it were agreed that if men tilt or tourney in the presence of the king, or if two masters of defence[16] playing [for] their prizes kill one another, that this shall be no felony—or if a lunatic kill a man, or the like—because felony must be done *animo felonico*; yet in trespass, which tends only to give damages according to hurt or loss, it is not so. And therefore if a lunatic hurt a man he shall be answerable in trespass. And therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification *prout ei bene licuit*) except it may be adjudged utterly without his fault. As, if a man by force take my hand and strike you. Or if here the defendant had said that the plaintiff ran across his piece when it was discharging, or had set forth the case with the circumstances so as it had appeared that it had been inevitable[17] and that the defendant had committed no negligence to give occasion to the hurt.

GIBBON v. PEPPER (KB 1695)

1 Ld. Raymond 38 in Baker & Milsom, *Sources*, 335–7

Translation of the Record[18]

Middlesex. . . .[19] Thomas Gibbon complains of Thomas Pepper, in the custody of the marshal of the Marshalsea of the lord king and lady queen, being before the said king and queen themselves, for that the same Thomas Pepper on the first day of May [1694] in the sixth year of the reign of the Lord William and Lady Mary now king and queen of England etc., at the parish of St. Martin in the Fields in the aforesaid county of Middlesex, with force and arms etc., made assault upon him the said Thomas Gibbon and then and there beat, wounded and ill-treated him so that his life was despaired of, and inflicted other outrages upon the same Thomas Gibbon, against the peace of the said present lord king and lady queen, and to the damage of him the said Gibbon of £40. And thereof he produces suit.

---

[12] For these and similar cases, see Selden Soc. vol. 94, pp. *34–5, 312–13.*

[13] *The Case of Thorns*; see [above, p. 15].

[14] *St. Quintin v Gyrton* (1387); see [above, p. 15, n. 6].

[15] [*Cuny v Brugewode* (1506); above, p. 15, n. 3.].

[16] I.e. prize-fighters.

[17] Cf. the brief report in Moo. K.B. 864, pl 1192: '. . . It was adjudged that the justification was not good, but that he ought to have said further that he could not otherwise have avoided the fact. Also, when he justifies the whole fact, there is no need of a traverse.

[18] KB27/2105, m. 64.

[19] Memorandum that the bill was preferred on Tuesday [22 October 1695] next after three weeks from Michaelmas, through Whitelocke Bulstrode, the plaintiff's attorney.

And the aforesaid Thomas Pepper, by Peter Courtney his attorney, comes and denies the force and wrong when etc. And, as to the coming with force and arms or whatever is against the peace of the said present lord king and lady queen, and the whole of the aforesaid trespass except the aforesaid assault, battery, wounding and ill-treatment, he says that he is not guilty thereof. And of this he puts himself on the country; and the aforesaid Thomas Gibbon thereupon does likewise. As to the aforesaid assault, battery, wounding and ill-treatment above supposed to have been committed, the same Thomas Pepper says that the aforesaid Thomas Gibbon ought not to have or maintain his aforesaid action against him for that, because he says that before the aforesaid time when the aforesaid assault, battery, wounding and ill-treatment are above supposed to have been committed, and also at the same time when etc., the same Thomas Pepper was (and he still is) the servant of a certain John Willis (the same John then being innkeeper of a certain common inn called the Angel Inn in the parish of St. Clement Danes in the aforesaid county of Middlesex), and—the same Thomas Pepper being thus the servant of the selfsame John as aforesaid—the same Thomas Pepper at the aforesaid time when etc. in the service of the aforesaid John in, through and over a certain street called Drury Lane (being a royal highway for all persons wishing to ride) in the parish of St. Giles in the Fields in the aforesaid county of Middlesex, in order to water the aforesaid horse; and, while the same Thomas was so riding as aforesaid, the aforesaid horse was then and there frightened (*terrificatus*) so that the aforesaid horse then and there violently ran away with the same Thomas Pepper, and the same Thomas Pepper could not then and there govern the aforesaid horse; whereupon the same Thomas Pepper then and there in a loud voice gave notice to the passers by in the aforesaid street to take care of themselves; but nevertheless the aforesaid Thomas Gibbon at that same time remaining there in the aforesaid street, the aforesaid horse ran upon the same Thomas Gibbon against the will of the selfsame Thomas Pepper and then and there threw down the same Thomas Gibbon to the ground, and these are the same assault, battery, wounding and ill-treatment whereof the same Thomas Gibbon now complains above. And the same Thomas Pepper is ready to aver this. And so the same Thomas Pepper prays judgment whether the aforesaid Thomas Gibbon ought to have or maintain his aforesaid action against him upon that etc.

[The plaintiff demurred to the plea, and there is a continuance for advisement until a date left blank. There is no judgment on the roll.]

. . . And Sjt. *Darnall*, for the defendant, argued that if the defendant in his justification shows that the accident was inevitable, and that the negligence of the defendant did not cause it, judgment shall be given for him. To prove which he cited *Weaver v. Ward*.[20] . . .

Northley, for the plaintiff, said that in all these cases the defendant confessed a battery which he afterwards justified; but in this case he justified a battery which is no battery.[21]

Of which opinion was the whole court. For if I ride upon a horse, and John Style whips the horse so that it runs away with me and runs over any other person, he who whipped the horse is guilty of the battery, and not me. But if I, by spurring, was the cause of such accident, then I am guilty. In the same manner, if A. takes the hand of B. and with it strikes C., A. is the trespasser and not B. And, *per curiam*, the defendant might have given this justification in evidence upon the general issue pleaded.

And therefore judgment was given for the plaintiff.[22]

(2) No custom of the realm, bailment or undertaking

LOGHTON v. CALYS (1473)

Record only: CP 40/847, m. 382

Middlesex. Richard Calys of the parish of St. Clement Danes without the bar of the New Temple, London, in the county aforesaid, brewer, was attached to answer Richard Loghton and Joan his wife in a plea why . . . .[23] whereas the aforesaid Richard Calys on the fifth day of June [1472] in the twelfth year of the reign of the present lord king, at the parish aforesaid, negligently put up in his soil (namely in a garden adjacent to the king's highway there) a heap or pile of logwood which was in danger of falling into the same way: the same Richard Calys, knowing the aforesaid heap or pile to be on the point of collapse (*in articulo corruendi*) into the said way, and on that account to be a grave risk to the lord king's lieges

---

[20] Above, p. 15.

[21] 4 Mod. 405 adds: '. . . He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such case it cannot be said with any colour of reason to be a battery in the rider.'

[22] Cf. 2 Salk. 638:'. . . The plaintiff demurred and had judgment; not but if the defendant had pleaded not guilty this matter might have acquitted him upon evidence. But the reason of their judgment was because the defendant justified a trespass and does not confess it'.

[23] Recital of writ omitted.

passing along that way, permitted the same heap or pile to stand in that manner without any rearrangement for a long time namely from the aforesaid fifth day until the thirty-ninth [*sic*] day of September then next following, when (through the default of the selfsame Richard) the heap or pile fell upon the aforesaid Joan, who was passing along the aforesaid way and unaware of the aforesaid danger, and crushed the same Joan and wounded her in many ways so that the same Joan wholly lost the strength of her limbs; to the damage of them the said Richard and Joan Loghton of £40. And thereof they produce suit etc.

And the aforesaid Richard Calys comes in his own person and denies the force and wrong when etc. And he says that the aforesaid Richard and Joan Loghton ought not to have their aforesaid action against him, because he says that he put up the aforesaid pile well, sufficiently and firmly, and kept it so put up until on the day and in the year above mentioned the pile was constrained to fall upon the aforesaid Joan by the vehemence of a great storm of wind; without this, that the aforesaid pile fell upon the aforesaid Joan by reason of the negligent and tumbledown construction of the pile, as the aforesaid Richard and Joan Loghton allege above. And this he is ready to aver; and so he prays judgment whether the aforesaid Richard and Joan Loghton ought to have or maintain their aforesaid action against him etc.

And the aforesaid Richard and Joan Loghton say that they ought not to be barred by anything previously alleged from having their aforesaid action, because they say that the aforesaid pile fell upon the aforesaid Joan by reason of the negligent construction of the pile in the way which the same Richard and Joan above suppose. And they pray that this may be enquired into by the country; and the aforesaid Richard Calys likewise. Therefore the sheriff is ordered to cause 12 men to come here in the octave of Michaelmas.

[The process continues to one month from Michaelmas, but no trial is recorded.]

ANON. (1582)

Cro. Eliz. 10, pl. 5 (C.P.) (untr.)

Snagg moved this case, and demanded the opinion of the judges in it: John Style[24] with a gun at the door of his house shoots at a fowl, and by this fireth his own house and the house of his neighbour; upon which he brings an action on the case generally, and doth not declare upon the custom of the realm (as 2 Hen. IV[25]), viz. for negligently keeping his fire. The question was, if this action doth lie?

And all the court held it did. For the injury is the same, although this mischance was not by a common negligence but by misadventure. And if he had counted upon the custom of the realm, as 2 Hen. IV, the action had not been well brought. Yet the custom of the realm is common law.

WALGRAVE v. OGDEN (CP 1590–91)[26]

Mich. 1590: 1 Leon. 224, pl. 305 (untr.) (= I) Hill. 1591: sub nom. *Mulgrave v. Ogden*, Cro. Eliz. 219, pl. 20 (untr.) (= II) Pas. 1591: sub nom. *Algar's Case*, HLS MS. 110, fo. 46v; BL MS. Lansdowne 1073, fo. 122. (= III)

I

An action upon the case was brought upon a trover and conversion[27] of 20 barrels of butter, and declared that by negligent keeping of them they were become of little value; upon which there was a demurrer in law.

And by the opinion of the whole court upon this matter no action lieth. For a man who comes to goods by trover is not bound to keep them so safely as he who comes to them by bailment.

WALMSLEY J. If a man find my garments and suffereth them to be eaten with moths by the negligent keeping of them, no action lieth; but if he weareth my garments it is otherwise, for the wearing is a conversion.

---

[24] Not a real name.

[25] *Beaulieu v. Finglam*; see [*Sources*, p. 557].

[26] The plea roll cited in some of the reports (C.P. Hil. 32 Eliz. 1, m. 2529) is no longer extant.

[27] This seems to be a mistake, and is not mentioned in the other reports. If conversion had been alleged, the question would not have arisen.

II

Action sur trover of 20 barrels of butter, and counts that he so negligently kept them that they became of little value. Upon this was demurred; and held by all the justices that no action upon the case lieth in this case, for no law compelleth him that finds a thing to keep it safely. As, if a man finds a garment and suffers it to moth-eaten; or if one finds a horse and giveth it no sustenance. But if a man find a thing and useth it, he is answerable, for it is a conversion. So if he of purpose misuseth it: as, if one finds paper and puts it into the water, and so forth. But for negligent keeping no law punisheth him.

And it was adjourned.[28]

III

Action on the case; and he counted that he lost certain barrels of butter, and the defendant found them, and so badly, negligently and improvidently preserved them that they became worthless. Upon this there was a demurrer.

And it was said that if a man finds cloth and keeps it, and it wasted by moths, nevertheless no action lies. And if a man finds a horse, and so negligently keeps it that it wanders away, or is stolen or keeps it so that it dies of hunger, still no action lies.[29] But if the defendant had put the butter or wool in a place where he knew the rain would ruin it, or on purpose put the horse in a place to starve it, perhaps an action would lie. Without an act done by him, however, for the purpose of harming the things, no action lies; for it is not right to find him guilty when no act is done.

BLYTH v. TOPHAM (KB 1607)

Cro. Jac. 158, pl. 11(untr.) (= I) HLS MS. 105, fol. 82v. (= II)

I

Action on the case, for that he digged a pit in such a common, by occasion thereof his mare (being straying there) fell into the said pit and perished. The defendant pleaded not guilty, and it was found for him. The plaintiff, to save costs,[30] now moved in arrest of judgment upon the verdict that the declaration was not good; for when the mare was straying, and he shows not any right why his mare should be in the said common, the digging of the pit is lawful as against him; and although his mare fell therein, he hath not any remedy, for it is *damnum absque injuria*, wherefore an action lies not by him.

The whole court was of that opinion. It was therefore adjudged upon the declaration that the bill should abate, and not upon the verdict.

II

. . . *Dyott* moved the case to be as follows. The defendant, as a trespasser, dug a pit in the waste of A., 30 feet from the highway; the mare of the plaintiff, who had no common or anything to do with the waste, escaped from him and went wandering into the waste, and fell into the pit and broke its neck; whereupon the plaintiff brought this action against the defendant who dug the pit.

POPHAM C.J. and FENNER J. There is a difference between this case and the case of 27 Hen. VIII, fo. 27,[31] where Fitzherbert said that if a man made a ditch across a highway, and someone received a particular damage thereby, he should have an action on the case against the person who made the ditch; because the highway is open to all liege-subjects, whereas the plaintiff here had nothing to do in the waste, but only in the highway, which was 30 feet off.

---

[28] Cf. Owen 141 (same term), corrected from YLS MS. G. R29.3, fol. 290 (sub nom. *Malgrave v. Ogden*): '. . . The court held clearly that the action would not lie, for he who finds goods is not bound to preserve them from putrefaction; but it was agreed that if goods [found] were used [and worn] and [so] by usage made worse the action would lie'.

[29] An abridged version of the same report in BL MS. Lansdowne 1067, fo. 146 stops here, adding: '. . . unless such negligence is *de male purpose*, in which case an action lies'.

[30] By preventing judgment being entered for the defendant upon the verdict.

[31] Y.B. Mich. 27 Hen. VIII, fo. 27, pl. 10. Baldwin C.J. advanced the view found in earlier Y.B.'s that no private action lay for a public nuisance, which was an offence against all the king's subjects and punishable in the court leet. But Fitzherbert J. argued that an action lay if someone had 'greater hurt or inconvenience from it than everyone has': as where someone riding in the highway fell into a ditch. Fitzherbert's view was followed in *Serjeant Bendlowes v. Kemp* (before 1584), cited in Cro. Eliz. 664; and this view has been accepted ever since.

And it was adjudged (the court being full) that the action did not lie.[32]

MITCHELL v. ALLESTRY (1676)

3 Keb. 650, pl.2 (untr.)[33] (= I) 1 Vent. 295 (untr.) (= II) ECO MS. 1.78, p. 183 (untr.) (= III)

The bill[34]

Middlesex. James Mitchell and Mary his wife, by Henry Wynne their attorney, complain of William Allestry, esquire, and Thomas Scrivener, in the custody of the marshal of the marshalsea of the lord king before the king himself, for that on the first day of June [1673] in the twenty-fifth year of the reign of the lord Charles II now King of England etc., in the parish of St. Clement Danes in the aforesaid county in a certain public and open place there called Little Lincoln's Inn Fields,[35] where all day and every day various subjects of the lord king have constantly walked about and gone (and been accustomed to go) in and about their necessary business, the same William and Thomas,[36] improvidently, rashly and without due consideration of the unsuitability of the place for the purpose drove and exercised two wild and untamed mares pulling a coach in order to break and tame the same mares for pulling coaches, the aforesaid place being inapt and unsuitable for that purpose by reason of the throng of many subjects then and there walking about: and the mares, because of their wild nature (inasmuch as the same mares could not be ruled or governed in this wise), then and there ran upon her the said Mary and there threw her to the ground with great force and ran over her with the aforesaid coach, so that the same Mary was so seriously crushed and broken in her body and limbs that by reason thereof she became lame and mutilated and cannot now be restored to perfect health. Whereupon the same James and Mary say that they are the worse and have damage to the extent of £200. And thereof they bring suit.

[This action was commenced in Michaelmas term 1675. In Hilary term 1676 the defendants pleaded not guilty, and on 5 May 1676 at *nisi prius* in Westminster Hall (before Raynsford C.J.) the jury found for the plaintiff with damages of 40 marks.

[The record confirms the reports that judgment was given for the plaintiff, with £12. 6s. 8d. costs.

[The defendant brought a writ of error in 1677: IND 1/6062, citing Trin. 28 Car. 11, m. 857 (recognisance). No further proceedings have been noticed.]

I

Simpson excepted in arrest of judgment, in action upon the case for bringing horses wild to tame in Little Lincoln's Inn Fields, being an open public place where people are all the day passing and repassing, because it is not said to be any highway, nor said that the defendant knew them to be wild, nor was there negligence in the coachman (who was thrown out and hurt).

But, by *Saunders*, an action upon the case well lay. As, by Smith of Westminster, for not penning an ox but setting a dog on him, whereby he ran into Palace Yard and hurt him. So where a monkey escaped and did hurt by default of the owner.[37]

And, *per curiam*, it is at the peril of the owner to take strength enough to order them. And the master is as liable as the servant, if he gave order for it.[38] And the action is generally for bringing them thither, which is intended personal.

And judgment for the plaintiff.

---

[32] Herne, *The Pleader*, p. 162, notes in the margin a record of 1621, where an action on the case was brought against a Derbyshire miner 'for his negligence in digging a pit for lead etc. in such a place that it was not easily discoverable, wherein the plaintiff's horse perished', and the defendant pleaded not guilty (Trin. 19 Jac. I, m. 577).

[33] Also reported in 2 Lev. 172.

[34] KB 27/1973, m. 1283. The bill is entered as 'a plea of trespass on the case'.

[35] A public square to the south-east of Lincoln's Inn Fields, including what is now New Square and part of Portugal Street.

[36] The reports reveal that Scrivener was Allestry's servant—his coachman—and that Allestry was not present when the accident occurred.

[37] Perhaps 'Andrew Baker's case, whose child was bit by a monkey that broke his chain and got loose': M. Hale, *History of the Pleas of the Crown* (1736), vol. 1, p. 430.

[38] Cf. 2 Lev. 'and it shall be intended the master sent the servant to train the horses there'.

II

. . . Upon not guilty pleaded, and a verdict for the plaintiff, it was moved by *Simpson* in arrest of judgment that here is no cause of action. For it appears by the declaration that the mischief which happened was against the defendant's will, and so *damnum absque injuria*. And then not shown what right the king's subjects had to walk there: and if a man digs a pit in a common, into which one that has no right to come there falls in, no action lies in such case.[39]

Curia contra. It was the defendant's fault to bring a wild horse into such a place where mischief might probably be done by reason of the concourse of people. Lately in this court an action was brought against a butcher who had made an ox run from his stall and gored the plaintiff, and this was alleged in the declaration to be in default of penning of him.[40]

WILDE J. said: if a man hath an unruly horse in his stable, and leaves open the stable door, whereby the horse goes forth and does mischief, an action lies against the master.

TWISDEN J. If one hath kept a tame fox, which gets loose and grows wild, he that kept him before shall not answer for the damage the fox doth after he hath lost him and he hath resumed his wild nature . . . .[41]

Judgment for the plaintiff.

III

. . . *Simpson*. This is a case, I think, *primae impressionis*; and, they not having laid (1) that the place *in quo* is a public highway, (2) that the defendants did know them to be untamed mares, (3) nor that the defendants did negligently suffer them to run upon her—nay indeed the plaintiff by his own declaration has excused them from that, for he says that on account of their ferocity they could not govern them, but that they did run upon her—[we pray judgment for the defendants].

Saunders to the contrary. As to (1), we say 'in a public place where every day the king's people continually [pass] etc.' And suppose the defendants had brought his coach and mares into Westminster Hall . . . that is no highway, yet sure if the mares did any hurt an action would lie. And he remembered the court of a late case against a butcher for not pinioning his ox. As to the second, we say that the defendants brought their mares into the place *in quo* to tame them, and then they must needs know that they were not tamed before.

Jeffreys on the same side. As to the third, we had formerly brought an action in this case, and then we had laid it that the defendants 'did negligently permit etc.'; but, coming to trial before my lord Hale [C.B.], the evidence as to the negligence seeming against us, we were non-suit. And my lord Hale did in a manner direct this action, and [said] that it would lie without laying it to be done negligently.

WILDE J. Suppose I have a wild horse, and I put him in my stable, and do not lock the door, and he gets loose and does mischief, an action will lie.

TWISDEN J. I am of another opinion, for when I put him in my stable I do a lawful action, and I am not bound to put a lock upon my door if I will venture my goods without one.

RAYNSFORD C.J. The law does preserve places frequented, and punishes more severely anything done to disturb them. And if one throws a stone into a market and kills one, it is murder.

WILDE and TWISDEN JJ. remembered a case where one was sued for that his monkey broke loose and hurt some children, but it was referred.[42]

THE COURT. Let the plaintiff have his judgment *nisi*.

---

[39] *Blyth v. Topham* (1608); see p. [15], above.

[40] *Smith's Case*, cited by Saunders (above).

[41] The reporter cites *Weaver v. Ward* (1616), above p. 15.

[42] I.e. to arbitration. see [n. 37], above.

BROWNE v. DAVIS (1705)

Queen's Bench bill in Lilly, *Entries* (3rd ed.) p. 38 collated with W. Bohun, *Declarations and Pleadings* (1733), p. 211[43]

Middlesex. William Browne complains of John Davis, in the custody of the marshal etc., for this: namely that, whereas the said William, on the sixth day of March [1705] in the fourth year of the reign of the lady Anne now queen of England etc.. in the parish of Chelsea in the county aforesaid, was lawfully possessed of a certain flat-bottomed boat then laden with dung, and riding at anchor in the River Thames within the parish aforesaid, as of his own proper boat; and whereas the said John Davis was then and there master and pilot of a certain barge then sailing in the River Thames aforesaid, within the parish aforesaid, towards the city of London: the said John Davis then and there so negligently. carelessly and unskilfully steered and governed his said barge that for want of good and sufficient care and steerage thereof the said barge then and there fouled the selfsame William's said boat, so laden as aforesaid, and broke and sank the said boat: by reason whereof the said William not only wholly lost his aforesaid dung, which was loaded in the said boat, but likewise lost the whole use, profit and benefit of his said boat for the space of six[44] days then next following, and also expended and laid out large sums of money in and about the raising, recovering and repairing of his said boat. And thereby the said William says he is the worse, and has damage to the amount of £30.[45] And thereof he produces suit etc.[46]

SCARBORROW v. HAMBLETON (1732)

J. Mallory, *Modern Entries* (1734), vol. I, p. 158 (trans.).

Middlesex. James Hambleton, late of the parish of St. Andrew's, Holborn, coachman, was attached to answer to John Scarborrow of a plea of trespass upon the case. And [thereupon] the said John, by Robert Martin his attorney, declares that, whereas on the first day of September in the year of our Lord 1721, at the parish of St. John, Hackney, in the king's highway there, he the said John was journeying in a chaise, and he the said James was at the same time there driving a coach; and the said John in fact avers that the said James then and there so improvidently and carelessly managed his cattle[47] that were then and there drawing the said coach that the said cattle drew the said coach upon the said chaise in which the said John was so journeying, so that the said chaise then and there by the negligence of the said James was overturned by the said coach and the said [John] was much bruised thereby. And whereas also afterwards,[48] that is to say, the same day and year above, at Hackney aforesaid in the said county, he the said John was driving another chaise in the said king's highway in the said parish of St. John, Hackney, in the county aforesaid, and then and there a certain person unknown to the said John, who at that time was a servant to the said James, was driving another coach of and belonging to the said James; and the said John doth in fact aver that the said servant of the said James then and there drove and whipped his cattle drawing the said coach in such a negligent and careless manner that the same cattle drew the said coach upon the last-mentioned chaise, in which the said John was then and there as aforesaid, so that the said chaise last mentioned was then and there overturned, by means whereof the said John was grievously bruised and wounded. Whereupon the said John saith that he is injured and endamaged to the value of £50. And therefore [he produces suit] etc.[49]

BOYD v. ROBINSON (1738)[50]

HLS MS. Notebook 155

Christopher Boyd, plaintiff. William Robinson, defendant.

---

[43] These are two different English translations from the Latin. The present text is slightly reworded from both.

[44] Reads 'fourteen' in Bohun, *Declaration and Pleadings* (1733).

[45] Reads '£40' in Bohun, *Declaration and Pleadings* (1733).

[46] The availability of such an action against the master of a ship seems to have been recognised for at least 40 years previously: see *Martin v. Green* (1664) 1 Keb. 730; *Mustard v. Hornden* (1680) T. Raym. 390; and [*Sources*, p. 375.]

[47] Presumably a translation of *averia*, which included horses.

[48] In so far as this is laid as a separate event it is fictional. A note in the margin reads: 'The plaintiff not knowing whether it was the defendant himself, or one of his servants, here is another charge upon the servant of the like nature'.

[49] Note at end, by Mallory: 'This declaration was perused and settled by Mr. Serjeant Hawkins, but the cause was never tried. However, I was informed that the defendant's attorney, upon advice and counsel, was told the declaration was well drawn.'

[50] These notes of evidence at Northumberland assizes are inserted to show the course of a trial at *nisi prius*.

Action upon the case against the defendant as a farrier for negligence in the making of a rowel[51] in plaintiff's horse.

Plea: not guilty.[52]

[Witnesses for the plaintiff:]

Mrs. Boyd. Did not observe it worsted at all—a small scratch on the forehead—the next morning his eye appeared something full—defendant sent for to wash the wound and put a plaster to keep out the cold—defendant cut the horse on the throat—he said if the horse died he would pay for it—died in the stable . . . .

Alexander Constable. A little cut, but no damage at all—saw the horse every day—gave his water—the horse ate and drank very well—the rowel put into his throat Thursday—the horse died the Saturday after—defendant made use of a pen-knife in making the rowel and found some difficulty in pushing the rowel in—the horse never rose and stood upon his legs after the cutting in his throat for making the rowel—worth six guineas—the defendant came to him the Friday, and nothing was afterwards done till the Thursday following—the swelling increased and it was bigger the Thursday than before—plaintiff not present when the rowel was put on.

John M'Afour.[53] A farrier 28 years—saw the horse the Saturday—his eye was open—a cut on the eye—the skin only cut—he would have put a rowel behind his ears to direct the humour—on opening the rowel he found blood in the wound—caused by his instrument—his not eating caused by the rowel, and the rowel the cause of his death—worth six guineas—caked or coagulated blood in the wound. He took out the rowel—never knew an horse die of such a fall or bruise as this horse had—says defendant is a good farrier.

Henry Corbet. Value of the horse six guineas . . . opened it in a proper manner—put in his finger—shows how far—and took out a great deal of coagulated blood—proceeded from cutting the wound too deep—the rowel was put too far in, and he thinks it was the occasion of his death.

For the defendant:

Mr. Robert Barwyes. Saw the horse after the fall—it was cut in a most desperate manner—it swelled near as big as his fist—the rowel was put in the place where it was usual to put a rowel—says McFall told him that the rowel would do him no hurt—the swelling over the eye appeared to be large and all jellied at the side of his cheek—believes he died of a hurt by the fall, and not from the rowel—neither windpipe nor weezle (wyzelt) were cut.

Mr. Blomire. Was called about two days after the horse died—defendant told him he was blamed for killing the horse—the horse was covered with mould—probed the hole with his finger—the head was swelled and the rowel was put there to draw off the humour—the stoprell[54] was properly placed—he saw nothing damnified—saw nothing cut but what is common—saw no cakes of blood—the swelling appeared on the side of his head—thinks the stoprell under his jaw—could do the horse no hurt—witness would have put a stoprell under his jaw to draw the humour from the swelling. This witness not called in till next day after the horse died.

Daniel Matthews . . . the plaintiff came while defendant was doing it—found no fault—the plaintiff further said, 'Why don't you do it?'—the eye and side of his head badly swelled—the horse did not drop down the time he was there.

Thomas Mark. To put a rowel in the cheek blade if it can be come at, if not under the jaw—thinks it must die of the fall— witness mentions his knowing a like case—died of the eye.

Isaac Marks. Hath known a rowel to be put under the throat with success—if care be taken of the knife, damage may happen—might die of the hurt on his eye—master farrier—known 23 or 24 years—McFall an

---

[51] A circular piece of leather or other suitable material, with a hole in the centre, inserted between the flesh and the skin of a horse in order to cause a discharge of humours.

[52] This shows that it was not an *assumpsit* action.

[53] Referred to below as 'McFall'.

[54] Not in the *New English Dictionary*.

ill farrier—would not trust him with an horse of that value—thinks his judgment of no value, but thinks he would not perjure himself—hath employed defendant seven years and he hath behaved well, and takes him to be a good farrier. As to [plaintiff's][55] first witness—plaintiff's mother—'Are you going to serve me with an action as you have Robinson? I'll swear myself to the Devil before you shall get that action'.

Verdict for the defendant.

THE LAW RELATIVE TO TRIALS AT NISI PRIUS (*c.* 1750)[56]

From the 1st ed. (1768), pp. 35–37, 98, 103.

Of injuries arising from negligence or folly.

Every man ought to take reasonable care that he does not injure his neighbour. Therefore wherever a man receives any hurt through the default of another, though the same were not wilful, yet if it be occasioned by negligence or folly the law gives him an action to recover damages for the injury so sustained. As in the case mentioned in the third chapter,[57] where the defendant, by uncocking his gun, accidentally wounded the plaintiff who was standing by to see him do it. If a man ride an unruly horse in any place much frequented (such as Lincoln's Inn Fields) to break and tame him, if the horse hurt another, he will be liable to an action; and it may be brought against the master as well as the servant, for it will be intended that he sent the servant to train the horse there; or it may be brought against the master alone.[58] The servants of a carman ran over a boy in the streets and maimed him by negligence; an action was brought against the master, and the plaintiff recovered.[59] And note that in such case the servant cannot be a witness for his master without a release, because he is answerable to him.[60] So in the case above-mentioned, if one whip my horse, whereby he runs away with me and runs over a man, the man may bring an action against such person; for the whipping my horse was an act of folly, and therefore he ought to be answerable for the consequence of it. A fortiori I might maintain an action if I received any hurt from my horse's running away, because the consequence is more natural. However it is proper in such cases to prove that the injury was such as would probably follow from the act done: as, that many people were assembled together near the place at the time of his whipping the horse, or that the person run over was standing near and within sight. Yet as the defendant is only to answer *civiliter*, and not *criminaliter*, it does not seem absolutely necessary to give such proof: though to be sure such circumstances will have weight in diminishing or increasing the quantum of the damages . . . . So if a surgeon undertake to cure a person, and by his negligence and unskilfulness miscarry, an action will lie. But if the person undertaking to make the cure be not a common surgeon, there must be an express promise, because if it were not his profession it was the folly of the plaintiff to trust him, unless he were deceived by an express promise; and the law in such case will not raise a promise. The defendant may in either case give in evidence that the plaintiff did not follow his directions.[61]

Of case for misbehaviour in an office, trust or duty

. . . For misbehaviour in a trust or duty an action on the case will likewise lie, for whosoever undertakes to do a thing for another ought to do it faithfully, else he is answerable for the damages arising from his negligence or misbehaviour. Therefore if a man deliver goods to a common carrier to carry, and the carrier lose them, an action on the case will lie against him; but if there appear to be no default in the defendant, the plaintiff shall be non-suited. As, if an action were brought against a carrier for negligently driving his cart so that a pipe of wine burst and was lost, it would be good evidence for the defendant that wine was

---

[55] Reads 'defendant's', presumably a slip.

[56] Formerly attributed to Sir Francis Buller (d. 1800), who edited later editions. He was a special pleader in 1768, but was not called to the bar until 1772. Selwyn, another editor, identified it as the work of Lord Bathurst (1714–94), probably written in the 1740s. There is a MS. version in LI MSS. Hill 99–101.

[57] *Underwood v. Hewson* (1724) 1 Stra. 596, before King C.J. at the Guidhall.

[58] *Mitchell v. Allestry* (1676); see p. [15], above.

[59] *Anon*. (before 1710) 1 Ld Raym. 739; Salk. 441; before Holt C.J. at the Guildhall.

[60] *Jarvis v. Hayes* (1737) 2 Stra. 1083, before Lee C.J. at the Guildhall.

[61] The only authority cited on the surgeon's liability is 1 Danv. 177, a translation (1705) of 1 Rolle Abr. 91, which does not draw all these distinctions. [The distinctions are drawn in *Marshall's Case* (1441), *Sources*, p. 367, though there we are dealing with a horse-leech rather than a surgeon. CD.]

upon the ferment and when the pipe burst he was driving gently.[62] So where the defendant's hoy, coming through [a] bridge, by a sudden gust of wind was drove against the bridge and sunk, Pratt C.J. held the defendant not liable, the damage being occasioned by the act of God, which no care of the defendant could foresee or prevent. And as to the evidence given by the plaintiff, that if the hoy had been better it would not have sunk with the stroke received, the chief justice said no carrier was obliged to have a new carriage for every journey: it is sufficient if he provide one which without any extraordinary accident (such as this was) will probably perform the journey.[63] But nothing is an excuse except the act of God and the king's enemies; and therefore in action against such a carrier, where the goods were spoiled by water, the defendant proving that when the goods were put on board the ship was tight and that the hole through which the water came had been made by a rat eating out the oakum, was holden to be no exception.[64]

. . . And note that in all cases where a damage accrues to another by the negligence, ignorance or misbehaviour of a person in the duty of his trade or calling, an action on the case will lie. As, if a farrier kill my horse by bad medicines, or refuse to shoe him, or prick him in the shoeing. But it is otherwise where the law lays no duty upon him: as, if a man find garments, and by negligent keeping they be spoiled.[65]

---

[62] *Farrar v. Adams* (1711), before Holt C.J. at the Guldhall; cited from Serjeant Salkeld's manuscript.

[63] *Amies v. Stevens* (1718) 1 Stra. 457.

[64] *Dale v. Hall* (1750) 1 Wils. 281. This was an *assumpsit*, though it was said that a common carrier's liability in tort was the same.

[65] *Walgrave v. Ogden* (1591), see p. [23], above.

ACKNOWLEDGEMENTS

[The following copyrighted material is contained in these materials in the order in which it appears. Where possible, the copyright notice is given on the first page where the material appears.]

Charles Donahue, "The Civil Law In England," *Yale Law Journal*, 84 (1974) 167–81 ..... I–1

Paul's Letter to the Romans, 1:1–3:31, 7:1–8:11, 12:1–13:14, in *Jerusalem Bible, New Testament* (New York 1966), 267–91 ..... I–9

Bede, *Ecclesiastical History* 1.15, in *English Historical Documents* [=EHD], I, D. Whitelock ed., 2d ed. (London 1979), 646 ..... II–1

Bede, *Ecclesiastical History* 2.13, EHD I, 671–2 ..... II–2

The Anglo-Saxon Chronicle, A Text, a^{o} 937, *Bright's Old English Grammar and Reader*, F. G. Cassidy and R. N. Ringler ed., 3d ed. (New York 1971), 163 ..... II–2

Carl Stephenson and Frederick George Marcham, ed., *Sources of English Constitutional History*, rev. ed. (New York 1972) [= Stephenson and Marcham, *Sources*] 1:18 (no. 10)[11] II–3

Bede, *Ecclesiastical History* 2.5, in EHD I, 663–4 ..... II–3

Bryce Lyon, *A Constitutional And Legal History of Medieval England*, 2d ed. (New York 1980) [= Lyon, *Constitutional History*] 19–26 ..... II–4

Christopher Brooke, *From Alfred to Henry III, 871–1272*, The Norton Library History of England (New York 1961) [= Brooke, *From Alfred to Henry III*] 31–65 ..... II–8

Lisi Oliver, *The Beginnings of English Law* (Toronto 2002), 60–81 ..... II–24

A. W. B. Simpson, "The Laws of Ethelbert," in *On the Laws and Customs of England*: *Essays in Honor of Samuel E. Thorne*, Morris Arnold *et al.* ed. (Chapel Hill, NC 1981) 3–17 ..... II–38

The Laws of the Earliest English Kings, F. L. Attenborough, ed. and trans. (Cambridge, Eng. 1922; repr.New York 1963), 24 ..... II–48

John T. McNeill and Helena M. Gamer, *Medieval Handbooks of Penance* (New York 1938; repr. 1990) 165, 164. ..... II–48

Lyon, *Constitutional History*, 108 ..... III–0

Brooke, *From Alfred to Henry III*, 82–93, 153–72 ..... III–1

Lyon, *Constitutional History*, 216 ..... III–15

Brooke, *From Alfred to Henry III*, 173–88, 211–23 ..... III–16

Stephen D. White, "English Feudalism and its Origins," *American Journal of Legal History*, 19 (1975) 138–55 ..... III–28

Stephenson and Marcham, *Sources*, 1:39–46, 49–54 (nos. 20–22, 25) III–38

Henry Gee and W. J. Hardy, *Documents Illustrative of English Church History* (London 1896), 54–59 (nos. 14, 15, 17) III–49

Stephenson and Marcham, *Sources*, 1:35–36, 73–76 (nos. 17, 30, 33I) III–51

Brooke, *From Alfred to Henry III*, 134–52 ..... III–55

The Assizes of Clarendon (1166) and Northampton (1176) , EHD II, D. C. Douglas and G. W. Greenaway ed., 2d ed. (London 1981) 440–6 (nos. 24–25) IV–1

[1] A complete listing of all the documents derived from this book will be found in Location of Documents at the beginning of these *Materials*.